Award No. 11656
Docket No. MW-11094

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

(Supplemental)

David Dolnick, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

MISSOURI-KANSAS-TEXAS RAILROAD COMPANY
MISSOURI-KANSAS-TEXAS RAILROAD COMPANY OF TEXAS

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood that:

(1) The Carrier violated the effective Agreement when it failed and refused to allow B&B Mechanic Douglas Curry a paid vacation in 1957 or pay in lieu thereof.

(2) The Carrier be required to allow Mr. Curry pay in lieu of the vacation which he had earned but did not receive in 1957.

EMPLOYES' STATEMENT OF FACTS: Bridge and Building Mechanic Douglas Curry rendered compensated service for the Carrier on not less than 133 days during the calendar year of 1956, thereby qualifying for a vacation of ten consecutive workdays in 1957 in accordance with the provisions of Section (b) of Article I of the August 24, 1954 Agreement, reading:

"(b) Effective with the calendar year 1954, an annual vacation of ten (10) consecutive work days with pay will be granted to each employe covered by this Agreement who renders compensated service on not less than 133 days during the preceding calendar year and who has five or more years of continuous service and who, during such period of continuous service, renders compensated service on not less than 133 days (151 days in 1949 and 160 days in each of such years prior to 1949) in each of five (5) of such years not necessarily consecutive."

On May 14, 1957, Mr. Curry was laid off account of force reduction. He filed his name and address on May 16, 1957 and prepared and dispatched letters of renewal thereon to the Carrier on July 6, 1957, August 31, 1957, October 29, 1957, November 19, 1957 and December 26, 1957.

Nonetheless, the Carrier has refused to allow Mr. Curry payment in lieu of the vacation which he earned but did not receive in 1957.

The Carriers request ample time and opportunity to reply to any and all allegations contained in Employes' and Organization's submission and pleadings.

Except as herein expressly admitted, the Missouri-Kansas-Texas Railroad Company and Missouri-Kansas-Texas Railroad Company of Texas, and each of them, deny each and every, all and singular, the allegations of the Organization and Employes in alleged unadjusted dispute, claim or grievance.

For each and all of the foregoing reasons, the Missouri-Kansas-Texas Railroad Company and Missouri-Kansas-Texas Railroad Company of Texas, and each of them, respectfully request the Third Division, National Railroad Adjustment Board, deny said claim and grant said Railroad Companies, and each of them, such other relief to which they may be entitled.

(Exhibits not reproduced.)

OPINION OF BOARD: Claimant had qualified for his 1957 vacation under Section 1(b) of Article I of the Vacation Agreement of August 21, 1954. He had rendered "compensated service on not less than 133 days during the preceding calendar year" and had "five or more years of continuous service".

On May 14, 1957, Claimant was furloughed because of a force reduction. At that time, he had not yet taken his 1957 vacation. Under Section 8 of the Vacation Agreement he was not eligible for vacation pay until and unless he retained his seniority rights under Rule 25 of Article 3 of the Agreement and retained his seniority rights up to the last pay period of 1957.

Section 8 of the Vacation Agreement provides as follows:

> "No vacation with pay or payment in lieu thereof will be due an employe whose employment relation with the carrier has terminated prior to the taking of his vacation, except that employes retiring under the provisions of the Railroad Retirement Act shall receive payment for vacation due."

Rule 25 of Article 3 of the Agreement reads:

"Rule 25.

> When employes laid off by reason of force reduction desire to retain their seniority right, laborers must file as provided in Rule 14 of this Article and other employes must file with the officer of the subdepartment, within five days of the day on which they were notified of layoff, their address, and renew same each sixty (60) days. Failure to renew the address each sixty (60) days or to return to service within seven (7) days after being so notified, will forfeit all seniority rights. When force is not restored within twelve (12) months after date of reduction, employe will be considered out of service and dropped from seniority list."

The question before the Board is whether Claimant renewed his seniority rights as provided for in Rule 25 and whether he retained his seniority rights until the last pay period of December, 1957.

Claimant says that he complied with the requirements of Rule 25 by mailing notices to Carrier on May 16, 1957, July 6, 1957, August 31, 1957, October 29, 1957, November 19, 1957 and December 26, 1957.

The evidence in the record is not clear and not consistent. There is no question that Claimant notified Carrier on May 16, 1957. Thereafter, Carrier's records and its position is inconsistent.

On February 5, 1958 Carrier wrote to Claimant and said:

> "You were cut off May 14, 1957 and filed your name and address May 16, 1957. Next filing was August 31, 1957. Elapsed period was in excess of 60 days."

On February 24, 1958 Carrier's Assistant Chief Engineer wrote to Petitioner's General Chairman as follows:

> "Your letter February 17, file 300-200-S, claim of Douglas Curry.
>
> "We do not have record of having received all of the letters you claim Mr. Curry sent the Carrier. Please advise to whom Mr. Curry sent each letter filing address, and at what location.
>
> "After we receive such advice, we shall make further check, but at present our record indicates Mr. Curry terminated his employment relationship and right to vacation under Rule 25, Article 3, of the working agreement and Article 8 of the Vacation Agreement, for which reason the claim is declined."

Petitioner replied on March 4, 1958 as follows:

> "I have your letter of February 24, 1958, concerning vacation pay due Mr. Douglas Curry.
>
> "In my letter of February 17, 1958, I advised you that Mr. Curry filed his name and address with you on May 16, July 6, August 31, October 29 and December 26, 1957.
>
> "Will you kindly advise which of these filings you did not receive.

In response to the letter of March 4, 1958, Carrier wrote under date of March 6, 1958, in part, as follows:

> "Our record shows we did not receive the alleged filing dated October 29, 1957."

Under date of March 7, 1958 Petitioner wrote to Carrier quoting Claimant's letter of October 29, 1957. On March 19, 1958, Carrier's agent, who wrote the letter dated March 6, 1958, replied to Petitioner's letter of March 7, 1958, in part, as follows:

> "Our record shows Douglas Curry last worked on May 13, 1957, filed his address May 16, 1957, and did not file again until August 31, 1957, some 100 plus days later."

On appeal to Carrier's Chief Engineer, that Carrier's officer wrote to Petitioner under date of March 31, 1958, in part, as follows:

> "Our records show that Douglas Curry was furloughed May 14, 1957, and filed his address on May 16, 1957. He renewed his address on the following dates:

"August 31, 1957

October 29, 1957

December 26, 1957."

It is reasonable to assume that when Carrier's Assistant Chief Engineer wrote the letter of March 6, 1958, he had a copy of his letter of February 5, 1958. On the latter date he wrote Claimant that no notice was received from May 16, 1957 to August 31, 1957. On February 24, 1958, he wrote that he did not "have record of having received all of the letters". On March 6, 1958 he wrote that Carrier "did not receive the alleged filing dated October 29, 1957." And on March 19, 1958 he wrote that Claimant last worked on May 13, 1957, "filed his address May 16, 1957, and did not file again until August 31, 1957, some 100 plus days later." All the letters were written by the same agent of the Carrier. It is incredible that he can be so inconsistent in a short period of less than six weeks. It is even more incredible that Carrier's records can be so inaccurate. At no time did Carrier or its agent explain or rationalize this inconsistency. There is not even a statement in the record that the letter of March 6, 1958 was erroneous.

Rule 25 does not say how an employe must file his name and address. He may present it, in writing, at Carrier's appropriate office, he may send it by messenger, he may send it through the United States Mail or he may telegraph the information. The important evidence to be determined is whether Carrier received it within the time limits prescribed by Rule 25. A written receipt from Carrier's agent may be desirable, but is certainly not a prerequisite.

Carrier's letters are an admission against its own interest. From all of the evidence in the record we conclude that notices were properly filed by Claimant in accordance with the provisions of Rule 25. This is not a record of conflicting evidence in which doubt must be resolved in favor of the Carrier. On the contrary, the evidence is clear that Carrier received the letter of July 6, 1957, and all other letters. The correspondence on the property establishes this fact.

Petitioner has met the burden of proof. The preponderance of evidence supports Claimant's position.

Carrier has raised several jurisdictional questions all of which are without merit.

FINDINGS: The Third Division of the Adjustment Board, after giving the parties to this dispute due notice of hearing thereon, and upon the whole record and all the evidence, finds and holds:

That the Carrier and the Employes involved in this dispute are respectively Carrier and Employes within the meaning of the Railway Labor Act, as approved June 21, 1934;

That this Division of the Adjustment Board has jurisdiction over the dispute involved herein; and

That the Carrier violated the Agreement.

AWARD

Claim is sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 30th day of July 1963.