Award No. 11657
Docket No. MW-11261

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 furloughed mechanic N. D. Hunter payment in lieu of five consecutive days of vacation for the year 1957.

(2) Furloughed mechanic N. D. Hunter now be allowed five days' vacation pay because of the violation referred to in Part (1) of this claim.

EMPLOYES' STATEMENT OF FACTS: Bridge and Building Mechanic N. D. Hunter rendered compensated service for the Carrier on not less than 133 days during the calendar year of 1956, thereby qualifying for a vacation of five consecutive work days in 1957 in accordance with the provisions of Section (a) of Article I of the August 21, 1954 Agreement, reading:

"Effective with the calendar year 1954, an annual vacation of five (5) consecutive work days with pay will be granted to each employe covered by this Agreement who renders compensated service on not less than one hundred thirty-three (133) days during the preceding calendar year."

On February 21, 1957, Mr. Hunter was laid off account of force reduction. He filed his name and address on February 23, 1957, and thereafter mailed letters of renewal thereof within the time limits specified by the agreement rules.

Nonetheless, the Carrier has refused to allow Mr. Hunter payment in lieu of five consecutive days of vacation for the year 1957.

The claim was handled in the usual and customary manner on the property, but was declined at all stages of the appeals procedure.

Awards Nos. 16021-16038 (Colby) held:

"We cannot indulge in speculation or conjecture by attempting to draw inferences from unsupported conclusionary allegations."

Award No. 16205 (O'Malley) held:

"The mere assertion of a fact, without any evidence to support the assertion, forces this Division to find against the party having the burden on the issue of fact which is omitted."

Award No. 16981 (McMahon) held:

"This Division has no authority to assume a state of facts, nor can we speculate on what the facts may be, where the record is silent. We cannot consider evidence which is not before us in the record."

Award No. 17871 (no Referee) held:

". . . A mere assertion . . . without documentary evidence supporting cannot be accepted as a fact."

All data submitted in support of the Carriers' position have been heretofore submitted to the Employes or their duly accredited representatives.

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 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 year." He had earned five days' vacation pay.

On February 21, 1957, Claimant was furloughed because of a force reduction. At that time, he had not taken the 1957 vacation. Under Section 8 of the Vacation Agreement he was not eligible for vacation pay until and unless he renewed his seniority rights under Rule 25 of Article 3 of the Agreement and retained his seniority rights up to the last pay period.

Section 8 of the Vacation Agreement provides as follows:

"Section 8.

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 sub-department 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 the following dates:

February 21, 1957

April 1, 1957

May 3, 1957

June 2, 1957

July 2, 1957

August 10, 1957

September 2, 1957

September 21, 1957

October 7, 1957

November 21, 1957

December 9, 1957

Carrier states that it did not receive Claimant's letters dated May 3, 1957, June 2, 1957, July 2, 1957 and August 10, 1957.

Petitioner contends that the disputed letters, as well as the others, "were properly addressed and placed in the United States Mail for delivery to the

Carrier's Assistant Chief Engineer, with the Claimant's return address thereon." None of the letters were returned to Claimant.

Petitioner has introduced in evidence photostatic copies of four handwritten letters from Claimant addressed to Mr. E. P. Kennedy and to Mr. E. Jones. The former is Carrier's Assistant Chief Engineer and the latter is Petitioner's General Chairman. These letters have the following dates and the stamped date received by Petitioner's General Chairman:

Date of Letter	Stamped Date Received
April 3, 1957	May 6, 1957
June 2, 1957	June 6, 1957
July 2, 1957	July 8, 1957
August 10, 1957	August 12, 1957

The letter of April 3, 1957, is obviously dated wrong. Since it was received on May 6, 1957 it, undoubtedly, was meant to read May 3, 1957.

Rule 25 provides that laid off employes must file with Carrier's designated officer periodic notices containing their addresses and notice that they desired to remain on the seniority list. Mailing of such notice, in itself, is not sufficient. The record needs to contain sufficient evidence to show that the notice was actually filed with the Carrier within the time limits prescribed. Whether such notice was filed or received by Carrier through the mail, by messenger or by telegraph is immaterial. The important element is to show that such a notice was actually filed and received by Carrier within such time limits.

Such notice was not filed with Carrier's agent within the prescribed time limits as provided in Rule 25. The sending of copies of such notice to Petitioner's General Chairman is not proof that other copies were filed with the Carrier. Mere assertions and photostatic copies of the letters received by Petitioner's General Chairman is not sufficient evidence that such notices were filed and received by Carrier within the time limitations. Petitioner has the burden of proof to show that such notices were received by Carrier. The record does not show that Petitioner has met this burden of proof.

The mere fact, in itself, that Carrier acknowledged receipt of notices of September 2, 1957 and thereafter does not constitute a waiver which can here be invoked. Once seniority has been forfeited the rights of other employes junior to Claimant are affected. They become eligible to vacancies when they arise in preference to Claimant. Carrier may not waive the rights of such junior employes. If the evidence showed that proper renewal notices had been filed with Carrier, such junior employe could have no cause to complain.

On the basis of the evidence in the record we are obliged to conclude that there is no valid basis for the claim.

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 did not violate the Agreement.

AWARD

Claim is denied.

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.