Award No. 15
Docket No. 15

PUBLIC LAW BOARD NO. 76

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

vs.

MISSOURI-KANSAS-TEXAS RAILROAD COMPANY

Roy R. Ray, Referee

STATEMENT OF CLAIM:

1. The Carrier violated the Agreement when, after terminating the seniority and employment of Mr. Alejandro Garcia on January 21, 1965, it failed and refused to allow him the five (5) days of vacation pay which he had earned during the calendar year 1964. (System file 2579-28/400-163)

2. Mr. Alejandro Garcia now be allowed five (5) days of vacation pay at the track laborer's rate because of the violation referred to in Part 1 of this claim.

OPINION OF BOARD: This claim seeks vacation pay for Alejandro Garcia whose service with Carrier was terminated on January 18, 1965. Garcia had entered Carrier's service on October 17, 1963 and worked as a Track Laborer in Extra Gang No. 585, Hamlin, Texas until January 8, 1965, when he was furloughed in force reduction. He failed to file his name and address with the proper persons to retain his seniority and employment status, and under Article 3, Rule 11 of the Agreement his seniority and employment relationship ended automatically ten days later. Almost a year later (January 8, 1966) the General Chairman wrote the Division Engineer stating "When Mr. Garcia was separated from service, as indicated above, he should have been paid for vacation pay that was due him at that time." He asked that the Division Engineer take care of the matter. The Division Engineer rejected the claim on the ground that it was not made within sixty days after termination from service as required by Article 28, Rule 1 (a). The claim was appealed to and declined by Carrier's highest officer on the ground that it was barred by the time limit provisions.

At the time in question Article 26, Section 1 (a) provided that an annual vacation of five consecutive workdays with pay would be granted to each employee who rendered compensated service on not less than 120 days during the preceding calendar year. Section 8 specifically provides that when an employee has qualified for a vacation under Section 1 (a) and his employment status is terminated for any reason he shall at the time of termination be granted full vacation pay earned up to that time. Carrier did not deny that claimant worked a sufficient number of days in 1964 to qualify for a vacation of five days with pay in 1965 had he remained in the service of the Company. Nor does Carrier deny that under Article 26, Section 8, claimant is entitled to payment in lieu of his 1965 vacation. Carrier's sole defense to the present claim is that it was not timely filed with the proper officer and is therefore barred. The Organization did not contend that the claim was filed within sixty days after claimant was terminated but takes the position that the time limit rule of Article 28, Section 1 (a) (Article V, Section 1 (a) of the 1954 National Agreement) has no application to and was never intended to apply to Article 26, Section 8 (Article 4, Section 2 of the 1960 National Agreement). It argues that under the 1960 Agreement it is mandatory that Carrier give the employee his vacation pay at the time his employment is terminated and that no claim is necessary. No Awards are cited which support this position.

We have researched the point, reading all the Awards to which we have been referred. Awards of the Second and Third Divisions clearly hold that the time limit provisions of Article 28, Section 1 (a) (Article V, Section 1 (a) of the 1954 National Agreement) do apply to claims for payment in lieu of vacation. Award 4297 (Second Division); Award 10352 (Third Division); Award 14453 (Third Division). In Award 4297 Referee Daly said:

> The controlling Agreement provides for vacation or payment in lieu thereof for retiring employes who have worked the prescribed number of days in a calendar year and meet the necessary qualifications.

Obviously, the Claimant had worked the requisite number of days during 1959 to earn vacation entitlement. He had also voluntarily retired in accordance with the controlling provisions. Therefore, up to this point the Claimant would seem to qualify for 15 days' pay in lieu of earned vacation entitlement.

However, the August 21, 1954 Agreement must also be considered. This document, which represents the mutual agreement and determination of the Carriers and the Organization, is equally binding on all the contracting parties and may be changed in part or in toto only by them.

In this particular instance, to be eligible for vacation entitlement the Claimant must also satisfy the provisions of Article V, Section 1 (a) of the August 21, 1954 Agreement, supra, as well as the provisions of Paragraph 8 of the Vacation Agreement contained in the controlling Labor Agreement dated September 1, 1949.

While the Claimant met the demands of Paragraph 8, he did not, however, fulfill the requirements of Article V, Section 1 (a). (Emphasis added).

In Third Division Award 10352 Referee Gray expressed the view in these words:

> Morally, Mr. Hagan may well be entitled to his vacation pay but this Board cannot deal in equity but must be bound by legal principles of law . . . . . we must hold that the claim is barred by failure of the Claimant to file his claim within 60 days. . . . . (Emphasis added).

Recently the Third Division has sustained a claim for payment in lieu of vacation by applying the time limit rule against the Carrier. In Award 16094 Referee Englestein said:

> ; . . . . . the letter written by Carrier's Superintendent, dated April 7, 1965, in which he declined the claim for sick leave and vacation pay, is not within the time limit provision because it was a response beyond 60 days.

The same issue was raised in Docket No. 1 before this Board and in Award No. 1 we accepted these Awards as controlling. We reiterate that holding here.

There is no doubt in this case that claimant failed to comply with the time limits. His termination from service was effective January 18, 1965, ten days after he was furloughed. On January 21, 1965 claimant Garcia was notified that his seniority and employment relationship was terminated due to his failure to comply with the mandatory provisions of Article 3, Rule 11. Since his rights to payment in lieu of vacation arose on January 18, 1965 it was necessary that

a claim be filed within 60 days from that date. No such claim was filed. The first communication from the Organization to Carrier concerning the matter was the General Chairman's letter of January 6, 1966 (almost a year later) referred to above. It is clear, therefore, that claimant failed to present his claim within the prescribed period. We have no alternative except to dismiss the claim.

As we stated in Award No. 1 of this Board we take this action reluctantly. While morally and equitably claimant should receive his vacation pay this Board has no equity powers. Carrier is within its legal rights in standing on the time limit rule. We are bound by the procedural rules adopted by the parties. As indicated above, they work both ways. We have no authority to dispense with such rules merely because their enforcement seems to us unjust.

AWARD

The claim is dismissed.

Public Law Board No. 76

Roy R. Ray
Neutral Member and Chairman

A. J. Cunningham
Employe Member

Fred R. Carroll
Carrier Member

Dallas, Texas
December 12, 1968