Award No. 1
Docket No. 1

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 it failed and refused to allow Messrs. J. B. Arnold, J. A. Hancock and John D. Cavender five (5) days of vacation with pay or pay in lieu thereof to which entitled for the calendar year 1965.

2. Messrs. J. B. Arnold, J. A. Hancock and John D. Cavender each now be allowed five (5) vacation days of pay at the track laborer's rate because of the violation referred to in Part (1) of this claim.

OPINION OF BOARD: This case involves a dispute over vacation pay for the three claimants whose service with Carrier was terminated in December 1964. At the time in question Article 26, Section 1 (a) provided that an annual vacation of 5 consecutive work days 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 of the same Article 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 such termination be granted full vacation pay earned up to that time. It is not disputed that each of the three claimants worked a sufficient number of days in 1964 to qualify for a vacation of 5 days in 1965 had they remained in the service of the company. Carrier does not deny that under Article 26, Section 8, claimants are entitled to payment in lieu of their 1965 vacation. But it resists payment on several jurisdictional grounds: (1) That Public Law Board No. 76 has no jurisdiction to hear

and determine this dispute for the reason that exclusive jurisdiction over such disputes rests with the National Disputes Committee established by the various railroads and brotherhoods on May 31, 1963 for the purpose of deciding disputes as to the interpretation or application of certain national agreements. (2) No claim for the vacation pay was presented to the proper officer of Carrier within 60 days from date of occurrence on which the claim is based as required by Article 28, Rule 1 (a) of the Agreement (Article V (1) (a) of the 1954 National Agreement). (3) The alleged claim was not appealed to Carrier's first appeal officer as required by Article 28, Rule 1 (b), (Article V (1) (b) of the 1954 National Agreement). (4) The alleged claim was not handled on the property in the "usual manner" as required by Section 3 First (i) of the Railway Labor Act, and therefore that this Board has no jurisdiction over the matter. We will take these up seriatum.

Paragraph 2 of the May 31, 1963 Agreement provides that any dispute as to the interpretation or application of the Vacation Agreement "not settled on the property may be referred in conformity with the procedures adopted to implement this Agreement, to the Disputes Committee (a) jointly by a railroad (or railroads) and one or more labor organizations parties hereto, (b) ex parte by a railroad (or railroads), or (c) ex parte by one or more of such organizations". Section 8 of the Agreement provides: "When a case which has been docketed with the Third Division of the National Railroad Adjustment Board is submitted to the Disputes Committee, the party or parties submitting it will so notify the Executive Secretary of the Third Division and request that the case be held in abeyance pending action by the Disputes Committee . . . ." Carrier argues that the word may in Section 2 was intended by the parties to be construed as "shall" or "must". We do not so interpret it and have been cited to no Award holding that view. To us it seems that the parties intended to give either party an option to take such vacation issues to the Disputes Committee if it so desired.

Thus we hold that Section 2 did not grant exclusive jurisdiction to the Disputes Committee.

Furthermore, to hold that the Disputes Committee had exclusive jurisdiction over the issue here involved would make no sense whatsoever. On January 11, 1966, the Disputes Committee recessed for an indefinite period of time, after having reached decision on only a small number of disputes. It directed the Third Division that it should restore to its active calendar all of the dockets which had been held in abeyance and proceed to handle them to conclusion. The Organization's "Notice of Intent" in this case was filed on December 30, 1965, and its submission was filed January 31, 1966. Carrier's submission was filed January 26, 1966. Thus both submissions came after the Disputes Committee ceased to function. For the reason expressed we hold that the National Disputes Committee did not have exclusive jurisdiction of the present claim.

We proceed next to a consideration of Carrier's contention that the claim was not timely filed with the proper officer and is therefore barred. The Organization takes the position that the time limit rule of Article 28, Section 1 (a) (Article V 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 employe his vacation pay at the time he is terminated and that no claim is necessary. It has, however, cited no Awards which support this position.

After a careful reading of all Awards to which we have been referred, we cannot escape the conclusion that the time limit provisions of Article 28, Section 1 (a) (Article V, Section 1 (a) of the 1954 Agreement) do apply to claims for payment in lieu of vacation. And we so hold. One of the clearest statements is found in Award 4297 (Second Division). 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).

We have been cited no Awards to the contrary.

In Award 14453 the Third Division again recognized the applicability of the time limit rule to vacation pay claims, saying: "We find persuasive the opinion in Award 9850, which held that Article V, Section 1 (a) of the August 21, 1954 National Agreement, commonly known as the time limit rule, must be considered in conjunction with the following interpretation of Article 5 of the December 1941 National Vacation Agreement issued June 10, 1942." In that case, however, the Board found the claim to have been timely filed.

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.

Were the time limits complied with in this case? Here the Claimants were terminated on December 10 and 14, 1964 respectively. On December 30th the General Chairman wrote a letter to Division Engineer Hughes (with copies to Chief Engineer Deavers and Auditor Schultz) in which he referred to a conversation on the previous day when he had inquired if the Claimants had been furnished blanks to complete for their vacation. In the letter he stated that the men had worked the necessary 120 days in 1964 to qualify them for a five day vacation in 1965. On February 11, 1965 the General Chairman wrote a letter to Vice President Winkel, enclosed a copy of his letter of December 30th to Hughes, and stated that he had received no reply. On March 1, 1965, Winkel replied stating that the letter of December 30th was not a claim.

Since the Claimants' rights to payment in lieu of vacation arose at the time of their respective terminations it was necessary that claims be filed within 60 days from the termination dates (December 10 for Arnold and Cavender and December 14 for Hancock). No such claim was filed with Carrier's proper officer within the 60 day period. In our view the General Chairman's letter of December 30, 1964 is in no sense a claim. It did not complain of any action of Carrier, nor did it charge a violation of any rule of the Agreement. We must hold, therefore, that the Claimants failed to present their claim within the prescribed period. We have no alternative except to dismiss the claim.

It is with great reluctance that we reach this result. Carrier admits that the Claimants met the requirements of Article 26, Section 6 of the Agreement and became

entitled to vacation pay. In fact, in a letter of March 25, 1965, wherein it proposed a compromise settlement Carrier offered to pay the claim. The proposed settlement was rejected by the Organization. While morally and equitably Claimants are entitled to their vacation pay, Carrier is within its legal rights in standing on the time limit rule. This Board has no equity powers and is 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 may shock our sense of justice.

A W A R D

The claim is dismissed.

Public Law Board No. 76

Roy R. Ray
Neutral Member and Chairman

A. J. Cunningham
Employe Member

A. F. Winkel
Carrier Member

Dallas, Texas
June 19, 1968