Award No. 20
Docket No. 20

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. That Carrier violated Article 28, Rule 1(a), by not responding to a claim instituted by Mr. Rito S. Perez, for vacation pay due within the prescribed time.

2. Mr. Perez be allowed five days vacation pay, due him for the year 1968.

OPINION OF THE BOARD: The following facts are undisputed: Rito S. Perez, a Machine Operator was cut off in a force reduction November 10, 1967. He promptly filed his name and address with the proper officers of Carrier as required by Article 3, Rule 11 of the Agreement, thus protecting his right to recall in Seniority order and all other rights under the Agreement. On April 15, 1968 Perez was notified that he was recalled to service. In the meantime, he had found employment elsewhere and failed to respond to the recall. On May 4, 1968, Carrier's Roadmaster Reid sent a letter to Perez advising him that by failure to report for service within the time limit he had forfeited his seniority rights. A copy of this letter was sent to General Chairman Uptergrove. Upon receipt of his copy of this letter, Uptergrove wrote to Perez on May 9, 1968 stating "Since . . . you have now lost your seniority and all other rights, I would suggest that you immediately write Division Engineer J. E. Clark, MKT Railroad Company, Waco, Texas and request such pay as may be due you in lieu of vacation for 1968. Furnish me a copy of your letter directed to Mr. Clark and if your request is denied, advise me and I will

attempt to assist you. May I impress upon you that it is important that you write Mr. Clark immediately."

On July 16, 1968, Uptergrove wrote Clark charging that Carrier had violated Article 28, Rule 1(a) (time limit rule) by not responding to a claim allegedly instituted by Perez by letter of May 14, 1968 for payment in lieu of vacation, and because of such failure by Carrier the claim should be allowed. With his letter Uptergrove enclosed a photocopy of the alleged letter of Perez. By letter of August 7, 1968 Clark responded to Uptergrove stating that since his letter with the attached photocopy of Perez's alleged letter was the first notice which had been received in his office requesting vacation pay in lieu of vacation for Perez, the claim was declined for failure to comply with Article 28, Rule 1(a) of the Agreement.

The Organization first asserts that when Carrier severed Claimant's seniority rights on May 4, 1968, it was required to pay him his accumulated vacation pay and that its failure to do so then violated the Agreement. In Award No. 1 of this Board we ruled that the time limit provisions of Article 28, Rule 1(a) apply to claims in lieu of vacation. In this case the Organization is in fact asserting a time limits violation against Carrier. It contends that Carrier violated the second sentence of Article 28, Rule 1(a) when it failed to notify Perez within 60 days after his claim was filed that it had been disallowed.

Article 28, Rule 1(a) reads:

> All claims or grievances must be presented in writing by or on behalf of the employe involved, to the officer of the Carrier authorized to receive same, within 60 days from the date of the occurrence on which the claim or grievance is based. Should any such claim or grievance be disallowed, the Carrier shall, within 60 days from the date same is filed, notify whoever filed the claim or grievance (the employe or his representative) in writing of the reasons for such disallowance. If not so notified, the claim or grievance shall be allowed as presented, but this shall not be considered as a precedent or waiver of the contentions of the Carrier as to other similar claims or grievances.

But it is clear from Article 28, Rule 1(a) that Carrier's obligation to respond to the claim arises only after the claim has been presented. The burden is upon the employe or his representative to prove that the claim was presented within 60 days after it arose. This can be accomplished only by evidence that the proper officer of Carrier received the claim. Here there is no such proof.

There is a general principle of law that where there is proof that a letter was correctly addressed, stamped and deposited in the United States mails it is presumed to have been received by the addressee. But that principle does not avail the Organization here. It has no evidence to this effect. In his letter of July 16, 1968 Uptergrove states that Perez directed a letter to Clark. But there is no evidence from anyone that the letter was properly addressed, stamped and mailed. In fact the alleged copy of the letter which Uptergrove enclosed in his letter has no address for Clark. So the presumption does not arise. The Organization has relied upon certain awards to support its argument that we should presume the Perez letter to have been received by Clark. Award 62, Special Board of Adjustment 272; Award 3285 Second Division; Award 1206 Fourth Division; National Disputes Committee, Decision 12. None of these decisions is in point here. In all of them the Referee stated that there was proof that the letter had been correctly addressed and mailed. In our case there is no evidence of these facts and the presumption, therefore, does not arise.

Moreover, even if the presumption were recognized it is rebuttable and where the alleged addressee denies the receipt of the letter the presumption vanishes and is of no effect. Award 11505, Third Division (Dorsey). Thus the burden is upon the Organization to prove the de facto receipt of the letter. Here it has utterly failed to do so. In the absence of proof that the claim was presented within 60 days it is obvious that no violation of the Contract by Carrier has been established. The

claim, therefore, has no legal basis.

Our denial of this claim is made reluctantly. Carrier does not deny that Claimant worked a sufficient number of days in 1967 to become entitled to qualify for some vacation in 1968. Morally and equitably Claimant is entitled to pay for vacation which he did not get to take due to severance. But Carrier is within its rights in standing on the time limit rule. We have no equity powers and are bound by such procedural rules. However, it seems to us that the parties might well consider the amendment of Rule 28, Rule 1(a) to make it inapplicable to vacation pay. We see no reason why payment for time earned toward vacation should not be automatic upon severance from service. Unless and until such action is taken it behooves the General Chairman to see that all such claims are promptly and properly filed.

A W A R D

The claim is denied.

Public Law Board No. 76

Roy R. Ray
Neutral Member and Chairman

A. J. Cunningham
Employe Member

Fred R. Carroll
Carrier Member

Dallas, Texas,
October 31, 1969