Award No. 9546

Docket No. CL-9218

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

William E. Grady, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF RAILWAY AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYES

PACIFIC ELECTRIC RAILWAY COMPANY

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

1. Carrier violated and continues to violate agreement rules by establishing a position of "Assistant Agent—Azusa-Glendora" under the agreement of another craft and class, to perform clerical work at and incidental to the Azusa, California, Agency, and concurrently therewith abolishing position of Station Clerk, Job. No. 5.

2. The Carrier shall now pay Telfair Koch, former incumbent of abolished Station Clerk Job. No. 5, a day's pay at the rate of pay of Station Clerk Job No. 5 for November 14, 1955 and continuing, for each date of violation.

EMPLOYES' STATEMENT OF FACTS: The Operating Department of the Carrier maintains a non-telegraph agency station at Azusa, California, engaged in the carload and less than carload freight business, express, and the selling of passenger transportation.

Previous to the effective date of the Clerks' Agreement with the Carrier, the clerical work of the agency was performed by employes under the supervision of an employe with title of Agent. On April 1, 1935, the Clerks' Agreement with Carrier became effective and until inception of this dispute in 1955 was applied to all employes at Azusa other than the Agent, whose position was first covered and identified by Agreement between the Carriers and The Order of Railroad Telegraphers dated September 16, 1934.

Immediately prior to August 1, 1955, the following station force was identified and maintained at Azusa, working between the hours of 8:00 A. M. and 5:00 P. M., daily, except Saturday and Sunday:

Agent	Job No. 1
General Clerk	Job No. 2
Rate & Revising Clerk	Job No. 3
Station Clerk	Job No. 5
Demurrage Clerk	Job No. 6

1. Dismiss the claim because the Board is without legal authority to render an award in the absence of notice to all parties involved.

2. Dismiss the claim because the alleged violation does not in fact exist.

3. Dismiss the claim because there has been no violation of the collective agreement in effect between the parties to the dispute.

4. Dismiss the claim because Item No. 2 of the claim has already been complied with by the Carrier.

5. Dismiss the claim because the Board is without any authority to require the Carrier to re-establish any position.

All data in support of Carrier's Submission is within the knowledge of the employes. Carrier reserves the right to submit additional data in opposition to data which may be presented by the employes and of which the Carrier now has no knowledge.

(Exhibits not reproduced.)

OPINION OF BOARD: The claim is, in substance, that the Carrier, in violation of its Agreement with the Brotherhood, abolished the job of Station Clerk at Azusa-Glendora, California and assigned the work to a newly created position at that location, namely Assistant Agent, covered by an agreement between the Carrier and The Order of Railroad Telegraphers. Notice has been given to the Order under Section 3, First (j) of our statute.

The background of the claim involves two locations, Azusa and Glendora. Azusa, a non-telegraph station, was originally a one man post manned by an Agent. By 1955 it had grown and embraced the Agent's position plus five clerical positions, one of which was Station Clerk. Glendora, also a non-telegraph station, some two and one-half miles from Azusa, was manned by an Agent. Business at Glendora so far declined that the Carrier decided to abolish the Glendora agency, as it had the right to do. However, faced with objections by the Order and the remaining shippers, it transferred the Glendora Agent to Azusa and continued Glendora as a separate entity at Azusa, in January 1952.

Thereafter Glendora business declined drastically. In February 1954 the Carrier decided that continuance of Glendora as a separate agency was not justified. The agencies were consolidated as Azusa-Glendora. On July 16, 1955 the Azusa Agent became Agent, Azusa-Glendora; the Glendora Agent became Assistant Agent, Azusa-Glendora. Claimant's position, Station Clerk, was abolished on November 11, 1955.

The Brotherhood does not contest the Carrier's right to combine the agencies. Nor, for purposes of this dispute, does it contend that the newly created Assistant Agent could not continue to perform such Glendora work as remained or assist the Azusa Agent in clerical work normally performed by him (c.f. Award No. 8313). The complaint in essence is that the work of Station Clerk substantially existed, and that the job was nominally abolished in order to provide work for the new position of Assistant Agent.

Certain salient points emerge. Glendora's decline would have resulted in abolition but for protest. Upon transfer of the Glendora Agent to Azusa, the

Glendora work which the Glendora Agent took with him was, concededly, "little". The Glendora work continued to diminish to such an extent that consolidation resulted. The new position of Assistant Agent was established. Prior to its establishment at Azusa there were five clerical positions and but one Agent sufficed. It does not appear that Azusa-Glendora was prospering. On the contrary, it is said that the job of Station Clerk was abolished because of decline in business. If Glendora agency work had so far diminished and the combined agency was declining, how was the Assistant Agent to substantially occupy his time unless the job was filled out? The Azusa Agent had handled the needs of his position, including clerical work, and the Glendora work left for his fellow Agent was de minimis.

Claimant's statement dated November 11, 1955 sets forth the work then done by him as Station Clerk. True, the statement is entitled "Job Description" (rather than Job Audit or the like) but it states that the tasks were performed, assigns time to each, and adds up to a day's work. When the job of Station Clerk was abolished its duties were not assigned to other clerical positions.

It is urged that there is no adequate showing that the work performed by the Station Agent was exclusive to his job by custom or tradition. However helpful this approach, we have here a particular set of facts which speak for themselves and we need not range from them. It does not appear that the duties of the Azusa Station Clerk had been performed by the Glendora Agent while stationed as such at Azusa on a fill in basis or that there was an ebb and flow of work (c.f. Awards No. 7311, 9395). The time lapse between creation of Assistant Agent and abolition of Station Clerk weighs in favor of the Carrier to a degree, but its weight is offset by Claimant's description of his work on November 11, 1955, which has not been impugned except in terms of the statement's formal title.

In sum, the work of Agent-Glendora had withered and the job had been abolished. The new position of Assistant Agent, not previously deemed warranted in more prosperous times, had been created. The Azusa Agent, without the help of an Assistant, had done the clerical work incident to his job at Azusa. The new job of Assistant Agent certainly was not intended as a sinecure. It was given substance by abolition of the job of Station Clerk and transfer of Station Clerk duties.

The claim will be sustained.

Our decision is based upon the particular facts, involving, among other things, creation of a new job. Had the duties of Station Clerk been taken over by the Agent, different problems might be presented.

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 Agreement was violated.

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 9th day of September, 1960.

DISSENT TO AWARD NO. 9546 (DOCKET NO. CL-9218)

While we emphatically disagree with the conclusions of the Majority with respect to the merit of this case, we are compelled to dissent to awarding penalty payment to the Claimant involved because he (Claimant) lost no time or pay and the Agreement contains no penalty payment provision for the Agreement violation alleged.

In awarding such penalty payment in the absence of an Agreement provision so providing, the Majority have ignored this Board's consistent holdings that employes damaged by Agreement violations should be made whole (Awards 9395, 8674, 8673, 8500, 7309 and 7183), and that it lacks authority to assess fines or penalties not stipulated by Agreement provision (Awards 9395, 8674, 8673, 7309, 5186, 3651, Second Division Award 1638, and First Division Award 15866). In so doing, they have held Carrier liable for that which it has not contracted (Award 6001) and have established a rate of pay (Award 9212), thus adding to the Agreement rather than interpreting it (Award 6757), and violating Agreement Rule 55 which requires negotiation for any change in the Agreement.

/s/ J. E. Kemp

/s/ R. A. Carroll

/s/ W. H. Castle

/s/ C. P. Dugan

/s/ J. F. Mullen

LABOR MEMBER'S ANSWER TO CARRIER MEMBERS' DISSENT TO AWARD NO. 9546, DOCKET NO. CL-9218

This Division has repeatedly rejected Carrier Members' contentions that this Board has no authority to assess damages in the nature of penalties for a violation of an agreement. See Awards 685, 1524, 1605, 1646, 2072, 2272, 2282, 2346, 2838, 2920, 3049, 3193, 3271, 3277, 3371, 3375, 3376, 3423, 3631, 3744, 3745, 3835, 3876, 3890, 3910, 3913, 3955, 3963, 4022, 4037, 4103, 4196, 4244, 4370, 4461, 4467, 4534, 4544, 4550, 4552, 4571, 4599, 4667, 4728, 4815, 4883, 4962, 5115, 5117, 5243, 5266, 5269, 5271, 5333, 5419, 5425, 5465, 5764, 5921, 5923, 5926, 5929, 5930, 5939, 5943, 5978, 6019, 6063, 6144, 6157, 6158, 6160, 6284, 6306, 6358, 6444, 6465, 6544, 6630, 6685, 6814, 6842, 6907, 7022, 7062, 7100, 7203, 7242, 7816, 8188, 9545 and those cited therein. The principle controlling here was summed up by Referee Wenke in Award 6063, as follows:

"Carrier contends that the claim should be disallowed because none of the claimants lost any time as a result of this company doing

the work. This claim is primarily to enforce the scope of the agreement and not for work performed. If the scope has been violated then a penalty is imposed to the extent of the work lost. This is done to maintain the integrity of the agreement. As to who gets the penalty, that is but an incident to the claim itself and not a matter in which the carrier is concerned for if the agreement is violated, it must pay the penalty therefor in any event."

A review of the Awards cited by Carrier Members will show that they lend no support to their position when viewed in the light of the factors involved there and here. Even so, the long line of authorities cited above, which were authored by many learned referees, are controlling and the question is no longer in doubt.

For that reason, Award No. 9546 properly disposes of the issues before the Board in the instant dispute.

/s/ J. B. Haines
J. B. Haines
Labor Member

CARRIER MEMBERS' REPLY TO LABOR MEMBER'S ANSWER TO CARRIER MEMBERS' DISSENT TO AWARD NO. 9546, DOCKET NO. CL-9218

Reviewing the ninety-one (91) Awards cited in Labor Member's Answer, a majority of these Awards are not "Penalty" Awards, but are clearly "Wage-loss" Awards. For example:

In Award 1524 employes were awarded "wage-loss" due them under the Sick-leave Rule.

In Award 3049 Claimant was awarded actual "wage-loss" for work of which she was deprived but which she was entitled to perform.

In Award 3271 we stated:

"We do not think that Claimant is entitled to the time and one-half rate in the present case for the time he lost. The rule is that the penalty rate for work lost because it was improperly given to one not entitled to it under the Agreement, is the rate which the employe to whom it was regularly assigned would receive if he had performed the work. Award 3193. The regular occupant of the position in the present case would have received the pro rata rate. The present claim will be sustained at that rate." (Emphasis ours.)

In Award 4574 we stated:

"Claimant was clearly entitled to be compensated for his Sunday work at the time and one-half rate in accordance with Section 2(b). The Carrier contends that this portion of the claim, if sustained, should commence on February 11, 1948, the date the claim was filed. We think not. This portion of the claim is not for a penalty; it is for compensation earned at an agreed upon rate."

In Award 5978 the sole question was whether Claimants' actual "wage-loss" should be paid for at the pro rata or time and one-half rate.

These five Awards cited in Labor Member's Answer are representative of a majority of the ninety-one (91) cited Awards, and fall within that group of Awards of which the following are representative.

Award 5186 (Referee Boyd), wherein the Board stated:

"It must be conceded that the Agreement does not contain a specific provision for a penalty in case of nonperformance of the obligation imposed by Article 8, Section 10. It is also well established by the precedents of previous awards that the Board will not impose a penalty where none has been specified in the Agreement. This is a sound doctrine. But it does not necessarily follow that where no penalty has been provided, this Board is helpless and without authority to make an award which will tend to enforce compliance with the terms of the contract.

It is a well established principle that if a party to an Agreement fails to perform that which he has undertaken to perform and such nonperformance results in a loss to the other contracting party, then the aggrieved may require the nonperforming party to compensate him for the loss suffered by reason of the breach. By the terms of the Railway Labor Act, this Board is authorized to consider disputes arising out of grievances or interpretations of Agreements between the parties and to make an award. The Board would fail in its objective of settling disputes if there is not implied in the broad purposes of the Act the authority of the Board to enforce its awards by an appropriate finding of damages, if any exist, and directing the payment thereof."

Award 5306 (Referee Wyckoff), wherein the Board held:

"FOURTH. Item (c) of the claim asks for 30 minutes per day at the rate of time and one-half from October 15, 1947 and for all other wage losses resulting from the rule violations.

The usual award is for the difference in the rates of pay between the position held by the Claimant and the position wrongfully denied him (Awards 2143, 2815, 3419, 3380, 4183, 4431, 4438, 4940, 4541). There was no such loss here because the basic rates of pay for the two positions were identical."

CARRIER MEMBER'S REPLY TO LABOR MEMBER'S ANSWER TO CARRIER MEMBER'S DISSENT TO AWARD NO. 9546, DOCKET NO. CL-9218

The remaining minority of the Awards cited by the Labor Member stem from Award 685 (Referee Spencer), wherein the basis for a "penalty" Award is found in the following language:

"* * * Accordingly, the claim, although it may be described as a penalty, is meritorious and should be sustained. The Division quotes with approval this statement from the Report of the Emergency Board created by the President of the United States on February 8, 1937:

'The penalties for violations of rules seem harsh and there may be some difficulty in seeing what claim certain

individuals have to the money to be paid in a concrete case. Yet, experience has shown that if rules are to be effective there must be adequate penalties for violation.' "

Under the provisions of the Railway Labor Act, as amended, an Emergency Board investigates the facts as to the dispute and makes a report to the President thereon. This report usually includes recommendations for the settlement of the dispute. An Emergency Board, however, as confirmed by the Courts, has no jurisdiction to interpret Agreements (minor disputes), which function is reserved exclusively to this Board.

The statement of the Emergency Board as quoted in Award 685 was merely an excerpt from that Board's observations. It is significant, however, that the Board recommended that the parties confer and negotiate a mutually satisfactory settlement of the dispute which was before it.

Accordingly, Awards following the observations of this Emergency Board, quoted in Award 685, supra, are in error in awarding "penalties" not expressly provided for in the Agreements. Our jurisdiction is limited to interpreting Agreements as written by the parties.

As stated by Referee Boyd in Award 5186—"It is also well established by the precedents of previous awards that the Board will not impose a penalty where none has been specified in the Agreement.

/s/ J. E. Kemp

/s/ R. A. Carroll

/s/ W. H. Castle

/s/ C. P. Dugan

/s/ J. F. Mullen

LABOR MEMBER'S ANSWER TO CARRIER MEMBERS' REPLY TO LABOR MEMBER'S ANSWER TO CARRIER MEMBERS' DISSENT TO AWARD NO. 9546, DOCKET NO. CL-9218

It is interesting to note that the Dissenters have receded from their original position that an employe is only entitled to be made "whole" and the Board lacks authority to assess "fines or penalties" in citing, with approval, Award 3271, which held that the penalty rate for work lost is the rate the regular employe would have received had he performed the work. That is what the Board did here when it awarded "a day's pay at the rate of pay of Station Clerk Job No. 5 for November 14, 1955 and continuing, for each date of violation," i.e., for each day the agreement was violated when work was removed from the Clerks' Agreement and transferred to another craft or class of employes.

Carrier Members' position on this subject has been inconsistent every time the question comes up. When the record shows that the Board should award the time and one-half rate in order to make the employe "whole," they take the position that the "penalty" for work not performed is the pro rata rate. Where an employes' individual rights to promotion have been violated, they contend that he should only be paid the difference between the rates of the position held and the one sought, as this is all that is necessary to make him "whole". Where, on the other hand, the claim is for a pro rata day's pay

for the removal of a position from the scope of the agreement, as here, they take the untenable position that the Claimant should be made "whole" (provided he lost no time) and that the Board has no authority to assess "a penalty or fine". They either are suffering from a misunderstanding of the controlling principles on the subject, or they are deliberately attempting to confuse the issue and thereby allow Carriers to escape their obligations to make reparations for violations of agreements.

It is clear that the principles involved are the awarding of damages for a violation of the agreement. The Agreement provides the rate of pay and measure of damages in all cases. The Boards' purpose of awarding such damages is twofold: First, the employes, either individually or collectively, should be made "whole" by being compensated the exact amount lost by virtue of the violation, and second, the Carrier should be "penalized for the violation by the awarding of damages and thereby maintain the sanctity of the Agreement by discouraging violations. It would follow that the awarding of damages by the Board, in order to carry out these two avowed purposes, cannot be considered "penalties or fines" as contended by the Dissenters. The Awards upon which they rely in their "Reply" to my "Answer" clearly refutes the position they originally took in their "Dissent".

Award 1524 recognized that one of the purposes of this Board was to remove causes of stress and upon finding a violation of the agreement, awarded damages. A denial of reparations or compensation for an established violation of an agreement would not remove "causes of stress". The burden is upon the Carrier to police and apply the agreement in the first instance. Awards 3590, 4468, 5057, 5266, 5269, 6267. The Organizations only recourse is to file claim for the violation. Awards 4461 and 6324.

In Award 4461, Referee Carter ruled:

> "* * *. Unless penalties and wage losses can be asserted by the Organization, its primary method of compelling enforcement of the agreement is gone."

It will be noted that this principle was recognized by Referee Boyd in Award 5186, cited by Carrier on page 2 of its "Reply". It should also be observed that the collective bargaining agreement is between the Petitioning Organization and Respondent Carrier and not between the individual Claimant and the Carrier. For that reason, the Organization and Carrier are the contracting parties, and the Organization is the proper party to assert a claim for its violation on behalf of any employe it represents. In such cases, the Board has repeatedly held that it is no concern of Carrier whom the Organization names as Claimant. See Awards 4022, 5266, 6324, among many others.

The following principles have been established by the Board as to its authority to assess damages and/or wage losses in the nature of penalties for violations of agreements:

1. Experience has shown that if rules are to effective there must be adequate penalties for violations. The sanctity of the agreements must be maintained.

2. The violation of the Agreement is the important thing and it is of no concern of the Carrier whom the Organization names as claimant, as the Carrier would only be required to pay once.

1. The penalty rate for work lost because it was given to one not entitled to it, is the rate which the occupant of the position would have received had he performed the work, even though he would have received the time and one half rate.

The following awards have established and reaffirmed these well founded principles.

Award 685, Referee Spencer:

"The objection of the carrier to the payment of overtime under Rule 37 must also be overruled. It is true, as the carrier points out, that the claimant 'was not required to work regularly in excess of eight hours.' The Division, however, has found that the carrier made an improper assignment in this case. Accordingly, the claim, although it may be described as a penalty, is meritorious and should be sustained. The Division quotes with approval this statement from the Report of the Emergency Board created by the President of the United States on February 8, 1937:

> 'The penalties for violations of rules seem harsh and there may be some difficulty in seeing what claim certain individuals have to the money to be paid in a concrete case. Yet, experience has shown that if rules are to be effective there must be adequate penalties for violation.' "

The above quotation has been quoted by others as controlling, including Referee Bruce Blake in Award 1646; Referee Tipton in Award 2072, Referee Fox in Award 2282 and Referee Youngdahl in Award 2838, among others.

Award 1605, Referee Blake:

"The Carrier makes the point that the claimant here is no more entitled to the call than the other telegrapher at Sayre. This may be —but that does not relieve the Carrier of its obligation to pay for the call. The other telegrapher is making no claim; and if he should the Carrier would not be required to pay twice. * * * "

Award 1646, Referee Blake:

"The Carrier contends, however, that, under the rule as interpreted North was not entitled to be called. The essence of the claim is by the Organization for violation of the agreement. The claim for the penalty on behalf of North is merely an incident. **That the claim might have been urged in behalf of others having, as between themselves and North, a prior right to make it, is of no concern to the Carrier. Awards 571, 1058, and 1605. That does not relieve it of the obligation to pay the rate stipulated for a call.** The others are making no claim; and if they should the Carrier would not be required to pay more than once." (Emphasis ours)

Award 2346, Referee Burque:

"We need not concern ourselves whether this in effect is a penalty or not. It is compensation for a violation of a rule, and what is said

in Awards 685, 1646 and 2282 on the subject, although not involving the same rule, is applicable to the situation here. Citation and quotation of the language used in those awards would serve no useful purpose; it is adopted here. Reference to the awards suffices."

In Award 2838, Referee Youngdahl, after citing Award 685 and Report of the Emergency Board, supra, ruled:

"This is sound doctrine and it is reaffirmed by this Board. Surely the parties to the Agreement did not engage in the idle ceremony of setting up comprehensive rules for the settlement of disputes without proper and adequate penalty in the event of a violation thereof. **To so conclude would be to impair, if not completely destroy, the effectiveness of the rules.** (Emphasis ours)

* * *

* * * In the instant case the Carrier has offered no proof in justification or mitigation of the violation of the rule. A protest of the violation and demand for adherence to the rule was timely made. The obligation to adhere to the rules is reciprocal. As it was aptly stated by Referee Shake in Award No. 2611:

> 'It was as much the duty of the Carrier to conform to the current Agreement as it was that of the employe and his organization to protest a violation thereof and it would be inequitable to permit the Carrier to reap a benefit from its own wrong.' "

Award 2277, Referee Fox:

"* * * The only question arises whether Gardner who did not, in fact, do the work, is nevertheless entitled to be paid therefor, and on an overtime basis of pay, * * *. If we are to allow the claim it must be done on the basis that the Carrier should be penalized for its violation of the Agreement, regardless of the fact that the result thereof would operate to compensate Gardner for work he did not perform, and on an overtime basis of pay. To impose this penalty may, in the circumstances, seem harsh; but Agreements are made to be kept and the imposition of penalties to attain that end, and to discourage violations, are justified. **As we view the matter, less harm will result to the principles of collective bargaining by imposing the penalty than from ignoring the violation and refusing to impose the penalty.** * * * (Emphasis ours)

Considering the case from all standpoints, we conclude that the situation in which the Carrier finds itself is the result of its own failure to protect itself against an excessive cost for the work in question, by a resort to the several methods open to it, within the rules of the Agreement. When it failed to follow that course, and sought to reach the same result by a violation of the rules, it must suffer the consequences. The claim will be sustained."

Award 2920, Referee J. M. Douglas:

"Carrier argues there is no penalty prescribed for a violation of Rule 4(b) and Claimant is attempting to recover under a rule (34(c)) which is applicable only where an employe is absent from his home station on irregular service. Award 2838, cited by Claimant, reaffirms

the doctrine previously announced in Award 685 that the absence of a penalty provision does not bar recovery even when no damage is shown. The purpose of such doctrine is to assure compliance with the rules."

Award 3277, Referee Carter:

"The penalty rate for work lost because it was given to one not entitled to it under the Agreement, is the rate which the occupant of the regular position to whom it belonged would have received if he had performed the work. Awards 3193 and 3271. If Claimant had been permitted to perform the work he would have received time and one-half for the Sunday work and time and one-half for the overtime work on Monday. The latter for the reason that the Monday work on the platform commenced at 7:30 A.M. and terminated at 8:00 P.M. If the employes entitled to the work had performed it, they, too, would have been entitled to two and one-half hours at the over-time rate. Consequently, the claim for two and one-half hours at the overtime rate on Monday is properly sustainable."

Award 3371, Referee Tipton:

"It may be that between W. H. Rodeback and other Storehelphers Rodeback was not entitled to present this claim, but the claim made by the Petitioner is for a violation of the Agreement. The claim on behalf of W. H. Rodeback is merely an incident. These facts do not relieve the Carrier of the obligation to pay the penalty. The Petitioner has elected to make the claim in his name. 'The others are making no claim; and if they should the Carrier would not be required to pay more than once.' Award No. 1646. See also Award No. 2282.

Should the penalties be on a pro rata basis or should the penalties be for time and one-half for the work that was performed by employes outside of the agreement? The Carrier contends that it was not required to postpone the work until after the employes had completed their tour of duty so that the employes covered by the Clerks' Agreement could perform this work. We agree with the Carrier as to this fact; nevertheless, if the employes had performed this work when it came up, the regular work of these employes would have had to be postponed and then done on an overtime basis:

After a review of many awards of this Board as to the correct penalty to be assessed for a contract violation, we have concluded that the correct rule is stated in Award No. 3277 in the following language: 'The penalty rate for work lost because it was given to one not entitled to it under the Agreement is the rate which the occupant of the regular position to whom it belonged would have received if he had performed the work. Awards 3193, 3271.' This rule is supported by legal authority. See the case of Steinberg v. Gebhardt. 41 Mo. 519." (Emphasis ours)

Award 3375, Referee Tipton:

"To accept the Carrier's justification for what is clearly a violation would mean that agreements are to be disregarded when, under stress of conditions it is more convenient to do so. That we cannot do. Award No. 2506.

The claims here before us are in the nature of penalties against the Carrier for having violated the agreement. **Under these circumstances these claims could be made in the name of any employe the Petitioner elected**, provided the claims did not make any additional penalty on the Carrier. It would only have to pay the penalty once. Awards Nos. 1646 and 2282.

After a review of many awards of this Board as to the correct penalty to be assessed for a contract violation, we have concluded that the correct rule is stated in Award No. 3277 in the following language:

* * *

This rule is supported by legal authority. See the case of **Steinberg v. Gebhardt, 41 Mo. 519.**

Applying this rule to the facts in these claims, it follows that the penalties should be assessed at time and one-half for the time lost." (Emphasis ours)

Award 3376, Referee Tipton:

"The Carrier makes the further contention that the Claimant was junior in service to W. H. Nelson who was working the second shift had indicated that he did not wish to 'double on two shifts except on and was available for the work, and further states that the Claimant infrequent occasions'. However, the fact remains that neither he nor Nelson were offered this work. **But this claim is for a penalty and this Board has ruled that the Petitioner may make the claim for compensation in the name of the employe, as it is only incident to the violation of the Agreement.** See Awards Nos. 1646 and 2282.

Under Awards 3193 and 3271, this claim cannot be allowed in full as it is a penalty payment. The rule is that the Claimant will be allowed 'the rate which the employe to whom it was regularly assigned would receive if he had performed the work'. The regular occupant of the position had Sunday as his assigned day of rest. Had he worked on any Sunday, he would have received the rate of time and one-half. The same is true as to holidays specified in Rule 41. The Claimant therefore is entitled to the overtime rate for Sundays and holidays, the straight time rate of $7.88 for week days named in the Employes' Statement of Facts, **which is in addition to what he has received on his own position.**" (Emphasis ours)

Award 3423, Referee Blake:

"In the light of some of the decisions of this Board the third contention of the Carrier (that no wage loss has been established by reason of the violation of the Agreement) might have offered some difficulty but for the decision of this Board in Award No. 3251. In all essential features the dispute in that case is indistinguishable from the issue in this. The contention there, as here, was that no wage loss had been established in behalf of any particular men covered by the Agreement.

In a comprehensive opinion, distinguishing some of the former Awards of this Board relied upon by the Carrier, we held that proof of wage loss is immaterial when the violation is deliberate and in com-

plete disregard of the rights of the Organization and the employes covered by the Agreement. That the violation of the Agreement in the instant case was deliberated is manifest from the record. * * *."

Award 3744, Referee Wenke:

"Until the carrier properly assigned someone to perform this work it belonged to these claimants and, if necessary, on an overtime basis, as was done during the period from November 1 to November 24, 1945.

The question arises as to whether the claim should be allowed on a pro-rata or overtime basis. We have examined the awards of this division and have come to the conclusion that the facts here bring it within the principle stated in Award 3277 and approved in 3371 and 3375 and that it should be allowed as overtime, that is, time and one-half."

Award 3835, Referee Wenke:

"As to the basis of its allowance we have said in Award No. 3271:

> 'The rule is that the penalty rate for work lost because it was improperly given to one not entitled to it under the agreement, is the rate which the employe to whom it was regularly assigned would receive if he had performed the work.'

Since this work was assigned on an overtime basis the employes to whom it was regularly assigned received pay accordingly. Consequently, it is allowed on that basis."

Award 3876, Referee Yeager:

"The claim will be sustained but we do not think that the claimant is entitled to have the time and one-half rate allowed. **Precedents of this Division are to the effect that the penalty for work lost is the rate which the employe to whom it was regularly assigned would have received if he had performed the work.** The regular occupant of this position would have received the pro rata rate. The claim will be sustained at the pro rata rate." (Emphasis ours)

Award 3814, Referee Douglas:

"Since Claimant was entitled to perform the service on the day the position was blanked, and since the regular rate due him under the agreement for that particular day, which was his relief day, was at the rate of time and one-half time, he is entitled to recover at that rate. In Award 3744 this Division again reaffirmed the principle: 'The penalty rate for work lost because it was given to one not entitled to it under the agreement is the rate which the occupant of the regular position to whom it belonged would have received if he had performed the work,' which principle had been heretofore announced in Awards 3277, 3371, and 3375. Had Claimant performed the work on the day in question, he would have received the time and one-half time rate.

Accordingly, the claim must be sustained at the time and one-half time rate."

Award 3963, Referee Fox:

"This is a pure penalty case. The claimant does not claim that he was deprived of work. The complaint is that the Carrier violated the Agreement and should be penalized therefore. We discuss this question at some length in Award No. 2282, written for the Board by this Referee, and it does not seem necessary to repeat or elaborate what was then said. Of the utmost importance is strict adherence to Agreements made in the processes of collective bargaining; and if inflicting an occasional penalty is necessary to impress this fact on parties to Agreements, the interests of all concerned are well served."

Award 4022, Referee Douglas:

"Carrier also claims that Shaw is not the proper claimant since he neither worked nor was assigned to work on the day in question, nor was it his position which was blanked. It was Bissenden's position which was blanked. But Carrier did not call Bissenden. No doubt Bissenden had first call for the work on that Sunday, but he has made no claim, and since Shaw has made the claim, Bissenden is now precluded from doing so. Carrier would not be required to pay more than once. **This Division has ruled that the fact the claim presented might have been made by another who had a prior right to make it is of no proper concern of the Carrier.** The essence of the claim is for the violation of the Agreement and the relief sought is more for the exaction of a penalty for such violation, rather than for reimbursement of a particular employe. In line with this reasoning this Division has pointed out the identity of the claimant is ordinarily incidental where the chief purpose is to impose a penalty. See Awards 1646, 2282, 3376. Therefore, since Bissenden failed to assert the claim, Shaw is a proper claimant.

Inasmuch as the position was a seven-day position, **time and one-half is the regular rate for a regularly assigned incumbent who fills the position on his relief day. Therefore, had Claimant been assigned to fill the position on that Sunday he would have received time and one-half as his regular rate for working on his relief day. See Award 3814.**

Accordingly the claim must be sustained and for the penalty rate." (Emphasis ours)

Award 3890, Referee Swaim:

"* * *. We have many times held that the penalty for violation of the Agreement is the important thing; that the claim on behalf of a particular individual is merely an incident which is of no concern of the Carrier. See Awards 1646, 2282 and 3376."

Award 4103, Referee Parker:

"Neither is it necessary to labor an additional contention that the two other employes in Watt's wheel were senior to him in point of service. **The essence of the instant claim is to impose a penalty for a violation of the contract.** Under such circumstances **this Division has consistently held a claim can be made in the name of any employe the Brotherhood elects and that regardless of rights of the employes as between themselves the cause can be maintained,** but the Carrier

can only be required to pay once on the same factual set up. See Awards 1646, 2282, 3375, 3376 and 4022.

* * *

Even though Watts was entitled to the overtime in question it does not follow he is entitled to pay at the overtime rate. **If Cliff had worked his position he would have been entitled to straight time only.** Under our Awards the penalty rate for work lost because it was given to some one not entitled to it is the rate the regular occupant of the position would have received had he worked his position (Awards 3814 and 4037, and Awards there cited)." (Emphasis ours)

Award 4037, Referee Parker:

"* * *. This Division has repeatedly held that the penalty rate for work lost because it was given to one not entitled to it under an involved agreement is the rate which the occupant of the regular position to whom it belonged would have received if he had performed the work. See Awards 3193, 3232, 3251, 3271, 3277, 3371, 3375, 3376, 3504, 3745, 3770, 3890, 3837, 3876."

Award 4370, Referee Elkouri, after quoting from Presidential Emergency Board report of February 8, 1937 (see Award 685, supra) ruled:

"This Board has often held that the penalty for a violation of an agreement is the important thing, and that the claim on behalf of a particular individual is merely an incident **which is of no concern of the Carrier.** See Awards 3890, 3376, 2282 and 1646." (Emphasis ours.)

Carrier Members' Dissent to the above Award does not take issue with the established "principle that the claim on behalf of a particular individual is merely an incident which is of no concern of the Carrier", they merely contend that the disposition of the monetary claim "transgresses any reasonable application of the principle" there.

Award 4544, Referee Wenke:

"In answer to the fact that there may have been others who, as a matter of seniroity, had prior right over Claimant to the work we have often said that the penalty for violation of the Agreement is the important thing; that the claim on behalf of an individual is merely an incident which is of no concern to the Carrier. See Awards 1646, 2282, 3890, and 4390 of this Division."

Award 4550, Referee Wenke:

"* * * In connection with the claim as made in behalf of Mrs. Betty Howenstein, this Board has often held that the penalty for a violation of an agreement is the important factor so the agreement will be enforced and that the claim on behalf of a particular employe is merely an incident which is of no concern to the Carrier. See Awards 2282, 3890, 4022, and 4370 of this Division."

Award 4552, Referee Wenke:

"Carrier says there were no extra or furloughed men available and as Claimant did not report on the job or have a telephone available whereby he could have been called **he was not available to per-**

form the work. There is no evidence that Carrier ever attempted to get in touch with Claimant. **Even so, this Division has often held that the penalty for the violation of an agreement is the important thing in order that the provisions thereof be kept and violations thereof discouraged and that the claim on behalf of an individual is merely an incident which is of no concern to the Carrier.** See Awards 1646, 2277, 2282, 2346, 3890, 4022, 4103, and 4390 of this Division.

However, under our awards the penalty rate for work lost because it was given to someone not entitled to it is the rate that the regular occupant of the position would have received had he worked his position. See Awards 3049, 3193, 3271, 3376, 3745, 3770, 4103, 4244, and 4467 of this Division. In this case that would have been the regular rate of the position." (Emphasis ours)

Also, see Award 4467.

Award 4571, Referee Whiting:

"The Organization claims pay at the premium rate. We have consistently held that the penalty rate for work lost because it was given to one not entitled to it under the agreement is the rate which the regular occupant of the position would have received if he had performed the work. Award No. 4552. The awards cited by the Organization are not inconsistent since premium pay was awarded therein upon the same principle. Awards 3371 and 3375. Examination of our awards upon the subject show that we have adopted the theory of payment of a penalty by the Carrier for its violation of the agreement instead of the theory of compensation to the Claimant for his loss if he had worked, except in cases where an agreement of the parties provides for compensation for wage loss under such circumstances. In view of our consistent decisions thereon we do not feel that we should now attempt to lay down a different rule."

Award 4599, Referee Whiting:

"* * *. The claim for time and one-half is proper since only Sunday and Holiday work is involved and whoever performed it would receive such premium rate for such days. The penalty rate for work improperly assigned is the rate which the occupant of the regular position to which it belonged would have received if he had performed it."

Award 4962, Referee Parker:

"The Carrier argues the instant claim cannot be upheld because Gardner was not available during the entire period of the assigned position worked by Maus. Assuming without deciding the point it is entitled to little weight. **Under repeated decisions of this Division of the Board we have held that the question whether there has been a violation of the contract is the important thing and that the claim of of a particular individual is of no concern to the Carrier since it cannot be required to pay but one claim (Awards 1646, 2282, 3376).**

* * * In any event, under what are now established precedents of this Division the penalty rate for work lost because it was given to someone not entitled to it is the rate the regular occupant of the

position would have received had he worked his regular assignment (Awards 4102, 4103, 4244, 4646). Claimant's recovery will be so limited." (Emphasis ours)

A review of Carrier Members' Dissent to Award 4962 will show they did not take issue with these stated principles. In Award 5115, Referee Wenke said:

"The penalty rate for work improperly assigned is the rate which the occupant of the regular position to which it belonged would have received if he had performed it which, in this case, is overtime or time and one-half."

Award 5243, Referee Shake:

"Technically, a double penalty only results when an employe is twice compensated for the same work, and that can hardly be said to be the situation here. In any event, penalties are regarded as coercive in character, rather than compensatory. They are often imposed, as a matter of sound discretion, to bring about the observance of agreements. Such exactions often appear harsh and the benefits thereof frequently accrue to the enrichment of persons whose rights to them would otherwise be difficult to justify. They are sometimes justified, however, to maintain the vitality of agreements. See Award No. 4539. We deem the penalty warranted in the instant case."

Carrier Members' Dissent to the above Award admitted that the Board "has previously adopted a definite pattern on the question" of penalties and did not challenge the Boards right to assess a penalty for a violation.

Award 5266, Referee Robertson:

"Carrier's contention that Mr. Lauck is not a proper Claimant because he was not the senior man on September 1, 1948, has been passed upon before by this Board. The fact that the claim presented may have been made by another who had a prior right to it is no proper concern of the Carrier. (Award 4022.) It can only be required to pay once."

Award 5269, Referee Robertson:

"* * *. As we pointed out in our Opinion in Award 5266, it is the Carrier's duty to police the Agreement. If the senior, regularly assigned employe is called but not available, obviously, no basis exists for a claim if the next senior employe is called. Here, Carrier did not attempt to call the senior man. In that it was in violation of the Agreement. A sustaining award is indicated.

Carrier's contention, to the effect if the senior man must be called, the Company should be relieved from payment of punitive time under Rule 53 providing that the Company shall not be penalized by the payment of punitive time in the exercise of seniority rights, etc., is untenable. The requirement of payment of the punitive rate is not occasioned by the exercise of seniority but by the employe qualifying for punitive rate under the overtime rules of the Agreement because of service in excess of eight hours in the day or work on his relief day as the case may be. However, in assessing the proper penalty in this docket, it must be borne in mind that the Claimant did not per-

form any work. **The penalty rate for work lost because it was given to one not entitled to it under the Agreement is the rate which the occupant of the regular position would have received, if he had performed the work.** Here, the regularly assigned employe would have received the pro rata rate had he worked on Wednesday, December 7, 1949. Accordingly, that is the proper penalty." (Emphasis ours)

Award 5419, Referee Parker:

"* * * The record makes it crystal clear the Carrier's action violated other rules of the current Agreement in at least three particulars, namely, by failing to bulletin the new position, by changing Smith's starting time and by shifting him from his regularly assigned position. **Any one of these violations suffices to sustain a penalty award and to deny this claim, restricting our decision, as we would have to do, to the single ground the employe named therein had failed to show he was personally entitled to the work, whether it be for lack of proper qualifications or for some other reason, would only lead to a multiplicity of claims and additional expense to the parties. Moreover, recognizing its primary function is to settle disputes involving fundamental differences between the parties to an Agreement, this Board has held many times that the claim on behalf of a particular individual is merely an incident which is of no concern to the Carrier where—as here—no claim is made on behalf of any other employe and the allowance of the claim as filed will preclude another claim for the same work. We think the instant case is one in which the foregoing principles should be applied.** Therefore, we hold the claim should be sustained as a penalty for violation of the rules of the current Agreement but that reparation should be limited to the pro rata rate under a well established principle (see Award Nos. 3955 and 4963)." (Emphasis ours)

Award 5579, Referee Whiting:

"The claim is for eight hours' pay at time and one-half rate for each Saturday from September 3, 1949 to July 1, 1950, after which date the work was performed by Clerks at another point. It is urged that the work could have been performed on a call basis and that the claim should be so limited. Since mail and baggage handling was required at various times from 5:30 P.M. to 10:50 P. M., it does not appear that the work could have been performed on a call basis. It is also urged that if the claim be sustainable, the pro rata rate of pay is proper under our awards. **We have regularly held that the penalty rate for work lost because it was given to one not entitled to it under the Agreement is the rate which the regular occupant of the position would have received if he had performed the work. Since no relief position was established to cover the rest days on this position, it appears that the regular occupant of the position would have received time and one-half if he had performed the work.**"

Award 5926, Referee Parker:

"It follows from what has been heretofore said and held that the Carrier's action was in violation of the Agreement and that Claimant is entitled to a sustaining Award. However, this is penalty payment, not compensation for time actually worked. Therefore, the rate should be that which the incumbent of the position would have received if

he had performed the work. See Awards 4467, 5117, 5240, 5444, 5548, 5607 and 5721 of this Division. * * *."

Award 5929, Referee Parker:

"The established rule, as we have heretofore indicated, and we should add the one to which we are disposed to adhere in the absence of special or extraordinary circumstances making it inapplicable, **is that the penalty rate for work lost because it was improperly given to one not entitled to it under a collective bargaining Agreement is the rate which the employe to whom it was regularly assigned would receive if he had performed it.** Illustrating the general principle see our Awards 3193, 4467, 5437, 5444, 5721 and 5831. * * *

* * *

Boiled down, we are inclined to believe that in the argument advanced here the Claimant is not presenting anything new or extraordinary as creating an exception to the rule but is simply seeking to reargue what has been already established by our Awards in the hope of modifying its force and effect. If not it has certainly ignored or unintentionally overlooked what we think is the short, simple, and overall answer to the Claim. **That answer is that Bower, the holder of the Swing Position, who was absent and unavailable to fill the duties of his assigned position, not the Claimant, was the employe to whom the work in question was regularly assigned. If he had been available and performed it he would have done so at the pro rata rate.** That under Award 3193, **supra,** and the others to which we have referred, means the penalty recoverable by Abell, who was neither notified nor called and did not perform the work, is likewise the pro rata rate." (Emphasis ours.)

Also see Awards 5930, 6544, 6687.

Award 6019, Referee Parker:

"* * *. The essence of this Claim that its action resulted in a violation of the Agreement, hence it makes little difference who brings the claim to the Board. Claimant or some other employe was entitled to do so and the Carrier cannot be again subjected to a penalty for the same violation of the Agreement."

Award 6063, Referee Wenke:

"Carrier contends that the claim should be disallowed because none of the claimants lost any time as a result of this company doing the work. This claim is primarily to enforce the scope of the agreement and not for work performed. **If the scope has been violated then a penalty is imposed to the extent of the work lost. This is done to maintain the integrity of the agreement. As to who gets the penalty, that is but an incident to the claim itself and not a matter in which the carrier is concerned for if the agreement is violated, it must pay the penalty therefor in any event."** (Emphasis ours)

Also, see Award 7203.

Award 6158, Referee Jasper:

"The fact that Price has failed to file his claim and abandoned it, does not keep the Claimant Handorf, from filing a claim for the violation. The Carrier would have to pay for the violation only once."

Award 6284, Referee Wenke:

"**It would appear that the work was performed while claimants were on duty. Just what significance that fact would have on the claim is not made apparent. This is not a claim based on a contention that claimants did not work the full time of their regular assignments. It is a claim based on the contention that Carrier removed from the Clerks work, which by their Agreement with Carrier, they had a right to perform. Once it has been determined that such a violation has taken place then, to make the Agreement effective, Carrier must pay for the work lost. Who the Organization names as claimants to receive pay therefor is only incidental to such a claim as long as they are within the class who would have a right to perform the work. See Award 2282 of this Division.**" (Emphasis ours)

Award 6306, Referee Wenke:

"We come then to the question as to the rate at which it should be allowed. The claim is made for overtime. The work was performed on Washington's Birthday and Saturday and Sunday. The latter are rest days for track forces on regular section gangs. **Rule 15(a) requires overtime pay for work performed on these days. We have often announced the following rule.**

> 'The penalty rate for work lost because it was given to one not entitled to it under the Agreement, is the rate which the occupant of the regular position to whom it belonged would have received if he had performed the work. Awards 3193 and 3271.'
>
> (Award 3277 of this Division)
>
> See Award 3375.

Considering when Carrier had this work performed, the provisions of Rule 15(a) of the parties' Agreement, **the occupant of the regular position to whom it belonged would have received overtime had he performed the work. Consequently the claim is properly made for time and one-half.**" (Emphasis ours)

Award 6465, Referee Sharpe:

"It is the position that Beals worked full time during the period in question, **and lost no time and that an employe has no right to fine or to penalize the Carrier where the claimant has suffered no monetary loss.**

The claim before us is in the nature of a penalty against the Carrier for having violated the Agreement. The Carrier relies upon a number of decisions of the First Division of the Nation Railroad Adjustment Board to the effect that where claimant was otherwise employed on the the day, or days, in question, he was not available for the services in question and not entitled to an Award. The Employes

likewise rely upon decisions of the Third Division of the National Railroad Adjustment Board to the effect that proof of wage loss is not controlling where the Carrier deliberately violated the Agreement. **In the case at bar there was a violation of the Agreement by the carrier for the reason that the shop foreman used employes to perform work that properly belonged to the B & B Gang.**

The case is controlled by Awards 4869, 4921 and 3375.

* * *

Claim sustained." (Emphasis ours)

Award 6473, Referee Sharpe:

"The Carrier urges that in the event Claimants are entitled to an Award that compensation should be limited to the pro rata rate, and cites many cases to that effect. The Employes likewise cite cases to the effect that time and one-half is the proper rate of pay except where a day other than Sunday or a Holiday is assigned as the rest day. **It is our opinion that an employe denied work is entitled to the rate of pay he would have received had he performed the service denied him.**" (Emphasis ours)

Award 6614, Referee Bakke:

"It is not the function of this Board to determine whether this man is or is not physically qualified. The only question before us is whether the agreement has been violated."

In Award 6814, Carrier contended "that the rule carries no penalty provision." Referee Robertson ruled:

"* * *. The mere fact that the rule carries no penalty provision is no bar to sustaining the claim as made. (See Awards 2855, 2756.)"

Award 6842, Referee Messmore:

"As stated in Award 5795: 'The essence of the claims made by the Organization is for a violation of the rules * * *. The claims for the penalty on behalf of the individuals named are merely incident thereto.' See Award 1646."

Award 7022, Referee Wyckoff:

"The Carrier has tendered no defense on the merits at any stage of the progress of these claims.

The argument is that the violations of the Agreement are trivial and insignificant. **We tread on dangerous ground if we remit penalties based upon our notions of triviality or insignificance** (See Award 1611) particularly where, as here, the violations occurred on the heels of Award 5195." (Emphasis ours)

Although Referee Carter had deviated from the well established principle "that the penalty rate for work not performed would be the rate the rate regular occupant would have received had he performed the work" by awarding the pro rata rate on a number of occasions, he ruled in Award 7134 that:

"The Carrier asserts that the pro rata rate only constitutes the measure of claimants' loss. We point out that the rate of pay for work performed on specified holidays is time and one-half, Rule 4-A-2, current Agreement. **The contract value of holiday work lost is time and one-half. In effect, the regular rate for holiday work is time and one-half.** It does not involve the claim for an unearned penalty as in the case of a claim for time and one-half for overtime lost. **We conclude that the claim should be sustained at the time and one-half rate.**" (Emphasis ours)

Also, see Awards 5837, 7134, 8287.

Award 7370, Referee Carter:

"The question as to the nature of the penalty for the violations has been raised. The Board has frequently decided that penalties cannot be pyramided. Where two or more violations carrying different penalties are established, the higher of such penalties is the one to be imposed. Awards 5423, 5549, 5638, 6750. Under the foregoing, Claimants are entitled to a day's pay on a pro rata basis for each day they were improperly held out of service, it being a higher penalty than time and one-half for rest day work."

Award 7816, Referee Smith:

"The Respondent asserts that even though a violation exists Claimants here are not entitled to reparations because no time was lost. The confronting claim was brought, in the main, to enforce the scope rule of the Agreement. In finding that the work was encompassed by the scope rule, reparations are justified. Otherwise the sanctity of the agreement cannot be maintained and violation thereof discouraged." (Emphasis ours)

Award 8188, Referee Smith:

"We are of the opinion that the Respondent's contention that this claim, if valid, should be sustained only at the pro-rata rate was properly answered in Award 3277 wherein we stated:

> 'The penalty rate for work lost because it was given to one not entitled to it under the Agreement, is the rate which the occupant of the regular position to whom it belonged would have received if he had performed the work. Awards 3193 and 3271. If Claimant had been permitted to perform the work he would have received time and one-half for the Sunday work and time and one-half for the overtime work on Monday. The latter for the reason that the Monday work on the platform commenced at 7:30 A. M. and terminated at 8:00 P. M. If the employes entitled to the work had performed it, they, too, would have been entitled to two and one-half hours at the overtime rate. Consequently, the claim for two and one-half hours at the overtime rate on Monday is properly sustainable."

For the reasons stated we are of the opinion that his claim is meritorious."

Other Awards holding that a penalty was justified are: Awards 3049, 3193, 3271, 3745, 3910, 3913, 3955, 4196, 4244, 4534, 4667, 4728, 4815, 4883, 5117, 5236, 5266, 5269, 5271, 5333, 5764, 5929, 5930, 5921, 5923, 5923, 5939, 5943, 5930, 5978, 6158, 6160, 6157, 6358, 6444, 6630, 7062, 7100, 7242 among others. In these, as well as the other awards contained in this "Answer", no wage loss was shown; Carrier Members making the same contentions that it has been making since the Board was created. Carrier Members' argument is therefore not new or novel and has been rejected consistently.

The Dissenters cannot evade the full force and effect of the above authorities by picking five awards and through carefully selected phrases taken therefrom and adroit placement of emphasis find support for the untenable conclusion reached in the last paragrph, page 1, of their "Reply".

Award 5186 (Boyd) clearly adopts the well established principle governing the determination of the subject under consideration. Award 5306 (Wyckoff) involved an individual employes' seniority rights to a certain position. No collective rights were violated in that instance, such as that confronting us here. Award 5306 must be interpreted in accordance with the factors there involved.

The principle established by Award 685 has been reaffirmed many times by this Division and now constitutes a controlling precedent.

/s/ J. B. Haines
J. B. Haines
Labor Member

CARRIER MEMBERS' REPLY TO LABOR MEMBER'S CURRENT EFFUSION IN CONNECTION WITH AWARD NO. 9546, DOCKET NO. CL-9218

Labor Member's Anwser, supra, is but a tedious attempt to justify the awarding to claimants of something not provided for by the agreement between the parties. Prolixity, however, cannot change this Board's jurisdiction which is limited by the Railway Labor Act, as amended, to interpreting and not writing agreements for the parties.

/s/ J. E. Kemp

/s/ R. A. Carroll

/s/ C. P. Dugan

/s/ W. H. Castle

/s/ J. F. Mullen