Award No. 9578

Docket No. CL-8768

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Howard A. Johnson, Referee

PARTIES TO DISPUTE:

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

READING COMPANY

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood that the Carrier violated the rules of the Clerical Agreement:

1. When on or about January 1, 1954, positions of Senior Engineering Assistant and Junior Engineering Assistant were established in the Office of Division Engineer at Philadelphia, positions so established being assigned Clerical duties of preparing, extending, calculating and transcribing A.F.E. (Authority for Expenditure) forms.

2. That the Carrier violated the provisions of Rule #44 when it failed to render a decision on appeal within prescribed time limits.

3. That the Carrier be required to compensate E. Lebengood, Catherine Brown, Clerical employes and incumbents of Clerical positions in the respective Office where Engineering Assistants were assigned; an additional days' pay at punitive rate for each and every day that Carrier continued such violation, as stated in Claim #1 and subsequent violation under the provision of Rule #44 (Claim for Money Payments) as outlined in Claim #2. Such claim to continue until violation of the Clerical Agreement rules are eliminated and discontinued.

EMPLOYES' STATEMENT OF FACTS: The Employes in this Statement of Facts desire to present certain pertinent information which relates to the subject matter of this dispute. We are, accordingly, submitting certain pertinent and factual developments, which will be in chronological order, beginning with Employes Exhibit "A". These exhibits will also cover correspondence relative to the positions and duties covering work performances of preparing, maintaining and extending of A.F.E. (Authority for Expenditure) forms.

On June 13, 1945, the Carrier, through its General Manager, conferred with the General Chairman relative to the establishment of certain positions for the purpose of handling Clerical duties in connection with A.F.E. (Authority for Expenditure) forms. See Employes Exhibits "A", "B" and "C". This was in line with procedures, as the work of A.F.E. forms was and had been performed and considered as work and duties in the line of Clerical for many years. The positions created were subsequently discontinued.

This claim has been discussed in conference and handled by correspondence with representatives of the Clerks' Brotherhood.

OPINION OF BOARD: The claim is that the Carrier violated the Agreement (1) when it established new positions known as engineering assistants and assigned to them certain clerical duties, and (2) when it failed to render a decision on final appeal on the property within the time limit imposed by Rule 44.

The claim apparently was initiated in writing by the Division Chairman's letter of July 28, 1954, to the Superintendent of the Philadelphia Division; it was denied by him on July 30 on the ground that the work in question properly constituted work of the engineering department. On August 11, the Division Chairman wrote the Superintendent appealing the decision and requesting a further conference for the purpose of developing a statement of agreed facts. On August 20 the Superintendent by letter repeated his denial of the claim as unfounded and stated his view of the facts. On September 7 the Chairman acknowledged its receipt, stated that he was appealing the decision for further handling, and inclosed a copy of his statement of the facts. On September 13 the Superintendent and Division Chairman presented the claim to the General Manager by joint submission.

Without denial or refutation by the Carrier the Employes allege in the Statement of Facts in their Ex Parte Submission as follows:

> "The joint submission between the Superintendent of the Philadelphia Division and the Division Chairman of the Clerks' Brotherhood Committee was advanced and handled by the General Chairman at the General Manager's meeting on September 30, 1954. * * * The General Manager stated that he concurred in the position of the Superintendent, denying the employes' claim and the case was accordingly advanced for handling with the Director of Personnel the same date and discussed in conference with the Director of Personnel under date of October 22, 1954."

The notice to the Division Chairman of the final denial of the claim was signed by the Director of Personnel under date of December 20, and according to the record was received by the latter on December 23. The offices of both were in Philadelphia and in the same zone. The notice was presumably delivered by U. S. mail, but if so, the record does not show when it was mailed.

By letter of December 27, 1954, the General Chairman acknowledged receipt of the letter of the 20th and stated:

> "Our records show that these cases were jointly appealed by the General Manager and myself under date of September 30th, discussed in conference under date of October 22, 1954, and your decision does not meet the requirements of Paragraph (d) of Rule 44."

On January 6, 1955, the Director of Personnel answered:

> "For years the fourth Friday of each month has been designated for meeting between Clerks' Brotherhood and the undersigned for the purpose of discussing and handling such claims and grievances as have not been settled and disposed of at a lower level. We have always considered and understood that the date your monthly meetings were held with this office constituted the dates the cases were appealed and that

we have sixty days therefrom to advise you of decision. This orderly procedure for handling claims and grievances, and the understanding with respect to the dating of appeal cases on the date of our meeting, has not been questioned in previous cases.

In your letter of December 27, 1954, you stated these cases were advanced to me on joint appeal between the General Manager and yourself on September 30, 1954. I am not in accord with this statement and submit that the date of appeal is the date of your regular meeting with the undersigned. My letter of denial was within 60 days of that date; accordingly, I do not agree with your allegation that my denial of these claims by letter of December 20, 1954 was not within the time limit prescribed in Rule 44 (b)."

The General Chairman replied by letter of January 12, 1955 as follows:

"Your statement to the effect that you do not agree with our position that your denial of the claims, by letter, under date of December 20th (received December 23, 1954), was not within the requirements of Rule 44, Paragraph D, is unacceptable. Neither do we believe that your position is tenable, since the employes themselves have certain time limits to meet and it has always been our understanding that the employes or representatives are limited to ninety (90) days (as provided in the Rule) to process a monetary claim and likewise ninety (90) days to advance the case in the various stages of appeal 'from the date on which the claim was denied.'

When Rule 44(d) was agreed to in 1944, all these factors were taken into consideration, including scheduled meetings; hence, you will note that the step of procedure (Paragraph D, Rule 44) a decision is required within the time limit of 'sixty (60) days from the date decision was appealed,' whereas in Paragraph C of the same Rule the following language appears, 'thirty (30) days from the date claim was presented.' The regular meeting dates and arrangements were in effect for years prior to the inclusion of this Rule in the Agreement which as previously stated, in the revision of July 1, 1944. Most meetings are held, particularly in the Operating Departments, on a monthly schedule and this was the factor in determining the additional thirty (30) days (or sixty (60) days) in Paragraph D of Rule 44. The Rule accordingly makes no reference to meeting dates and your position, as stated, would be tantamount to reading into the rule additional language.

You state 'the understanding with respect to the dating of appeal cases on the date of our meetings, has not been questioned in previous cases.' I beg to differ with this statement, as it has been questioned, to my knowledge, on two (2) occasions in cases progressed to the Third Division, National Railroad Adjustment Board. In fact, this matter was recently brought up by yourself in a discussion with me and I advised you at that time that we considered the date of appeal as being the date that the Lower Officer and our Committee agreed that they were not in position to adjust the case, or disagreed, upon the basis of adjustment, as the developments might be and at that time jointly agreed to appeal the case for higher handling and the records in most instances indicate this procedure. * * *

Even assuming and without any indication or admission on our part that there would be any merit to your contention that the (60 days) refers to regular meeting dates, it seems that your letter of December 20th would also be questionable as to meeting time requirements. According to my calculations your letter of December 20th was written on the fifty-ninth (59) day and did not reach this office until December 23rd, and accordingly we were not advised of your 'decision within sixty (60) days.' "

In other words, the various dates are apparently not disputed, but the Carrier's contention was that by usage the date of discussion and hearing has been considered as the time from which the period for denial runs. The Employes denied that contention, and the record includes no further showing upon the point. Consequently the question must be governed by the rule as written by the parties.

Rule 44 provides as follows:

"RULE 44—CLAIMS FOR MONEY PAYMENTS

(a) Claims for money payments alleged to be due, arising from any cause, may be made only by the employe or a 'Representative', as that term is defined in Rule 2 of this agreement, on his behalf and must be presented, in writing, to the employe's immediate supervisor within ninety days from date the employe received his pay check for the pay period involved or the basis of the claim occurred; except that time off duty account of sickness, leave of absence, suspension or reduction in force will extend time limits of this paragraph by the period of such time off duty. When there is a claim for money payments alleged to be due based on an occurrence during period employe was out of active service due to sickness, leave of absence, suspension or reduction in force, it must be made, in writing, within ninety days from the date the employe resumes duty.

(b) If claims are not made within the time limits specified in paragraph (a) of this rule, they will neither be entertained nor allowed.

(c) When claims have been presented in accordance with paragraph (a) of this rule, the employe and the representative will be notified, in writing, of the decision of the Management within thirty days from the date claim was presented. When not so notified, the claim will be allowed.

(d) Claims denied in accordance with paragraph (c) of this rule will be considered invalid unless the decision is appealed within ninety days from the date on which the claim was denied. When a decision is so appealed the Representative will be notified in writing of the decision within sixty days from date the decision was appealed. When not so notified, the claim will be allowed.

(e) When money claims are allowed the employes affected and the Division Chairman will be advised in writing the amount involved and payroll on which payment will be made."

The rule is susceptible of only one meaning. It is that unless the Representative is notified in writing of the denial within sixty days from date of

final appeal, the claim is automatically allowed. The time runs from date of appeal, which cannot be construed as meaning the date of hearing.

Since the appeal was taken on September 30 and no written notice of the denial of the appealed claim was given the Representative on or before the close of November 29, the sixtieth day thereafter, the claim was thereupon automatically allowed, and Rule 44 (e) immediately applied and should have been followed.

Therefore, we have no occasion to consider whether by a denial dated on the 59th day and received on the 62nd, the Representative is "notified in writing of the decision within sixty days." But ordinarily he would seem to be "notified" when he actually received notice, not when it was signed or was started out toward him, in the absence of any contractual provision to the contrary.

As noted above, the objection that the final denial came too late was made on the property, before an appeal was taken to this Board. Whether that fact is material may be questionable, since under Rule 44 (d), in the absence of a final denial within time, the allowance was automatic. In any event, the objection was raised there and renewed here.

It is here urged for the first time, not by the Carrier, but by a carrier member, that the claim was invalid from the beginning because not presented within the time or to the person specified by Rule 44 (a).

The Carrier's Statement of Facts in its Ex Parte Submission stated:

> "Claim was presented and progressed by the Clerks' Brotherhood in behalf of Claimants' Lebengood and Brown * * *, which claim the Carried denied."

The Carrier then proceeded to discuss the merits of the claim, without any suggestion that it had not been properly presented and progressed. The record affirmatively shows that no such objection was raised by the Carrier, either on the property or before this Board, but that the Carrier discussed only the issues raised by the Employes.

The argument is that all procedural provisions of the Agreement for the initiation and progressing of claims and grievances are jurisdictional, and therefore that whenever in its examination of the record it finds that any procedural step was not taken within the time or in the manner provided by the Rules, even if the matter is not raised by the parties, the Board has no jurisdiction of the case and must dismiss it. Admittedly, if this Board lacks jurisdiction of a claim or grievance the parties cannot confer jurisdiction by agreement or by failure to object.

Seven awards of this Division and one award of a special board are cited as authority for the proposition that these procedural objections are jurisdictional and can be raised for the first time on appeal, either by the parties or by this Board. One of the citations, Award 8760, refers to the issue of res judicata, which means that the case had already been decided in a prior award. That is not a procedural question and is not in point. Award 8804 involved a claim which was not filed with this Board within the nine month limit imposed by Article V of the Chicago Agreement of August 21, 1954. That Award, like this, involves a procedural default under a contract, and therefore is exactly analogous to this claim.

Awards 8383, 8564, 8797, 8886 and 8889 of this Division, and Award 40 of Special Board of Adjustment 170 all support the contention that questions of the parties' procedure on the property are questions affecting the jurisdiction of this Board; if they are correct, this Board has no jurisdiction and must dismiss the claim, even if a party does not request it.

On the other hand, there are more numerous awards of this Division holding that procedural questions of the kind cannot be raised for the first time on appeal. Among them are Awards 1552 (Wenke), 2786 (Mitchell), 3269 (Carter), 5140 (Coffey), 5147 (Boyd), 5227 (Robertson), 6500 (Whiting), 6744 (Perker), 6769 (Shake), 8225 (Johnson), 8572 and 8573 (Sempliner), 8674 and 8675 (Voukoun), 8685 (Lynch) and 8807 (Bailer). In other words, by the weight of authority, technical procedural questions are no more entitled to be raised for the first time on appeal than are questions affecting the parties' substantive rights, which would seem reasonable.

This Board is not a court, but like courts it derives its jurisdiction from a statute and not from contracts. It was established by the Railway Labor Act with definite powers and duties, i.e., jurisdiction, which can be limited only by statutory authority. The Act prescribes no statute of limitations, but even if it did, that would not constitute a jurisdictional matter, as hereinafter shown. Certainly, if not even a statutory limitation is jurisdictional, a contractual limitation cannot be jurisdictional.

"Jurisdictional" means pertaining to jurisdiction. We shall therefore consider the meaning of "jurisdiction", according to the statement of legal principles by the two leading encyclopedic legal authorities, as generalized from the decisions of courts; we shall also examine the law respecting statutes of limitations.

"The word 'jurisdiction' implies a court or tribunal with judicial power to hear and determine a cause, and such tribunal cannot exist except by authority of law. * * * **Jurisdiction always emanates directly and immediately from law.** * * *" 50 Corpus Juris Secundum 1090, Courts, Section 28. (Emphasis ours.)

"**Jurisdiction**, in the general sense, as applied to the subject matter of a suit at law or in equity, **must be found in, and derived from, the law** which organized the tribunal; * * * Whenever the attention of the court is called to the absence of a jurisdictional fact, it may, and should, refuse to exceed its powers. **Delay in instituting an action for a period greater than that prescribed by a statute of limitations will not deprive a court of jurisdiction.**" 21 Corpus Juris Secendum 39. (Emphasis ours.)

"Jurisdiction cannot be limited by the parties to a controversy, * * *." 21 Corpus Juris Secendum 41, Courts, Section 30.

"The bar of the statute of limitations is an affirmative defense, and cannot be availed of by a party who fails, in due time and proper form, to invoke its protection. * * * It is necessary, in order that a defendant may invoke the statute of limitations as a defense, that he plead the statute specially * * *; if he fails to do so, the defense is not available, for it is deemed waived, and the plaintiff may recover as in the other cases, notwithstanding the statute has run. * * * The reason for this rule lies in the fact that statutes of limitation presuppose an established substantive right, but forbid the plaintiff from enforcing

it by the customary remedies. Therefore, the statute is a weapon of defense, and ordinarily must be pleaded and relied on by the defendant." 34 American Jurisprudence 333, Limitation of Actions, Section 428.

"Generally speaking, the defense of the statute of limitations is a personal privilege of the debtor, which, in his option, he may urge or waive, * * * and which may be availed of only by the person for whose benefit the statute inures, or someone standing in his place or stead, and not by a stranger." 53 Corpus Juris Secundum 936, Limitations of Actions, Section 13.

"Since a statute limiting the time within which actions shall be brought is for the benefit and repose of individuals and not to secure general objects of policy or morals, and it is regarded as a personal privilege, it is a general rule that the protection may be waived by one entitled to rely on it, unless the statutory provision is jurisdictional, or goes to the right of action, and broadly speaking the rule as to waiver applies in respect of the bar of any statute which is a mere restriction on the remedy as distinguished from a limitation on the right.

The law does not compel a party to resort to this defense; nor can others insist on it for him; * * *." 53 Corpus Juris Secundum 958, Limitations of Actions, Section 24.

In Finn vs. United States, 123 U.S. 227, the United States Supreme Court made an authoritative statement concerning statutes of limitation, that is, statutes limiting the time in which to sue, as distinguished from statutes which limit the substantive right itself. The court said:

"The general rule that limitation does not operate by its own force as a bar, but is a defense, and that the party making such a defense must plead the statute if he wishes the benefit of its provisions, is not applicable to suits in the court of claims against the United States. An individual may waive such a defense, either expressly or by failing to plead the statute; but the Government has not expressly or by implication conferred authority upon any of its officers to waive the limitation imposed by statute upon claims against the United States in the court of claims. Since the Government is not liable to be sued, as of right, by any claimant, and since it has assented to a judgment being rendered against it only in certain classes of cases, brought within a prescribed period after the cause of action has accrued, a judgment of the court of claims for the amount of a claim which the record or evidence shows to be barred by the statute, would be erroneous."

These principles apply, not merely to courts, but to quasi-judicial and administrative tribunals established by law; for they also derive their jurisdiction from the law, and only from the law. Statutes limiting the time in which to sue do not affect the jurisdiction of the tribunal; they affect only the right of litigants to invoke that jurisdiction, and the objection that the claim comes too late is waived if not invoked by the other party or by someone authorized to represent him in the litigation. It is obvious that the parties can do no more by contract than the Congress can by statute. They can by mutual agreement limit their right to invoke the Board's jurisdiction, but they cannot thus limit the Board's jurisdiction, for such power is in the Congress and nowhere else.

The statute discussed in Finn vs. United States involved a limitation of the substantive right to sue the United States, and not merely a limitation of the time in which to sue, which might have been waived by an individual. It was therefore jurisdictional and could not be waived.

On behalf of the Carrier it is contended that the same is true under Section 3 First (i) of the Railway Labor Act, which established this Board. That Section provides in part:

> "The disputes between an employe or group of employes and a carrier or carriers growing out of grievances * * * shall be handled **in the usual manner** up to and including the chief operating officer of the carrier designated to handle such disputes; but failing to reach an adjustment **in this manner**, the dispute may be referred by petition of the parties or by either party to the appropriate division of the Adjustment Board * * *." (Emphasis ours.)

The above provision is the source of this Board's jurisdiction, just as the statute in the Finn case was the source of the jurisdiction of the Court of Claims. It follows that unless, within the meaning of the Railway Labor Act, the parties have failed to reach an agreement on the property **in the usual manner**, within the meaning of the Railway Labor Act, this Board has no jurisdiction of the claim.

In substance, the contention is that by the clause "in the usual manner" the Act means "in the exact manner which the parties may establish by agreement, without variation or waiver." If it does, the matter is jurisdictional. That construction would be very unusual; for the procedural provisions are still purely contractual. Being thus subject to modification or change by agreement, they should ordinarily be subject to modification or change by waiver.

Webster's New International Dictionary defines "usual" as "such as in common use; such as occurs in ordinary practice, or in the ordinary course of events; customery, ordinary, habitual, common." It states that as synonyms: "**usual, customary, habitual, wonted, accustomed** mean familiar through frequent or regular repetition. **Usual** stresses the absence of strangeness or unexpectedness; * * *." (Emphasis ours for clarity.)

We have found no judicial definition of the term "usual manner," but the expression "usual way" was discussed in Eckhart vs. Swan Milling Co., vs. Schaefter, 101 Illinois App. 510, which said:

> "By 'usual way' * * * is not meant any uniform exceptionless way but only the general, common or ordinary way."

In the absence of a definitive interpretation of Section 3 First (i) by the courts we do not feel that such a restrictive meaning can be given the phrase "in the usual manner" as to make the parties' procedural agreement so absolute that none of its provisions can be waived. We believe that the Congressional intent was to require only that the remedies on the property must first be exhausted in the general, common or ordinary way.

Section 3 First (u) authorizes the Board to "adopt such rules as it deems necessary to control proceedings * * * not in conflict with the provisions of this section." It seems clear that the Board cannot by rule either extend or limit its jurisdiction; at any rate, it has not attempted to do so, but after copying in its Rules of Procedure part of Section 3 First (i) has merely added:

"No petition shall be considered by any division of the Board unless the subject matter has been handled in accordance with the provisions of the Railway Labor Act, * * *."

Thus awards which hold that procedural limitations in contracts are jurisdictional and limit the jurisdiction of this Board seem erroneous. Such provisions limit, not the Board but the parties, and like other contractual provisions, whether procedural or substantive, are waived unless invoked by a party himself, or by his representative in the litigation, and not by the tribunal or its members. This applies to all contracts, including ordinary union agreements as well as the special Chicago Agreement of August 21, 1954.

We necessarily conclude that the Carrier violated Rule 44 of the Agreement when it failed to render a decision on or before the close of November 29, 1954; that under Rule 44 (d) its failure constituted an automatic allowance of the claim; and that the notice required by Rule 44 (e) should then have been given. Consequently we are precluded from examining the other issues raised on the property, or here tendered the Board by the parties or by any member of the Board.

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 has been violated.

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 7th day of October, 1960.

DISSENT TO AWARD NO. 9578, DOCKET NO. CL-8768

Award 9578 is correct in construing Rule 44 (d) as automatically allowing a claim, and in construing Rule 44 (e) as immediately applying, after the close of the sixtieth day from the date of an appeal on which a timely decision is not made, and in construing that the notice required by Rule 44 (e) should then be given in such a case, thus limiting to and ending Carrier's liability to pay the claim by default under the rule with the sixty-first day in such circumstances. The Award is in error, however, in this case, by inferring and implying, but not expressly holding, that Carrier waived, through not invoking, the ninety-day limitation of Rule 44 (a) for properly filing the claim in the first place.

Rule 44 (a) provides:

"(a) Claims for money payments alleged to be due, arising from any cause, * * * must be presented * * * within ninety days from date the employe receives his pay check for the pay period involved or the basis of the claim occurred; * * *."

The basis of the instant claim occurred "on or about January 1, 1954" which would make the pay period involved January 1 to 15, 1954. The claim was not initiated until the Division Chairman's letter dated July 28, 1954. Accordingly, the claim was barred because Rule 44 (b) immediately applied and should have been followed. It provides as follows:

"(b) If claims are not made within the time limits specified in paragraph (a) of this rule, they will neither be entertained nor allowed."

The rule is susceptible of only one meaning. It is that, unless a claim is made within the time limits specified in Rule 44 (a), it will neither be entertained nor allowed. The fact that it may be entertained by continued resistance thereto on the part of Carrier does not mean that it necessarily must be allowed, by waiver or otherwise. Furthermore, waiver of such a rule cannot be accomplished by inference or implication, especially after the time limit has expired making Rule 44 (b) immediately applicable, and the record in this case does not contain any express waiver by Carrier of the procedural requirements of the rule. Accordingly, neither Rule 44 (d) nor Rule 44 (e) was applicable inasmuch as the claim was not properly filed in the first place.

This Division is limited to interpreting the Agreement as written by the parties. By sustaining the claim to the extent indicated in Opinion of Board, based on speculation and conjecture, Award 9578 is in error. For this reason, among others, we dissent.

/s/ W. H. Castle

/s/ R. A. Carroll

/s/ C. P. Dugan

/s/ J. E. Kemp

/s/ J. F. Mullen

LABOR MEMBER'S ANSWER TO CARRIER MEMBERS' DISSENT TO AWARD NO. 9578, DOCKET NO. CL-8768

By the use of false logic, disguised under specious phraseology, the Dissenters attempt to beguile the superficial observer into believing that Carrier's liability here is limited to the sixty-first day after it failed to deny the claim. There is nothing in the Award that supports such an erroneous conclusion. That the Dissenters are well aware of this paradox is self-evident from the position taken by Carrier Member in re-arguing this case before the Referee.

A review of Award 9578 will show that the Board found: "That the Agreement has been violated" and the "Award" held that "claim sustained". Inasmuch as claim was sustained, we must look to the "Statement of Claim" to find the extent of Carrier's liability. The "Statement of Claim" provides:

First. That Carrier violated the Agreement when it established positions of Engineering Assistants in the office of Division Engineer at Philadelphia.

Second. That Carrier violated Rule 44 when it failed to render a decision within the prescribed time limits.

Third. That certain specified employes be compensated **"an additional day's pay at punitive rate for each and every day that Carrier continued such violation,** as stated in Claim #1 and subsequent violation under the provision of Rule #44 (Claim For Money Payments) as outlined in Claim #2. Such claim to continue until violation of the Clerical Agreement rules are eliminated and discontinued." (Emphasis ours.)

Therefore, it is crystal clear that the "claim sustained" by the Board is a continuing one that will only be fully satisfied when Carrier eliminates and discontinues the violation, and concurrently therewith compensates the claimants an additional day's pay at the punitive rate for each and every day that the violation continued.

The Board's finding that Carrier violated Rule 44, when it failed to render a decision on, or before, the close of November 29, 1954, the 60th day from date of appeal, and that its failure constituted an automatic allowance of the claim, is correct. However, Carrier did not allow the claim by discontinuing the violation, nor did it compensate Claimants for the amounts due at that time. Consequently, the requirements of Rule 44, not having been complied with at that time, the violation of the Rule continues until claim is allowed in full.

The Dissenters untenable contentions are not new to this Board. The same position was taken by Carrier Member in Panel Argument and rejected by the Referee here. It was also introduced previously in a dispute covered by Award 7713. Referee Smith overruled Carrier's untenable assertion as follows:

> "Here the Respondent could have limited the amount of its obligation but it having failed to do so this Board has no alternative but to find that this claim is meritorious from the date of its inception on April 1, 1952, until the date the parties reconciled their differences on June 1, 1954."

Referee Johnson's decision here is consistent with the conclusions he reached in Award 9447, when he held that the employes failure to appeal a claim within 60 days under Article V, August 21, 1954 Agreement, barred the subsequent filing of a new claim on a continuing alleged violation of an Agreement. If the Employes do not have a second chance at the merits of a claim after failure to comply with the time limit rules (9447), it is clear that the Carrier is not entitled to a second chance at the merits of a dispute under the clear mandate of the Rule. This conclusion is fully supported by Third Division Awards 4529, 6361, 6789, 7713 supra, 8101, 8318, 8412, 9205, also, Second Division Award 3280 and First Division Award 19343.

The Dissenters' statement that: "The Award is in error, however, in this case, by inferring and implying, but not expressly holding, that Carrier waived, through not invoking, the ninety-day limitations of Rule 44(a) for

properly filing the claim in the first place", is not only frivolous and misleading, but is based on distortion and misapprehension of the facts.

In the first place, there is no evidence in the record that Petitioner's claims were not presented within the ninety-day limitation provided in Rule 44(a). Second, Carrier did not question that the claims had been properly presented and appealed by the Organization during the handling of the dispute on the property. Therefore, the Dissenters assume something that is not in the record. It would follow that their premise is based on speculation and conjecture.

The crux of Carrier Members' Dissent, however, is that they are objecting to the Board's refusal to consider a new issue, which was introduced for the first time by a Carrier Member in Panel Argument before the Referee.

The Dissenters first took the position that such matters could be introduced because the parties entire agreement was before the Board for consideration in any controversy. This premise is obviously erroneous and the Division has so held on numerous occasions. For a resume on this subject, see my Dissent to Award 9189 and the awards cited therein.

After the Board had repeatedly rejected these theories, Carrier Members came back with the ingenious, although untenable, theory that procedural matters were jurisdictional and could, therefore, be raised at anytime. See Carrier Members "Reply" to my Dissent to Award 9189 and my "Answer" thereto. The so-called jurisdictional question was again raised here and rejected by the Board in Award 9578. The Award is logically sound, well documented and should clarify the confusion created by the Carrier Members introduction of such matters and, further, should forever set at rest any questions as to their right to do so.

A review of the Dissent will reveal that Carrier Members are more concerned with creating disputes than settling them. A study of the Railway Labor Act will clearly show that it was never intended that the National Railroad Adjustment Board would be used as a vehicle to create controversy, but rather to settle disputes that could not be reconciled on the property by the parties. See Section 2, First, Sixth and Section 3, First (i) of the Act.

Award 9578 properly decided the issues involved in accordance with the pertinent facts of record, the applicable rules and governing law.

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

CARRIER MEMBERS' REPLIES TO LABOR MEMBER'S ANSWERS TO CARRIER MEMBERS' DISSENTS TO AWARDS 9578 AND 9579

The Labor Member's answers, supra, reflect but his own opinion and not that expressed by the author of Awards 9578 and 9579. Obviously, the decisions in those Awards are merely co-extensive with the Opinion of Board therein, which limits Carrier's liability as shown and as set forth in the Carrier Mem-

bers' Dissents to those Awards. Liability by default as of a time expressly fixed in the rule, as the Opinion holds in these cases, cannot be extended inasmuch as thereafter the merits are again controlling over claims and alleged violations must be proven to be such in order to be allowed covering any subsequent period.

In response to the Labor Member's citation of Award 7713, we cite Carrier Members' Dissent thereto which shows that Award to be in error.

In Award 9447, also cited by the Labor Member, this Division interpreted a different rule as it applied to different circumstances from those involved here; that Award can have no bearing on the instant case.

/s/ W. H. Castle

/s/ R. A. Carroll

/s/ C. P. Dugan

/s/ J. E. Kemp

/s/ J. F. Mullen

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Interpretation No. 1 Award No. 9578

Docket No. CL-8768

NAME OF ORGANIZATION: Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employes.

NAME OF CARRIER: Reading Company.

Upon application of the Carrier involved in the above award, that this Division interpret the same in the light of the dispute between the parties as to its meaning and application, as provided for in Section 3, First (m) of the Railway Labor Act, as approved June 21, 1934, the following interpretation is made:

The question is the extent of the Carrier's liability for payments under this award.

The request for the interpretation is resisted on the ground that the award is simply "Claim sustained," and requires no interpretation; — in other words, that since it does not contain some such qualification as "Claim sustained in accordance with Opinion of Board", the award is not limited by the latter, which expressly found only a procedural violation of Rule 44, with a consequent automatic allowance of the substantive part of the claim at that time, as provided by Rule 44, thus precluding a decision thereof on the merits.

While that is not the only question raised here, the situation is in that respect identical with this Division's interpretations of Awards No. 6121 and 6122, in which it said:

> "The only possible ambiguity in our opinion and Award No. 6121 arises out of the statement of the award as "claim sustained." If that had read claim sustained on the basis and to the extent stated in the opinion there would be no possible ambiguity. Similarly if Award No. 6122 had read claim sustained on the basis and to the extent stated in the opinion governing Award No. 6121 there would be no possible ambiguity. That having been our intent we do now so interpret those awards."

We make a like interpretation here for clarity, although in any event, under the Railway Labor Act and Federal Court decisions, this Board's findings of fact constitute an integral part of its awards. For instance, in Shiply v. P.&L.E.R. Co., 83 Fed. Supp. 722, the court said that an award of the Board "must contain precise and definite findings of fact, and not a legal conclusion based on undisclosed findings," citing System Federation No. 59 v. L. & A. R. Co., 119 Fed. 2d 509 (cortiorari denied by the United States Supreme Court, 314 U.S. 656, 86 L. ed. 526, 62 S. Ct .108); Railroad Yardmasters of North America v. Indiana Harbor Belt R. Co., 70 Fed. Supp. 914 (affirmed by the Circuit Court of Appeals, 166 Fed. 2d 326); and Crawley V. D. & H. R. Co., 63 Fed. Supp. 164. In Koelker v. B. & O. R. Co., 140 Fed. Supp. 887, the court considered the findings of fact as part of the award, for it pointed out state-

ments therein which it found inferentially conflicting, and said that therefore it could not be determined without an interpretation by the Board whether its denial of the claim was on the merits. If they had not constituted part of the award they would not have made its meaning doubtful.

Obviously the award to be interpreted includes the matters stated by the Board in its Opinion and Findings.

A further objection made to the proposed interpretation is that the basis of money payment upon the violation of Rule 44 was not presented by the parties, the contentions of each having been directed solely to the question whether it had been violated. But the payment question was necessarily before the Board; for under the Railway Labor Act (Title 45, Section 153, U.S.C.), the Board's duty is to settle disputes and to order the payment of money if that is involved. Consequently, in Awards 2070, 4149, 4248, 4867, 5754, 6461, 6614, 8807 and 8890 of this Division, and Awards 2285 and 3285 of the Second Division, interpretations were made, several holding that though it was not discussed by the parties the basis of payment for time not worked was at pro rata or straight time rate, even though the punitive rate was claimed; or that outside earnings, or wages that could have been earned to mitigate damages, should be credited, or that payment should not be made for time spent in jail. The basis for payment is necessarily before the Board if it is to settle this dispute, even though its decision is not final and binding upon the parties as to the money award.

In panel discussion of the proposed interpretation the neutral suggested to labor and Carrier members the question whether an interpretation is properly made by the neutral and by Board members not joining in the original award, where not assented to by those who joined in the award; reference was also made to a somewhat analogous though different situation, where court rules limit the consideration of a petition for rehearing to the judges who participated in the original decision. The answer to that question is that the Board has not adopted such a rule, and that it cannot do so here under the guise of an interpretation, assuming that such rule might be valid under the Railway Labor Act. The Act requires the Board to make an interpretation of an award where a dispute arises concerning its meaning. The interpretation is almost certain to be in some respects contrary to the views of one side or the other, and neither can justly contend that the other's views should not be considered.

In its opinion in the instant case this Division said:

> "We necessarily conclude that the Carrier violated Rule 44 of the Agreement when it failed to render a decision on or before the close of November 29, 1954; that under Rule 44 (d) its failure constituted an automatic allowance of the claim; and that the notice required by Rule 44 (e) should then have been given."

The violation of Rule 44 was not a continuing violation. It occurred just once, at the close of the sixtieth day after the appeal. Under the self-executing provision of Rule 44 as adopted by the parties, the claim was then automatically allowed with reference to the period then ended, and the amount due under the claim should then have been stated and timely paid as contemplated by Section (e) thereof. Rule 44 does not provide for further accruals or for the statement and payment thereof, and this Board cannot supply such provisions.

The automatic allowance of the claim was in effect a default judgment and spoke as of the time thereof, and as of the amount then due. While an equity decree may in proper cases provide a continuing liability, equity is not here involved, as this Board has repeatedly held, and equitable decrees are not granted by default, but only on proof of the merits.

This Board could not, therefore, go beyond the provisions of Rule 44 and provide an answer for further amounts or extended periods.

The weight of authority as well as of reason supports this conclusion. See Award 192 of Special Board of Adjustment No. 43, Award 38 of Special Board of Adjustment No. 259.

In Second Division Award 3298, that Division, construing the analogous clause of Article V 1(a), of the National Agreement of August 21, 1954, likewise decided that the allowance was limited to the time of the cut-off rule violation, which, however, it erroneously stated as the time of the delayed denial rather than the expiration of the sixtieth day. Under Rule 44 the automatic allowance of the claim be default is not when it is belatedly denied, but when the time for valid denial expires.

There is some authority to the contrary of our conclusion here; for instance, Award 7713, in which this Division expressly found a violation of the cut-off rule and refused to consider the merits of the claim of a continuing violation, but nevertheless said;

> "Here the Respondent could have limited the amount of its obligation but it having failed to do so this Board has no alternative but to find that this claim is meritorious from the date of its inception in April 1, 1952, until the date the parties reconciled their differences on June 1, 1954."

Thus the Board was punishing the Carrier for the claimed continuing violation upon which it had expressly declined to rule. It did not find that the claim was valid on its merits from the date of its inception on April 1, 1952; it found only that regardless of merits the claim was automatically granted because not denied within 90 days after its presentation on April 26, 1952; — in other words that the Claimants then received under the cut-off rule what was essentially a default judgment.

The Claimants were undoubtedly entitled to damages for the delayed payment of the automatic allowance; but their damage was the loss of use of the money which the judgment then ordered paid, which is measurable as interest on that amount at the going rate until paid. They were not entitled to have the amount of the judgment increased daily, as if they had stood upon and had proved the claimed continuing violation on the merits. Consequently the Board was wrong in punishing the Carrier as for a continuing violation.

Upon the hearing of the request for an interpretation it was suggested by a Carrier member that the original claim did not present a matter properly within the Board's jurisdiction, and that the default therefore did not justify an award. Jurisdiction of the subject matter of a proceeding is statutory and cannot be conferred by consent or default. Consequently, if this Board did not have jurisdiction its award is a nullity and can be so declared by competent judicial authority. But the defect in jurisdiction, if it exists, is not apparent on the face of the record, and this Board cannot consider the question under the guise of making an interpretation.

The question is not here presented to what, if anything, the Board might have found these Claimants entitled as damages if they had established the substantive claim on the merits. That is one of the issues which Carrier's default under Rule 44 removed Claimants' burden to establish.

The Carrier should make payment to each Claimant of the amount to which each became automatically entitled at the close of November 29, 1954, upon the automatic allowance of their claims at that time, with interest thereon at the going rate at Philadelphia, Pennsylvania, until paid. The claim having been made, and automatically allowed as of that time, for an additional day's pay for each Claimant at punitive rate to and including the automatic allowance, the questions of outside earnings and of straight pay rate for time not worked are not here involved.

Referee Howard A. Johnson who sat with the Division, as a member, when Award No. 9578 was adopted, also participated with the Division in making this interpretation.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois this 12th day of June 1962.

SPECIAL CONCURRING OPINION TO INTERPRETATIONS NO. 1 TO AWARDS NOS. 9578 AND 9579, DOCKET NOS. CL-8768 AND CL-8769, SERIAL NOS. 195 AND 196

In the main, Interpretations No. 1 to Awards 9578 and 9579 are correct and we concur. However, the requirement therein for payment of interest on the amount awarded each claimant exceeds this Division's authority inasmuch as neither Rule 44 nor the Awards themselves contain any such requirement and no such payment was claimed; see Third Division Awards 5501 and 6962 and First Division Awards 12989, 13098 and 13099, for illustration, as well as the many awards which recognize that this Board must interpret agreements as written by the parties and is without authority to add to or detract therefrom. Furthermore, the requirement for payment of interest conflicts particularly with that part of these interpretations themselves which correctly holds—

> "This Board could not, therefore, go beyond the provisions of Rule 44 and provide an award for further amounts * * *."

/s/ W. H. Castle

/s/ P. C. Carter

/s/ R. A. Carroll

/s/ D. S. Dugan

/s/ T. F. Strunck

LABOR MEMBER'S DISSENT TO "INTERPRETATIONS TO AWARDS NOS. 9578 AND 9579", DOCKETS NOS. CL-8768 AND CL-8769, SERIAL NOS. 195 AND 196

These so-called interpretations, when stripped of their redundancies, prolixities, inconsistencies and the apologetic manner in which they were written, leaves the erroneous conclusions reached without support either in contract or law. In fact, the "interpretations" are nothing more than an illegal attempt to relieve the Carrier of the amount of monies admittedly due under Awards 9578 and 9579, when they were adopted by the Referee and Labor Members.

I will not only show that the Referee, who prepared these "Interpretations" and the Carrier Members, who joined him in illegally adopting them, exceed the authority conferred upon them by the Railway Labor Act, but that they have also attempted to usurp the jurisdiction of the Federal Courts. That there is no merit to their misdirected and odious "interpretations" is obvious. Not only is this crystal clear from the inconsistent positions taken by the referee in his two proposed "interpretations", but also from the diametrically opposite views expressed by the Carrier Member in his argumentation before the Referee.

It must be remembered that at no time during the handling of these disputes on the property did the Carrier take the position that its liability was limited under Rule 44 to the date that the claim was untimely denied by its official, or that its liability was cut-off on the sixty-first day after an appeal had been made. In fact, these two inconsistent hypothesis were first proposed to the Referee by the Carrier Member on two different occasions in panel argument.

Therefore, it is clear that the parties that executed Rule 44 were in agreement as to its intent and meaning from the effective date thereof, up to and including the adoption of Awards 9578 and 9579. Apparently, these two unfounded theories arose from the figment of a fertile imagination, as a device to relieve Carrier of its obligation to allow the claim as presented under the mandatory requirements of Rule 44 and reduce the money due under the Adjustment Board awards and orders.

In our first panel argument before the Referee on Dockets CL-8768 and CL-8769 on September 14, 1960, the Carrier Member took the untenable position that:

> "In any event the claim for payment by default would not extend beyond December 20, 1954, **the date on which Carrier's Director of Personnel actually denied the claim * * *.**" (Emphasis ours.)

The record shows that these two claims were appealed to the Director of Personnel on September 30, 1954, and not denied by him until December 20, 1954, or 81 days after an appeal had been made. It is interesting to note here that the Carrier Member's contention that Carrier's liability would not extend beyond the date on which the Director of Personnel denied the claim, i.e., 81 days after appeal, is inconsistent with his "Dissent" to Awards 9578 and 9579 and the plea presented to the Referee prior to their adoption. The question also arises, if the Awards meant what the Referee and Carrier Members now claim in their "Interpretations", why was it necessary for the latter to dissent thereto?

This brings up a very interesting question, which can only be answered from a review of the events leading up to the adoption of these prepotserous "Interpretations".

Subsequent to the panel argument on Dockets CL-8768 and CL-8769 on September 14, 1960, the Referee issued his proposed awards on these disputes, which were the same as those subsequently adopted as Awards 9578 and 9579 on October 7, 1960, with the exception as the the last paragraph under "OPINION OF BOARD" in Award 9578.

The Carrier Member requested an opportunity to re-argue the Referee's proposed Awards in Dockets CL-8768 and CL-8769 prior to their adoption. This re-argument was held on October 3, 1960, at which time the Carrier Member pleaded with the Referee to change his awards, as the amounts due claimants thereunder were in the neighborhood of $150,000.00. It was at this time that the Carrier Member first brought forth the absurd contention that Carrier's liability under Rule 44 extended only to the sixty-first day after appeal under such circumstances. Here again the position of Carrier's Representative was changed from that taken on the property and from that taken in the first panel argument.

Apparently, the Referee rejected both of Carrier Member's absurd theories because he only changed his awards by adding the last paragraph under "OPINION OF BOARD". Nowhere in the awards can it be shown that Carrier's liability was limited to the date that the Director of Personnel denied the claim, or the 61st day after an appeal had been made to him. The claim was sustained without qualifications or conditions and there is no ambiguity in the claim, which provides that: "Such claim to continue until violation of the clerical agreement rules are eliminated and discontinued." Consequently, there was no room for an interpretation of the Awards.

Awards 9578 and 9579 were adopted on October 7, 1960, by a majority vote of the Referee and Labor Members. Carrier Member's "Dissent" was filed on the same date and my answer thereto was filed on October 25, 1960 and Carrier Members' "Replies" were filed on October 31, 1960. The Dissent, Answer and Reply was sent to the Referee and the Executive Secretary of the Division received a "memorandum" stating that the former wished to make no comment on the dissent or answers thereto.

It is interesting to note that the five Carrier Members in their "Reply" to my "Answer to Carrier Member's Dissents" stated:

> "The Labor Member's Answer, supra, reflects but his own opinion and not that expressed by the author of Awards 9578 and 9579."

I made no answer to this absurd statement as I thought it presumptuous in view of the fact that the Referee had not expressed such a view in my presence and had rejected such contentions by joining with the Labor Members in adopting the Awards. Regardless of this, however, we now find that the Referee has changed his position and in the guise of an "interpretation" has rendered a new award with the help of the Carrier Members.

In accordance with Section 3, First (b), Railway Labor Act (45 U.S.C.A. 153), the Board issued an order directing the Carrier to make effective Awards 9578 and 9579 and to pay to the employe(s) the sum to which he (they) were entitled under the Awards on, or before, January 16, 1961, which the Carrier Member had admitted was in the "neighborhood of $150,000.00."

It will be noted that there was no misunderstanding as to the amounts due under these Awards when they were adopted, nor the sums due the employes under the Board's Order, insofar as the Referee and the Carrier Member were concerned. However, in an attempt to prevail upon the Director of Personnel to make the Awards effective and pay the employes the sums due, General Chairman Swan was confronted with a letter from a Carrier Member of the Board to the Director of Personnel, proposing that the Carrier settle on the basis of Carrier Members' Dissents to Awards 9578 and 9579. That the Carrier Member exceeded his authority under the act is clear from what I had to say in my Answer to Carrier Members' Dissent to Award No. 10173, Docket No. CL-9538. Apparently, the Carrier's so-called request for an "interpretation" of Awards 9578 and 9579 were motivated by the same letter.

These so-called requests for an "interpretation" were argued before the Referee by the Carrier Member and myself on October 16, 1961, at which time the former presented a "brief" of a little over a page and one-half, in which he cited Second Division Awards 2285 (Carter), 3285 (Carey) and Interpretation No. 1 to Award No. 2285, Serial 35 in support of his position. I presented a Memorandum of eight pages pointing out that the Board had no authority to reopen and rehear a dispute on its merits and make a new award, as requested by the Carrier. I quoted from the following authorities in support of my position:

Interpretation No. 1 to Award No. 3113, Serial 58, Referee Youngdahl held:

> "Under the circumstances of this case, therefore, it is not now proper, through an interpretation, to consider this issue."

Interpretation No. 1 to Award No. 3136, Serial No. 59, Referee Youngdahl held:

> "In effect what Carrier now seeks is a rehearing on the merits and the setting aside of the award because of lack of proof by claimants. * * *
>
> The Interpretation requested by Claimants is sustained."

Interpretation No. 1 to Award No. 3360, Serial No. 66 Referee Tipton stated:

> "This Board can only interpret the Award that has already been adopted in this dispute and not make a new award."

Interpretation No. 1 to Award 3563, Serial No. 70, Referee Carter states:

> "The Carrier undertakes to review the correctness of the award and to question the reasoning which sustains it. Such a review cannot be had on an application to interpret or clarify the meaning of an award. This is so, even if the conclusion reached is incorrect or its reasoning faulty. * * *."

Interpretation No. 1 to Award 4607, Serial No. 91, Referee Whiting ruled:

> "In the submission of the case to this Board there was no claim by the Carrier that earnings in other work should be deducted from the claim if granted. So, since the automatic deduction provided for

by Rule 6 is not applicable, our Award sustaining the claim for all time lost does not permit of such deduction and we may not under the guise of interpretation rehear the case and alter the Award under consideration of matters not before the Board when the award was rendered."

Interpretation No. 1 to Award 4248, Serial 93, Referee Carter, states:

"* * * The claim is valid under the award made from the date of the violation to the date the violation is corrected."

Interpretation No. 1 to Award No. 4967, Serial No. 105, Referee Carter:

"* * * The Award is necessarily based on the facts shown by the record. After the record is closed, new or additional evidence cannot properly be received. If this was not so, the awards of the Division would have no finality. An interpretation of an award may not properly be treated as a rehearing or a new trial of the merits of the case. Its purpose is to explain and clarify the award, not to make a new one. We are obliged to say that the only evidence properly before us for consideration is that appearing in the record at the time the docket was closed, that the evidence appearing in the application for an interpretation is outside the record and, consequently, the position of the Organization is correct."

Interpretation No. 1 to Award No. 5078, Serial No. 108, Referee Coffey, ruled:

"Contention of Carrier that additional force employes are required by agreement to make themselves available for work, was not expressly raised and argued in original submission and may not now be raised for first time in connection with request for interpretation. * * *."

Interpretation No. 1 to Award 5195, Serial No. 110, Referee Wenke held:

"In doing so it should be understood that an interpretation of an award is not a rehearing or a new trial of the case on its merits. Its purpose is to explain or clarify the award as made, not to make a new one. Consequently questions raised and disposed of will not be considered again. Neither will we consider questions raised for the first time.

* * * * *

The contentions raised by Carrier's application really do not seek an interpretation of the Award but seek to have old issues reconsidered and new issues determined. As already stated, that is not the purpose of an interpretation. **The Award, as made, fully and clearly determines all questions which Carrier here seeks to have determined.** All Carrier needs to do to carry it out is to determine on what days and for how long the violations continued, if they have ceased, and pay the parties entitled thereto the amounts as fixed by the Award." (Emphasis ours).

That this Board has no right to relitigate a dispute upon the basis of new contentions or evidence, through the guise of an interpretation is recognized by Carrier Members in their Dissent to Interpretation No. 1 to Award No. 6388, Serial No. 141, Referee Ferguson, wherein they state:

"* * * How any self-serving declaration made after the Board rendered its Award can properly be considered in determining what the Board meant by its Award, is beyond our comprehension. * * * This Board has long recognized that in interpreting an award it may not engage upon or relitigate a claim upon the basis of new evidence not included in the record at the time the award was rendered. In Interpretation No. 1 to Award No. 4967 (Serial No. 105), Referee Carter ruled that:"

Also, see Carrier Members' Dissen to Interpretation No. 1 to Award 5197, Serial No. 146, where they took the same position. In their Dissent to Intepretation No. 1 to Award No. 6346, Serial 151, Carrier Members accused Referee Smith of not being neutral because:

"Here, in the guise of an Interpretation, the same participating referee has treated the proceeding as a rehearing on its merits, and, compounding error upon error, reaches a determination based not upon the facts appearing in the record at the time the docket was closed but based upon facts not contained in the original record."

In Interpretation No. 1 to Award 6689, Serial 153, Referee Leiserson held:

"A second question in the application for interpretation raises a new issue as to how to identify the senior available employes whose claims were sustained by the Award. No such question was raised or argued in the original submissions, and since this is a new issue it cannot be considered by the Division as a dispute involving interpretation of Award 6689. This question, too, should be dismissed."

I submit that under the above referred to authorities, the Referee should have dismissed the Carrier's request. If this recommendation was not followed the Referee must then interpret the Awards in accordance with the clear and unambiguous language contained in the Employes' claims, which were sustained without qualifications in both Awards. This controlling principle is clearly supported by this Board in the following Interpretations:

Interpretation No. 1 to Award No. 388, Serial No. 10, Referee Sharfman, ruled in part, here pertinent, that:

"**Since the claim was sustained without condition or limitation, the measure of relief to which the employe is entitled must be determined by the terms of the claim.** These terms, based upon the contention that the employe was improperly displaced from his regularly assigned position, embraced two requests: first, that he be restored to his regularly assigned position; and second, that he be 'compensated in full for any monetary loss resulting from the carrier's action in removing him from his assignment.' The fact that the claimant is not now required to return to his former position is immaterial, since this arrangement was reached by agreement of the parties subsequent to the award. The sole issue concerns the extent of the compensation to which the claimant is entitled under the original award. When the claim as to compensation was sustained, it was sustained in the terms in which it had been submitted and argued on behalf of the employe; and this claim was not limited to net wage loss, but included 'any monetary loss' resulting from the carrier's action. The substantive position of the carrier in the original proceeding had been directed solely to a denial that any provision of the prevailing agreement be-

tween the parties had been violated. The Board expressly found otherwise, and liability on the part of the carrier for the full measure of compensation as specified in the claim naturally follows." (Emphasis ours.)

In Interpretation No. 1 to Award No. 1641, Serial No. 31, Referee Blake ruled on a similar Carrier request:

"The award sustains the claim without qualification."

In Interpretation No. 1 to Award No. 1673, Serial No. 39, Refereee Mitchell ruled:

"The claim in this case was for all losses sustained by all employes involved in or affected by this Agreement violation from October 1, 1940, until the violation is corrected. **The award sustained the claim as made, which means that the employe affected should be paid until the violation is corrected.**" (Emphasis ours.)

Interpretation No. 1 to Award No. 3765, Serial No. 74:

"The application relates itself to Section (c) of the claim. That section of the claim is specific. **No objection was made to the Board as to its form with reference to the basis of the compensation claimed, it was sustained without qualifications,** and it should be complied with as allowed, that is; all employes involved or affected by the Agreement violation should be paid additionally * * *." (Emphasis ours.)

Interpretation No. 1 to Award 3900, Serial No. 79, Referee Carter held:

"* * * Violations of rules and compensatory claims therefor, are not to be presented piecemeal by either party. It is the function of this Board to enforce the agreements and award full compensatory loss for their violations by a single award wherever it is possible to do so and the scope of the issues presented permit. The award before us for interpretation found that the Agreement had been violated and awarded compensation lost on June 3, 10, 17 and 24, 1945, **and on all dates subsequent thereto on which similar violations occurred until the Agreement violation was corrected.** This is in accord with the purposes of the Railway Labor Act and the general practice of this Board.

"There is another reason why the Carrier's contention cannot be sustained. The defense to the payment of compensation for subsequent violations should have been made to the original claim. A party cannot participate in the hearing of the original claim, fail to raise a claimed defense and, then, under the guise of an interpretation, present that which he had opportunity but did not present at the hearing. By failing to raise such claimed defense at the hearing before the Division, he will be deemed to have waived it. The efficient and expedient handling of claims before the Division requires that this rule be followed, otherwise no finality could ever attach to the awards of the Division. The purpose of this Board is to expeditiously adjust and settle disputes, not to permit them to run on indeterminably."
(Emphasis ours.)

Interpretation No. 1 to Award No. 4516, Serial No. 89, Referee Carter held:

"* * * The award adjudicates all such violations until the Carrier corrects the violation of rules of which complaint was made. Under such circumstances, a claimant is not required to file claims for each day that the violation occurred. * * * The contention of the Carrier, if sustained, would result in a multiplicity of claims and an unjustified splitting of claims which are based upon a single misinterpretation of the rules."

Also, see Interpretation No. 1 to Award No. 8657, Serial No. 189.

It should be remembered that we were not here involved as to the proper application and interpretation of Rule 44, rather we were confronted with a request for an "interpretation" of an Award that had already disposed of the dispute on its merits by sustaining the claim without qualifications or conditions.

That the Carrier was not seeking an interpretation, but a rehearing on the merits of the dispute was clear from its letter of December 29, 1960, File 733.00, wherein it pleaded:

"The Carrier is not arguing, * * * the justice or injustice of the Board's decision that the time limit rules were violated. **The Carrier is arguing for the reasonable premise that its liability is cut off when denial of the claim was finally made by the highest appeals officer.**" (Emphasis ours.)

It will be noted that Carrier reverted to the same untenable theory that was first raised by the Carrier Member in panel argument on September 14, 1960, i.e., the 81st day, although he changed it later to the 61st day. That this issue had never been raised previously, or during the handling of the dispute on the property by Carrier, was conceded by the latter. The record is clear on this point.

Regardless of these authorities and matters of record, the Referee came out with his first proposed "Interpretation to Award 9578", reading as follows, with heading etc. eliminated:

"The question is the extent of the Carrier's liability for payments under this award.

"During the handling on the property and before this Division the Employes raised as a rules violation, and relied upon as conclusive, the Carrier's failure to announce its decision within sixty days after the appeal, as required by Rule 44, which reads in part as follows:

'(d) * * * When a decision is so appealed the Representative will be notified in writing of the decision within sixty days from date the decision was appealed. When not so notified the claim will be allowed.

'(e) When money claims are allowed the employes affected and the Division Chairman will be advised in writing the amount involved and payroll on which payment will be made.'

"After discussing Rule 44 and the applicable facts this Division said:

'The rule is susceptible of only one meaning. It is that unless the Representative is notified of the denial within sixty days from date of final appeal, the claim is automatically allowed. The time runs from date of appeal, which cannot be construed as meaning the date of hearing.

'We necessarily conclude that the Carrier violated Rule 44 of the Agreement when it failed to render a decision on or before the close of November 29, 1954; that under Rule 44(d) its failure constituted an automatic allowance of the claim; and that the notice required by Rule 44(e) should then have been given. Consequently we are precluded from examining the other issues raised on the property, or here tendered the Board by the parties or by any member of the Board.'

"In other words this Board's award was based solely upon the Carrier's violation of Rule 44 and the penalty therein provided, which was the automatic allowance of the claim at the expiration of the sixty day period, without regard to the merits of the other violations claimed; for the allowance then became final without regard to those merits. Consequently we have not decided, and, cannot decide, that the other matters complained of constitute violations, whether they continue or not.

"The violation of Rule 44 was not a continuing violation. It occurred just once, at the close of the sixtieth day after the appeal. Under the selfexecuting provision of Rule 44 as adopted by the parties, the claim was then automatically allowed with reference to the period then ended, and this Board cannot set that allowance aside and make a new one as of the date of the award, or with penalties increased to cover a further period. As it has often been properly admonished, this Board has not the powers of a court of equity, but is bound by the parties' agreements.

"In Second Division Award 3298, that Division, construing the analogous clause of Article V 1 (a), of the National Agreement of August 21, 1954, decided that the allowance was limited to the time of the violation, which, however, it regarded as the time of the delayed denial rather than the expiration of the sixtieth day.

"A similar conclusion was reached by Award 38 of Special Board of Adjustment No. 259. No precedent has been cited or found contrary to the conclusion indicated in this and the two above cited awards, that the period involved is limited to the time of the violation of the time limit rule and the resulting automatic allowance, which occurs without regard to the merits.

"Upon the hearing of the request for an interpretation it was suggested that the original claim did not present a matter properly within the Board's jurisdiction, and that the default therefore did not justify an award. Jurisdiction of the subject matter of a proceeding is statutory and cannot be conferred by consent or default. Consequently, if this Board did not have jurisdiction its award is a nullity and can be so declared by competent judicial authority. But the defect in jurisdiction, if it exists, is not apparent on the face of the record, and this Board cannot consider the question under the guise of making an interpretation."

The above "Interpretation No. 1 to Award 9578", was never adopted. It is included herein to show the various inconsistent opinions expressed by the Referee. It is quite evident from a review of this proposed "Interpretation" and that adopted as "Interpretation No. 1 to Award No. 9578", Docket No. CL-8768, Serial No. 195, that the Referee was uncertain as to the manner in which to accomplish his object, i.e., to reduce Carrier's liability to pay to the employes the sum to which they were entitled, admittedly in the "neighborhood of $150,000.00.

It is interesting to note in both proposed "interpretations" that he rejected Carrier's request for an "interpretation" that would cut-off its liability on the 81st day, i.e., "when denial of the claim was finally made by the highest appeals officer", supra. In fact, he even gave the Carrier more than the Carrier Member requested, although the latter was not satisfied with the end result as evidenced by Carrier Members' "Special Concurring Opinion" to Interpretations Nos. 1 to Awards Nos. 9578 and 9579 etc. It is amusing that in the "Concurring Opinion", the Carrier Members concur in the "main" with the "Interpretations" as being correct, but claim that the requirement for the payment of interest "exceeds this Division's authority inasmuch as neither Rule 44 nor the Awards themselves contain any such requirement".

The "Concurring Opinion" sustains the position that I expressed to the Referee on numerous occasions, i.e., that this Board was without authority to add to or detract from the plain and unambiguous terms of an agreement. Rule 44 is clear and definite on the point at issue that was before the Board prior to adoption of Awards 9578 and 9579. The Rule has not changed since that time, although it is clear that the Referee, the Carrier and Carrier Member's respective positions have changed when expediency dictated.

The second "Interpretation No. 1 to Award 9578", later adopted as Serial No. 195, resulted from a further panel argument in which I informed the Referee that he had exceeded the authority vested in him by the Railway Labor Act, as his "Interpretation" was a new Award that was based on a proposition that was never in issue during the period the claim was handled on the property. In fact, Carrier admitted that that point had never been raised. It was also pointed out to him that the same contention had been presented to him in opposition to his proposed Awards by the Carrier Member and that he had rejected it. If Award 9578 did not properly state his position in the premises, then the burden was upon him to have made his point clear at that time in order that the Labor Members would not be mislead into voting for an Award that did not reveal the true position of the author, who had reservations in relation thereto and intended to change at the first opportunity, which apparently was the case here.

While erroneously holding that Carrier's liability was limited to the 60th day, Carrier Member claimed the 61st day, the Referee then held in his first "Interpretation" that:

> "Consequently we have not decided, and cannot decide, that the other matters complained of constitute violations, whether they continue or not."

This conclusion was abandoned by the Referee in his second "Interpretation" apparently, because it was contrary to his obligation under the Railway Labor Act to settle disputes on their merits. The fact of the matter is that these disputes were before him on the merits, as expressed in Item 1 of the Employes' claim, as well as the claim that Carrier violated Rule 44 by its untimely

denial. Therefore it is clear that if we considered, arguendo, that the Referee's interpretation of Rule 44 was proper, then the obligation was upon him to decide Item 1 of the Employes' claim on its merits. In either event the Referee removed himself out from under the protective umbrella of the law. Regardless of the rather far-fetched contention that:

> "This Board could not, therefore, go beyond the provisions of Rule 44 and provide an award for further amounts or extended periods."

the fact still remains that unless there was a continuing violation of Rule 44, then the obligation was upon the Referee to decide the disputes on their merits, instead of misleading the Employes into believing that their continuing claims had been sustained under Rule 44. In another dispute, which this same Carrier claimed was on all fours with the instant disputes, insofar as the merits were concerned, although Rule 44 was not there involved, this Board sustained the Employes' claim in Award 10639. If this case was meritorious, it is logical to assume that the claims in Dockets CL-8768 and CL-8769 were also meritorious in accordance with Carrier's contention that the alleged violation of the agreement was the same. Having failed to decide Awards 9578 and 9579 on their merits subsequent to the "60th day" period under Rule 44, we are led to the conclusion that the Referee had no intention of restricting Carrier's liability at that time, or otherwise he would have met his obligation by deciding the claims subsequent thereto.

It is amazing how much the Referee relies on local, or Special Board of Adjustment Awards in support of his belated conclusion, while at the same time rejecting National Railroad Adjustment Board Awards given to him, prior and after adoption of Awards 9578 and 9579, by the Employes in support of their position. It is also clear that he totally disregarded the above quoted Interpretations that properly ruled the Board had no authority to change an Award, or create a new one in the guise of an interpretation. For those Awards that have rejected the two inconsistent theories that Carrier's liability is limited to the date of Carrier's untimely denial, or the 60th or 61st day after appeal, under rules similar to Rule 44, see Awards 7713, 8101, 8318, Third Division; Award 3280, Second Division and Award 19343, First Division of the National Railroad Adjustment Board.

A further review of Referee Johnson's first and second "Interpretations" will show that he originally stated:

> "A similar conclusion was reached by Award 38 of Special Board of Adjustment No. 259. No precedent has been cited or found contrary to the conclusion indicated in this and the two above cited awards, the period involved is limited to the time of the violation of the time limit rule and the resulting automatic allowance, which occurs without regard to the merits."

However, after our panel re-argument, where it was again brought to his attention that he had been given a number of awards by the N.R.A.B. that had rejected Carrier Member's unfounded and unsupported contentions, he now admits that there is some authority to the contrary. It is interesting to observe, however, that he disagrees with the awards upon which he relies for support. In citing Second Division Award 3298, he finds it is erroneous because it was there held that "the time of the delayed denial rather than the expiration of the sixtieth day terminated Carrier's liability.

In Award 43, S.B.A. 192, the Referee held contrary to Awards 3298 and the contention here made by allowing Carrier credit for 60 days prior to untimely denial.

In Award 38, S.B.A. No. 259, the official to whom the appeal was made never did deny the calim, consequently, if the Referee there had followed Award 3298, the claim would have run forevermore. However, he got around that difficulty by erroneously limiting Carrier's liability to the date that Carrier's highest officer denied the claim.

Therefore, it is crystal clear that none of these Awards, upon which this Referee relies, give any support to his far-fetched conclusions. In fact, each takes an entirely different view and are therefore inconsistent. There is one thing that they have in common, however, and that is a desire to relieve the Carrier of its obligation under the rule of allowing the claims, as presented. The manifested necessity of having to rely upon such inconsistent awards, conclusively proves the weakness of the Referee's position in these "Interpretations."

That he is concerned about his authority to change the force and effect of an award by reducing the amount of money due under the Order of the Board, is quite evident from the court decisions he cites in the fifth paragraph of "Interpretation No. 1 To Award 9578, Serial 195." I submit that these Court decisions have no bearing or relevancy here, as both Awards 9578 and 9579 were clear and unambiguous and there was no misunderstanding as to their meaning. In fact, they did not need clarification or interpretation.

However, the Court of Appeals, Third Circuit (1951), in Kirby et al v. Penna. RR Co., 188 Fed. 2d 793, reversed the dismissal of the District Court of an action to enforce Third Division, N.R.A.B., Award 4291, on the conclusion that the form of the Award disposing of the claims was not sufficient to make it the basis of a court action. The Court of Appeals ruled:

> "* * *. The District Courts are empowered, under the rules of the court governing actions at law, to make such order and enter such judgment, by writ of mandamus or otherwise, as may be appropriate to enforce or set aside the order of the * * * Board.
>
> "(2) So we have this situation. The Congress has provided for the submission of certain railway labor disputes to a body which over the years has established its own method of operation in a way which gives each side a chance to have its problems heard and decided by persons who are thoroughly familiar with the industry and the kind of questions presented. The law-making body has thought well enough of the type of operation to provide for the enforcement of its results where necesary. * * * We think under these circumstances to insist upon the kind of definite requirement of findings of fact to which we are accustomed in the ordinary non-jury case would be doctrinaire and unrealistic.[9] We think the courts should take the findings of these Divisions of the Railroad Adjustment Board as they come and do what they can with them."

The court also took note that its conclusion differed substantially from that expressed by some of the decisions relied upon here by the Referee. The Court compared Virginia RR. Co. v. System Federation No. 40, 4 Cir., 1942, 131 F. 2d 840, 844-845; Munsey v. Virginian RR. Co., D.C.E.D. Va., 1941, 39 F. Supp. 881, 883, which supported its decision.

The Court further stated that:

> "Note 11. The only power given the court is to enforce or set aside the order of the * * * Board. 45 U.S.C.A. Sec. 153, First (p). To this extent the preceeding is like an action on a judgment. **The court cannot shape a new order.** * * *" (Emphasis ours.)

The Court also recognized that Carrier may increase the amount of its liability under an Award by refusing to comply with the Board's order. On pp. 798, 799, the Court said:

> "If it (Carrier) refuses to comply it may increase the amount of back pay owed the claimants." (Parenthesis ours.)

A review of Awards 9578 and 9579 and Board's Orders will show that they were clear and definite. Surely, if the Courts could not make a new order, then a Referee assigned to the Division cannot do so in the guise of an interpretation. Furthermore, the Court has properly held that it is only authorized to enforce or set aside an order of the Board. This being true, the Referee here is attempting to ursurp the prerogatives of the Courts by setting aside an Order of the Board.

The contention made in the seventh paragraph of the "Interpretation" that: "A further objection made to the proposed interpretation is that the money payment upon the violation of Rule 44 was not presented by the parties." is not a factual statement.

The record shows that the Employes' Representatives called upon the Carrier's Director of Personnel to "allow the claim," which was a continuing one, because of his failure to deny the claim within the time limits provided in Rule 44. The Carrier denied that it had violated Rule 44 and defended its position on that basis before the Board. At no time did Carrier contend that its liability under the Rule was limited to any stated period. This point was never a part of the issue in dispute on the property. Therefore, I not only objected to the introduction of the Carrier Member's proposition in regards to limiting Carrier's liability to the 81st day and his subsequent inconsistent contention that Carrier's liability ceased on the 61st day, I also informed the Referee, before and after his proposed awards and again after his proposed "Interpretations", that he was not authorized to consider these new allegations as they were not a part of the dispute handled on the property and therefore were inadmissible at this late date. In fact, I told him that the Railway Labor Act gave us jurisdiction over those matters that were in dispute between the parties. This position is sustained by a long line of awards of this Division. See my Dissent to Award 10645, Docket CL-9578 and the authorities cited therein.

It is also interesting to observe that the instant Referee concurs in this fundamental principle in Award 9578, as follows:

> "On the other hand, there are more numerous Awards of this Division holding that procedural questions of the kind cannot be raised for the first time on appeal. Among them are Awards 1552 (Wenke), 2786 (Mitchell), 3269 (Carter), 5140 (Coffey), 5147 (Boyd), 5227 (Robertson), 6500 (Whiting), 6744 (Parker), 6769 (Shake), 8225 (Johnson), 8572 and 8573 (Sempliner), 8674 and 8675 (Vokoun), 8685 (Lynch) and 8807 (Bailer). In other words, by the weight of authority, technical procedural questions **are no more entitled to be raised for the**

first time on appeal than are questions affecting the parties' substantive rights, which would seem reasonable." (Emphasis ours.)

Furthermore, in his "Comments" to the Labor Member's Dissent to Award 9445, Docket TE-8406, the Referee takes the opposite view than that taken in his "Interpretations" here. He said:

> "The first suggestion that the closing of the Barnett station and consequent discontinuance of the Agent-Telegrapher's position in 1950 constituted a violation of the Rules appears on the third page of the dissenting member's brief. It nowhere appears in the record made by the parties, either on the property or before this Board.
>
> **"It is too well settled for argument that only the issues presented on the property are properly before this Board on an appeal. And certainly the Board cannot properly be criticized for failing to rule upon an issue not presented by the parties even here, but raised only by a Board Member."** (Emphasis ours.)

Whether his point was well taken or not, the fact still remains that he is fully aware of the requirements of Circular No. 1 and the Railway Labor Act, insofar as this introduction of new matters are concerned for the first time before the Board. However, he did not apply that principle here, as there was no dispute between the parties as to the proper application of Rule 44 under the confronting circumstances. It is further evident from the "Opinion of Board" in Award 8225, which was written by this Referee, that he realized that he had no jurisdiction over something that was not a part of the dispute between the parties prior to the case being submitted to the Board. In that Award, he ruled:

> "Therefore, we need not consider whether the 60 days limit for the presentation of Mr. Phillips' claim started running on December 17, 1954, when the vacation schedule was adopted, or on May 9, 1955, when he was required to start his vacation at a time not of his choosing, and therefore became directly affected. For this question was not raised on the property. Awards 3950, 5095 and 7848."

The Carrier Members agree that new allegations, contentions, questions, or assertion, cannot be raised for the first time before the Board, is self-evident from their Dissent to Awards 8299 and 9988. Also, see my Answer to Award No. 10173, Docket No. CL-9438, the pertinent parts thereof being made a part of this Dissent.

There is no question that the amount due claimants was necessarily before the Board prior to adoption of those Awards and they could not be changed by issuing new awards in the guise of interpretations. Therefore, the Awards cited in the seventh paragraph of the "Interpretation" have no bearing on the lack of authority of this Board to change an Award and Order of the Board. Surely, the Referee is "grasping for straws" in a desperate attempt to support an unwarranted and inexcusable act.

In the eighth paragraph, the Referee acknowledges that an Award should not be interpreted by others than those who adopted it. Had he in this instance rejected the Carrier's request for a rehearing on the disputes and issue a new award on the basis of a point that was not in issue on the property, he would have had the Labor Members' support.

It must be small satisfaction indeed to know that a few other referees have had to rely upon Carrier Members to adopt an erroneous interpretation. I doubt, however, that such past procedure will give to the instant "Interpretations" the validity, which they so clearly lack. It is enough that the Referee admits that the procedure engaged in in adopting his "Interpretations" was irregular and unusual.

In the ninth paragraph, he bases his absurd "Interpretation" on the last paragraph under "Opinion Of Board" of Award 9578. Are we to believe that he incorporated this paragraph into the Award for no other purpose than to later "clarify" it by a so-called interpretation? Surely, the English language contains sufficient words to have "clarified" this paragraph prior to adoption and thereby put the Labor Members on notice that the Referee did not mean what he said when he issued an award sustaining a claim that was not ambiguous. A review of this paragraph fails to reveal an intent to limit Carrier's liability to the sixtieth (60th) day, as here contended. That such a contention finds no support in Rule 44 and was outside the Referee's jurisdiction to consider, led the Labor Members into believing that the Award meant clearly and explicitly what was stated, that the Employes' claim was sustained without qualifications. If there were any qualifications, they were in the mind of the Referee as they do not appear in the Award itself. It should be remembered that both erroneous contentions, i.e., that Carrier's liability did not exceed the 81st day, or 61st day after appeal, were before the Referee prior to the adoption of Awards 9578 and 9579. However, he ignored both and sustained the claims, as presented.

In the tenth paragraph he makes the absurd statement that the violation of Rule 44 was not a continuing violation, it occurred only once. However, in the paragraph quoted above he holds that Carrier violated Rule 44 by failing to render a decision on or before the close of November 29, 1954, and that such failure constituted an automatic allowance of the claim; and "that the notice required by Rule 44(e) should **then** have been given."

What he fails to recognize, however, in his so-called interpretation is that Carrier has never allowed the claim, nor has it given the notice that the Referee held that it should have "then" given. The allowance of the claim under Rule 44 (d) and notice of the allowance of the claims to the "empolyes affected and the Division Chairman" are conditions precedent to a full compliance with the Rule. The Referee recognizes this by holding that the "notice required by Rule 44(e) should then have been given."

Prior to the adoption of Awards 9578 and 9579, we were not concerned whether Rule 44(d) was violated only once, or there was a continuing violation, when Carrier failed to render its decision within the 60 day period. What we were concerned with was whether Carrier had complied with the mandatory provisions of the Rule by allowing the claim under Rule 44(d) and notifying the employes of such allowance under Rule 44(e). The record is clear that Carrier has not complied with these provisions up to this time which clearly constitutes a **continuing violation.**

It is also clear that the Referee has gone entirely off the reservation in the tenth paragraph, in a desperate attempt to support an unsupportable thesis. The same applies to the eleventh paragraph. However, I am glad that the Referee's attempt to relieve Carrier of its liability under Rule 44 was not motivated by "equity".

In conclusion we should remember that:

First, we are not here concerned whether the Referee's belated interpretation of Rule 44 is proper or not.

Second, what we are concerned with, however, is whether he had authority to re-open Awards 9578 and 9579 and render new awards, in the guise of Interpretations, on a point not in issue between the parties on the property, thereby setting aside the original Awards and Orders of the Board.

From the facts of record and what has heretofore been said, it is crystal clear that "Interpretations Nos. 1 to Awards Nos. 9578 and 9579", Dockets CL-8768 and CL-8769 were spawned outside the jurisdiction of the Board and should be declared null and void.

/s/ J. B. Haines

J. B. Haines
Labor Member

CARRIER MEMBERS' REPLY TO LABOR MEMBER'S DISSENT TO INTERPRETATIONS NOS. 1 TO AWARDS NOS. 9578 and 9579, DOCKETS NOS. CL-8768 and 8769 SERIAL NOS. 195 and 196

In the main, the Labor Member's Dissent is merely a reiteration of the arguments and citations he presented to the Referee prior to the adoption of Interpretations Nos. 1 to Awards 9578 and 9579 and which have been rejected thereby. The Dissent makes clear, however, that its author is not here concerned with whether or not the interpretation of Rule 44 is proper, and that his main concern is whether or not the Board exceeded its authority in making these Interpretations.

That the interpretation of Rule 44 is proper insofar as terminating the allowance thereunder as of the sixtieth day is concerned, is attested to by Fourth Division Award 1657, which cited Award 9578, among others, concerning the limitation point for sustaining claims by default, and which limited the "basis of payment" therein, as required under Article V of the August 21, 1954 National Agreement, to the sixtieth day.

Furthermore, it also is clear from precedents cited that this Division has not exceeded its authority under the Railway Labor Act in its interpretations of Awards 9578 and 9579. In its interpretations, supra, the Referee quotes from and follows interpretations of Awards 6121 and 6122, and also cites Federal Court decisions under the Railway Labor Act, to support his conclusion in this respect, as follows:

> "Obviously the award to be interpreted includes the matters stated by the Board in its Opinions and Findings."

Furthermore, the question of "basis of payment" under Rule 44 is not a new issue, as alleged by the Labor Member, but is inherent in the claim itself as well as in the Rule. The dispute involves the payment of money and could hardly be settled by the Board without definitely stating the basis of payment. Hence the Referee's holding, as follows:

> "This Board could not, therefore, go beyond the provisions of Rule 44 and provide an award for further amounts or extended periods."

Accordingly, the Referee correctly interpreted Awards 9578 and 9579 on the basis of the Opinion and Findings therein, with the exception referred to in the concurring opinion which the undersigned filed in this matter with regard to the interest feature.

/s/ W. H. Castle

/s/ P. C. Carter

/s/ R. A. Carroll

/s/ D. S. Dugan

/s/ T. F. Strunck