Award No. 9579

Docket No. CL-8769

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 May 12, 1954, a position of Junior Engineering Assistant was established in the Office of the Division Engineer at Reading, Pa.; position so established being assigned to perform clerical duties of preparing, extending, calculating and performing other clerical duties in connection with A.F.E. (Authority for Expenditure) forms.

2. That the Carrier also violated the provisions of Rule #44 (Claims for Money Payments), when it failed to render a decision on the monetary claim with the prescribed time limits.

3. That the Carrier compensate Carl D. Saylor, incumbent of clerical position in the respective office where Engineering Assistant was assigned, an additional day's pay at punitive rate for each and every day the violation outlined in Claim #1 and subsequent violation outlined in Claim #2 continues. Such claim to continue until the violation of the Clerks' Agreement is eliminated and corrected.

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.

Part 3 of the Brotherhood's claim is a request that Carrier be required to compensate regular assigned incumbent of clerical position in Reading Division Engineer's office an additional day's pay at time and one-half for each day the alleged violation continues. This, in Carrier's opinion, would be an unnecessary and unwarranted penalty payment and has no basis or support under Carrier's agreement with the Clerks' Brotherhood. Claimant Saylor lost no time or earnings as a result of the appointment of an Engineering Assistant and was not adversely affected thereby.

Under the facts and for the reasons set forth hereinbefore, Carrier maintains that the work involved is properly performed by an Engineering Assistant and is not exclusively clerical work. Carrier submits that the claim is without merit and not supported by the evidence, past practice or the rules of the Clerks' agreement. Therefore, Carrier respectfully requests the Board to deny the claim in its entirety.

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

OPINION OF BOARD: This claim is in all respects similar to that in Award 9578, except that it was initiated within the time limited by Rule 44 (a), although apparently not by presentation to Claimant's immediate superior.

What we have said in that award is equally applicable here, and on the same authorities this claim must likewise be sustained.

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. 9579, DOCKET NO. CL-8769

Award 9579 covers a companion case to that covered by Award 9578, and the undersigned make our dissent to the latter Award a part of our dissent hereto, by reference.

/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. 9579, DOCKET NO. CL-8769

What I had to say in My Answer to Carrier Members' Dissent to Award No. 9578, Docket No. CL-8768, applies equally as well here and by reference, is made a part of my answer to their Dissent here.

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

CARRIER MEMBERS' REPLIES TO LABOR MEMBER'S ANSWERS TO CARRIER MEMBERS' DISSENTS TO AWARD 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 Members' 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 to Award No. 9579

Docket No. CL-8769

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, approved June 21, 1934, the following interpretation is made:

As stated in the Opinion of the Board in this award, this claim was in all material respects similar to that in award 9578, and necessitated the same disposition.

Consequently, what we have said in Interpretation No. 1 to Award 9578 is equally applicable here.

Referee Howard A. Johnson who sat with the Division, as a member, when Award No. 9579 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 preposterous "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 to 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 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 (o), 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-9438. 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 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 No. 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 the 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' Dissent to Interpretation No. 1 to Award 5197, Serial No. 146, where they took the same position. In their Dissent to Interpretation 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 between 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 followed."

(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, Referee 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