Award No. 10173
Docket No. CL-9438

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Lloyd H. Bailor, Referee

PARTIES TO DISPUTE:

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

THE WESTERN PACIFIC RAILROAD COMPANY

STATEMENT OF CLAIM: This is a claim of the System Committee of the Brotherhood that:

(a) The Carrier has violated and continues to violate the rules of the Clerks' Agreement through its unilateral action, beginning April 1, 1955, of removing the work involved in supplying cabooses at Oroville, California from employes within the scope and operation of the Clerks' Agreement and thereafter permitting and/or requiring employes outside the Agreement to perform that work, and

(b) Carrier violated the provisions of Article V, Section 1(a) of the August 21, 1954 Agreement when the decision denying the claim here involved was not mailed to the General Chairman within the sixty days allowed for making such decisions, and

(c) The work here involved be properly assigned to employes in the Store Department at Oroville, and

(d) Messrs. E. T. Knarr, W. R. Martinson, L. A. Darnell, S. R. Journey, J. L. Sudderth and D. D. Strachan be compensated for eight hours at the overtime rate, as outlined below, for the week April 7 through 13, 1955 inclusive, and that they and/or their successors to their respective positions be compensated for eight hours at the overtime rate for each shift on which the violation has occurred since that time (in addition to what they have already received for service on such days); this to be on the basis of seniority and availability, except that on shifts when two or more employes outside the Agreement have been used to perform such work, an equal number of Store Department Employes are entitled to the allowance herein requested for each shift involved.

This claim is to cover each day on which this violation continues to occur. The claims for the week April 7, through 13, 1955, which were filed by the individual employes with the Carrier, are as follows:

Date	Claimant	Assigned Hours	Hours Claimed
4/ 7/55	E. T. Knarr	Rest Day	8 A. M. to 4 P. M.
"	W. R. Martinson	4 P. M. to 12 M	7:30 A. M. to 4 P. M.
"	L. A. Darnell	12 M to 8 A. M.	4 P. M. to 12 M
"	S. R. Journey	8 A.M. to 4 P. M.	4 P. M. to 12 M
"	J. Sudderth	8 A.M. to 4 P. M.	4 P. M. to 12 M
4/ 8/55	L. A. Darnell	12 M to 8 A. M.	8 A. M. to 4 P. M.
"	J. Sudderth	8 A.M. to 4 P. M.	4 P. M. to 12 M
"	S. R. Journey		4 P. M. to 12 M
"	E. T. Knarr	Rest Day	8 A. M. to 4 P. M.
4/ 9/55	J. Sudderth	8 A. M. to 4 P. M.	7:30 A. M. to 4 P. M.
"	W. R. Martinson	4 P. M. to 12 M	7:30 A. M. to 4 P. M.
"	L. A. Darnell	12 M to 8 A. M.	8 A. M. to 4 P. M.
4/10/55	J. Sudderth	8 A. M. to 4 P. M.	7:30 A. M. to 4 P. M.
"	W. R. Martinson	4 P. M. to 12 M	7:30 A. M. to 4 P. M.
"	L. A. Darnell	12 M to 8 A. M.	8 A. M. to 4 P. M.
4/11/55	W. R. Martinson	4 P. M. to 12 M	7:30 A. M. to 4 P. M.
"	E. T. Knarr	4 P. M. to 12 M	8 A. M. to 4 P. M.
"	L. A. Darnell	12 M to 8 A. M.	8 A. M. to 4 P. M.
"	D. D. Strachan	7:30 A. M. to 4 P. M.	4 P. M. to 12 M
"	J. Sudderth	8 A.M. to 4 P. M.	4 P. M. to 12 M
"	S. R. Journey	7:30 A. M. to 4 P. M.	4 P. M. to 12 M
4/12/55	W. R. Martinson	4 P. M. to 12 M	7:30 A. M. to 4 P. M.
"	L. A. Darnell	12 M to 8 A. M.	8 A. M. to 4 P. M.
"	D. D. Strachan	7:30 A. M. to 4 P. M.	4 P. M. to 12 M
"	S. R. Journey	7:30 A. M. to 4 P. M.	4 P. M. to 12 M
"	J. Sudderth	8 A.M. to 4 P. M.	4 P. M. to 12 M
4/13/55	L. A. Darnell	12 M to 8 A. M.	8 A. M. to 4 P. M.
"	W. R. Martinson	4 P. M. to 12 M	7:30 A. M. to 4 P. M.
"	S. R. Journey	7:30 A. M. to 4 P. M.	4 P. M. to 12 M
"	D. D. Strachan	7:30 A. M. to 4 P. M.	4 P. M. to 12 M
"	J. Sudderth	8 A. M. to 4 P. M.	4 P. M. to 12 M

NOTE: In order to determine the proper claimants, after April 13, 1955, a joint check must be made of the Carrier's records.

EMPLOYES' STATEMENT OF FACTS: Prior to April 1, 1955, separate cabooses were assigned to each train crew in through freight service operating on the Carrier's third subdivision covering the territory Oroville Yard, Mile Post 203, to Portola, Mile Post 321, a distance of 118 miles.

Effective April 1, 1955, the Carrier pooled the cabooses in through freight service to operate between Oroville, California and Salt Lake City, Utah, and eliminated the assignment of a certain caboose to each crew.

Supplies for cabooses, both prior to and subsequent to April 1, 1955, were furnished from supplies in the Store Department at Oroville for cabooses departing from that point.

2. no change has occurred in the function performed by Store Department employes who issue materials to the using party;

3. the fact that the Organization claims identical work for employes in two different seniority districts casts serious doubt on the validity of both claims.

All of the above has been presented to the Employes.

(Exhibits not reproduced.)

OPINION OF BOARD: The six employes named in the above statement of claim originally filed individual timeslips for the period of April 7 through April 13 or 15, 1955 but after denial by Carrier's General Store keeper, the claims were consolidated as a single continuing claim which was further progressed on the property. Appeal to the Carrier's highest officer designated to handle such matters was made by the Organization's General Chairman in his letter dated November 8, 1955. The Carrier officer involved (W. K. Tussey, Assistant to General Manager—Labor Relations) acknowledged receipt of this appeal by written reply dated November 15, 1955. The claim was discussed in conference on December 13, 1955.

Under date of February 7, 1956 the General Chairman wrote Carrier officer Tussey advising that no decision had been received on the claim and requesting compliance with Article V, Section 1(a) of the August 21, 1954 Agreement by having the claim "allowed and the violation herein complained of corrected . . . ," inasmuch as 90 days had elapsed since the claim was appealed to the Assistant General Manager—Labor Relations. The latter replied on February 15, 1956 that a decision dated December 29, 1955 had been mailed to the General Chairman, according to the Carrier's records, on December 30, 1955. Carrier officer Tussey attached to his February 15 communication a copy of a denial decision dated December 29 and stated he could only surmise that the original letter was lost in the mail. The General Chairman replied on April 4, 1956 that the letter said to have been mailed on December 30 was never received, and again requested allowance of the claim.

The Carrier having continued in its refusal to grant the claim, the Organization has appealed the matter to the Board, both on the cut-off rule in Article V, Section 1(a) of the August 21, 1954 Agreement (to which both parties are signatory) and on the merits of the dispute.

In argument before the Board the Carrier contends the claim is fatally defective because it represents a split cause of action. It is urged that in Docket CL-8901 the Organization laid claim to the same work and alleged the same Agreement violation on the substantive aspect which it is asserting here.

Docket CL-8901 involved a claim arising at another point on the property which was initiated shortly after the submission of the individual timeslips that resulted in the instant dispute. Due to difference in the speed of progression of the two cases, the claim arising at the other point reached the Board before the subject claim, and thus received a lower docket number.

We note that in February 1960 the parties jointly requested withdrawal of Docket CL-8901 from this Board for the purpose of referral to a Special Board of Adjustment. Pursuant to this request we dismissed that case by Award 9288 issued in March 1960. Thus it no longer can be argued that this Board is confronted with duplicate claims filed by the same party. If it be

urged that duplicated claims are being pressed before separate tribunals, we must observe that the Carrier voluntarily participated in bringing about such a result. We conclude that this procedural objection of the Carrier must be rejected.

Article V, Section 1 places correlative obligations upon the parties with respect to the progression of claims. Once a claim is properly filed, the Carrier has the responsibility for making a timely denial thereof, if it is to be denied. The Organization bears the obligation of making a timely appeal from the denial if it desires further progression of the claim. When either party is charged with failure to discharge the responsibility placed upon it by the Agreement in this regard, that party has the burden of proving it properly met its responsibility. The Carrier cannot be expected to prove it failed to receive a claim or an appeal. Likewise, the Organization cannot fairly be charged with the obligation to establish that it did not receive a claim denial.

In the instant case the Carrier has not presented proof that a denial letter was mailed on or about December 30, 1955 or at any other time within the prescribed time limit. Of course the best (although not the only) proof of notice to the Organization via the mails would be the documentation obtainable by use of certified or registered mail, return receipt requested. By such means the Carrier would have evidence that the denial letter was in fact mailed and further would be advised that delivery actually was made to the addressee as of a given date. If the receipt certifying delivery is not returned to the Carrier within the usual time, inquiry can be made with reasonable dispatch or other corrective action can be taken, instead of assuming that the silence of the other party means it has received the notice through the mails.

Since the Carrier has not shown in this record that timely notice of appeal denial was given the Organization by mail or otherwise, the language of Article V, Section 1(a)—which is made applicable by the following subparagraph (c)—plainly requires the claim to be "allowed as presented." The governing language of the rule precludes giving any consideration to the merits of this claim under the confronting circumstances. We therefore make no comment concerning whether the substantive aspect of this dispute is meritorious.

FINDINGS: The Third Division of the Adjustment Board, upon the whole record and all the evidence, finds and holds:

That the parties waived oral hearing;

That the Carrier and the Employes involved in this dispute are respectively Carrier and Employes within the meaning of the Railway Labor Act, as approved June 21, 1934;

That this Division of the Adjustment Board has jurisdiction over the dispute involved herein; and

That the Agreement was violated.

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 13th day of November 1961.

DISSENT TO AWARD NO. 10173 — DOCKET CL-9438

The majority in its Award in this case allows the claim as presented on the basis of an alleged violation of the Time Limit provisions of Article V, Section 1(a) of the August 21, 1954 Agreement. The record discloses a contention by the Carrier that the highest officer designated to handle labor matters prepared and mailed a timely denial of the claim to the General Chairman. The Organization on the other hand, contends the General Chairman never received the Carrier's denial letter.

Faced with these conflicting contentions, the majority has seen fit to believe the Organization and to disbelieve the Carrier though the Carrier furnished the Organization, when later challenged on the matter, with a carbon copy of its letter of timely denial. The Organization's contention of non-receipt is supported by nothing but assertion.

The majority failed to approach this conflict in the manner correctly set forth in **Second Division Award No. 3541** wherein Referee Mortimer Stone said, when faced with the same problem:

> "This presumption being that both parties are telling the truth, we find that carrier gave timely notices of disallowance of claim as required by the Time Limit Rule and that the local chairman failed to receive them, so neither is in default under the rule."

If both parties are to be believed until evidence warranting disbelief is uncovered, then a proper finding results. The majority in Award No. 10173 did not use this correct basic premise, but rather elected to believe the Organization's contention and reject that of the Carrier though no evidence appears in the record to justify the rejection. The result is manifestly unfair and accords preference where none is warranted or proper.

Award No. 10173 is further in error in its rejection of Carrier's contention with regard to this claim involving a split cause of action. The docket here, and Docket CL-8901 involve the identical issue but the latter one, as admitted by the majority, though initiated subsequently, progressed more rapidly and received a lower docket number. The parties by mutual agreement in February, 1960 withdrew Docket CL-8901 from the Third Division for referral to a Special Board of Adjustment. The majority concludes that the Carrier by participating in the withdrawal of the earlier docket, thereby waived any argument it might have as to there being a split cause of action since this **Board** is not confronted with duplicate claims filed by the same party. What the majority overlooks is that the Carrire is faced with the same claim in two tribunals having equal power under the Railway Labor Act to render binding awards on the issue. The dividing of the cause of action is even more damaging under such circumstances.

The majority further endeavors to prescribe the best method for obtaining proof as to compliance with Time Limit rules. It is not a proper function of this Board to prescribe procedure to be used by the parties. Our function is to interpret the pertinent rules of agreements and that alone. In this respect the Award is thus further in error.

Award No. 10173 is additionally erroneous in that it disregards the language of the claim as presented, viz:

> "(b) Carrier violated the provisions of Article V, Section 1(a) of the August 21, 1954 Agreement when the decision denying the

claim here **was not mailed** to the General Chairman within the sixty days allowed for making such decision." (Emphasis ours.)

The burden of proving its claim properly rests with the Claimant and thus it was incumbent on it to prove that the Carrier had not mailed its denial decision, something the Claimant has not done here and could not do. The Organization is a free agent when phrasing its claims, and if it elects to assume a burden it cannot meet in the statement of its claim, it is not thereby relieved of its burden of proof. The Board must take the claim as it is submitted to it.

In any event, the Award having been based solely upon Carrier's violation of Article V, Section 1, and the penalty therein provided, which was the automatic allowance of the claim without regard for the merits of the other violations claimed, the allowance became final at the termination of the sixty-day period.

The violation of Article V 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 Article V as adopted by the parties, the claim was then automatically allowable with reference to the period there 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' agreement.

For these reasons, we dissent to Award No. 10173.

/s/ D. S. Dugan
/s/ P. C. Carter
/s/ R. A. Carroll
/s/ W. H. Castle
/s/ T. F. Strunck

LABOR MEMBER'S ANSWER TO CARRIER MEMBER'S DISSENT TO AWARD NO. 10173, DOCKET NO. CL-9438

Here again, we have Carrier Members attempting to reduce the force and effect of an Award by the introduction of a new issue that was not a part of the "dispute" between the parties on the property, thereby violating their obligation under the Railway Labor Act (45 U.S.C.A. 153).

The Act provides that disputes over which the Board has jurisdiction "shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes" before being referred by petition "to the appropriate division of the Adjustment Board with a full **statement of the facts and all supporting data bearing upon the dispute**" (Section 3. First (i)). (Emphasis ours.)

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, * * *." (See Award 9578)

The Supreme Court in the Slocum case (339 U.S. 239), Mr. Justice Black declared:

"The Act thus represents a considered effort on the part of Congress to provide effective and desirable administrative remedies for adjustment of railroad-employe disputes growing out of the interpretation of existing agreements. The Adjustment Board is well equipped to exercise its congressionally imposed functions. Its members understand railroad problems and speak the railroad jargon. Long and varied experiences have added to the Board's initial qualifications. Precedents established by it, while not necessarily binding, provide opportunities for a desirable degree of uniformity in the interpretation of agreements throughout the nation's railway system * * *."

The Railway Labor Act is primarily an instrument of industrial government for railroading by the industry itself, through the concentrated agencies of railroad executives and the railroad unions (Penn. RR v. Rychlik, 77 S ct. 421). As a fundamental charter for self-government by the railroad industry, the Act must be construed and applied in harmony with the underlying purposes of the Constitution of the United States and the principles of justice and fair play.

In this scheme of industrial self-government, the Adjustment Board becomes the equivalent of an appellant tribunal for the review of disputes heard and decided in the industrial process. On this basis, **the administrative officers of the railroads and the Unions are no less bound to observe the rule of law and the constitutional commands of fair play at the critical local levels than are the officials who sit on the Adjustment Board.** All the officers of this industrial government, from the highest to the lowest levels, are bound to function pursuant to due process of law. (See Professor Joseph Lazar's "Due Process On The Railroads"). Mr. Justice Miller in United States v. Lee, U.S. 196, stated:

"No man in this country is so high that he is above the law. No officer of the law may set aside that law at defiance with impunity. All officers of the Government, from the highest to the lowest, are creatures of the law, and are bound to obey it. It is the only supreme power in our system of government, **and every man who by accepting office participates in its functions is only the more strongly bound to submit to that supremacy, and to observe the limitations which it imposes upon the exercise of the authority which it gives.**" (Emphasis ours.)

I submit that the representatives of the parties and Members of the Adjustment Board are creatures of the Railway Labor Act, and in the performance of their duties and obligations under the Act, must "observe the limitations which it imposes upon the exercise of the authority which it gives."

I will not only show that the Dissenters have exceeded their authority by the introduction of an issue that was not in dispute between the parties, thereby attempting to reduce the amount of damages due under Award 10173, but I will also show their arguments are not based on the facts of record, nor on the clear and specific language of Article V, August 21, 1954 Agreement.

The Dissenters admit that the Award allows the "claim as presented" in accordance with the Time Limit provisions of Article V, Section 1 (a), and then attempts to change the Award with the preposterous assertions that a "violation of Article V was not a continuing violation. It occurred just once, at the close of the sixtieth day after the appeal" and under the "self-executing provisions of Article V as adopted by the parties, the claim was then automatically allowable" and this "Board cannot set this allowance aside and make a new one as the date of the Award, or with penalties increased to cover a further period." Not only was this contention never made by the Carrier prior or subsequent to submission of the dispute to the Board, it was not presented to the Referee when the dispute was argued before the Board by Carrier Member Dugan. Therefore, it is clear that he is attempting to evade the force and effect of the Award by creating a new dispute in his Dissent. I will first show that he has exceeded his authority by failing to stay within the limitations imposed upon him by the Railway Labor Act and Circular No. 1, the Board's Rules of Procedure and second, I will show that such contentions are unsupportable under Article V of the August 21, 1954 Agreement.

In Award 6657, Referee Wyckoff ruled:

> "This claim started and ended on the property as a dispute on a single issue of fact; and both parties still recognize it fundamentally as such, although the submissions have fanned out into a variety of other questions which, so far as we can ascertain from the record, were neither presented nor discussed on the property. Such being the case, they are not properly before us."

In Award 5469, Referee Carter held:

> "* * *. This question was not raised on the property, and cannot be raised before this Board for the first time. Parties to disputes before this Board will not be permitted to mend their holds after they reach the Board on appeal, and thereby create variances in the issues from what they were on the property."

Award 7850 involved a question of interpreting the same article and section that was before the Board here. Referee Lynch ruled:

> "However, because Carrier did not raise the issue while the dispute was being handled on the property, it cannot do so now."

In Award 8484, Referee Vokoun held:

> "From the above opinions of the Board it is apparent that the Board has diligently protected the parties, both Carrier and Organization, in the presentation of their cases on appeal and limiting the defenses interposed so that there can be no enlargement — or in lay language, no second look after the case is concluded on the property."

In Award 8674, Referee Vokoun also held:

> "* * *. In this instance the record discloses no mention whatsoever of the defense or claim that any monetary penalty, if a violation be found, should be refused because of the failure to expeditiously prosecute the claim. This was submitted to the Board for the first time by the Carrier representative on the Board in his presentation to the Board. The Board must, under the rules established by the Board in numerous awards, therefore disregard this as a defense and not consider it herein."

This principle is so well established by numerous Awards of the Board, the clear requirements of the Railway Labor Act and Circular No. 1, the Board's Rules of Procedure, that the citation of other authorities are unnecessary. It should be noted, however, that Respondent Carrier and Carrier Member Dugan did not disagree with the interpretation placed upon Article V, Section 1(a), under the confronting circumstances by the Employes' Representative prior to the adoption of Award 10173 on November 13, 1961. In fact, the contention that Carrier's liability under this Article is cut-off at the end of the 60-day period was not raised until the Carrier Members' Dissent. Therefore, it is clear that both the Carrier and its Representative on the Board have acquiesced in the interpretation placed thereon by Petitioner and the Board and are thereby estopped from now contending to the contrary. That there is no merit to the position belatedly taken by the Dissenters is manifest from the clear and unequivocal terms of the Agreement.

That the Dissenters are fully cognizant of the limitations placed upon them by the Railway Labor Act and Circular No. 1, is self-evident from their Dissents to Awards 8299 and 9988. In their "Dissent" to the latter, they state:

> "* * *. For the Board to have accepted, considered and relied upon any 'evidence' at the referee hearing which did not appear in the written record was flatly contrary to this Division's rules and regulations, * * *.
>
> * * *
>
> Moreover, even with the initial hearing before the Third Division, the Division's Executive Secretary in his notice of hearing advised the parties:
>
> > 'In consideration therewith you are hereby advised that the Third Division is not disposed to admit known evidence at an oral hearing which has not theretofore been presented for consideration by the interested parties during negotiations between them in their undertaking to adjust the dispute without petition to the Adjustment Board.' (Letter dated April 9, 1956)
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> Such instructions are, of course, premised on the Board's original regulations issued as Circular No. 1, October 10, 1034:
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> * * *
>
> (These regulations are codified in the Code of Federal Regulations. Title 29, Chapter III, Part 301.)

All familiar with the Board's procedure are aware of the Board's rule. Indeed, at the start of the hearing which was held in this docket with the Referee present, the Chairman of the Division admonished both parties of the Board's rule in this regard. This was reiterated during the meeting.

The Board, having provided that no evidence will be presented or considered at hearings, must adhere to its own rules. While this situation is not commonplace, an Agency violating its own rules has been considered and condemned by the Courts. In **Sangamon Valley Television Corp. v. United States** (1959), USCA-DC, 269 F. 2d 221, the Court of Appeals held —

'Agency action that substantially and prejudicially violates the agency's rules cannot stand.'

This case involved an application for a television license. The Federal Communications Commission had set a time limit on the filing of written statements favoring or opposing the application and provided that no additional statements would be accepted thereafter. Contrary to such rule, the applicant for the television channel filed ex parte statements and discussed the application with the Commissioners individually after the time the Agency had set for the filing of written statements had passed. * * * See also, **Service v. Dulles** (1957), 354 U.S. 363, 388, where the Court said:

'While it is of course true that under the McCarran Rider the Secretary was not obligated to impose upon himself these more rigorous substantive and procedural standards, neither was he prohibited from doing so, as we have already held, and having done so he could not, so long as the Regulations remained unchanged, proceed without regard to them.'"

The docket in the confronting dispute closed on November 25, 1957, and under the adopted policy of this Division, neither party could have added anything further to that contained in the record. If the parties to the dispute could not add anything to their respective positions, the Dissenters cannot at this late date do so.

In Award 6024 (Parker), it was ruled that the Board cannot "supply Carrier with a defense which it did not see fit to make itself." Award 1524 (Richard) recognized that the purposes for which the Act created the Board was to remove "causes of stress". It is crystal clear that the purposes and intent of Congress in creaitng the Adjustment Board would be emasculated if the Members thereof could create dispute and thereby relieve the involved parties of their responsibilities under the Act.

The scales of justice are maintained in balance by a sensitive mechanism, adjusted with such nicety that they record the minutest evidentiary weight. But if a heavy hand of influence can be laid upon one of the scales, to what purpose are laws passed to protect the ancient precepts of fair play? The resulting cynicism is an invitation to self-help.

In Award 5077 (Coffey), it was held:

"The Board's jurisdiction stems from an Act of Congress which places a duty on the parties to exert every reasonable effort to make and maintain Agreements and to settle all disputes whether arising out of such Agreements or otherwise. This they cannot do if outside influences go to work too soon and are injected into the controversy prematurely. * * *."

The Dissenters purpose here is all too clear when viewed in the light of similar disputes that were decided by the Division in Awards 9578 and 9579. There the same violation occurred, the Board finding: "That the Agreement has been violated" and stating in the Award that: "Claim sustained." Although the "Award" and "Claim" was clear and specific the Carrier Members created a phoney dispute and prevailed upon the Reading Railroad to request an "interpretation" thereof in the light of their "Dissent" thereto. This un-

authorized action on the Carrier Member's part clearly exceeded his authority under the Act as previously shown and also, violated Section 3. First (m), providing:

> "* * * In case a dispute arises involving an interpretation of the award the division of the Board upon request of either party shall interpret the award in the light of the dispute."

There was no dispute between the parties as to the proper interpretation of Award 9578 and 9779, Carrier admitted this when it stated in its so-called request for an interpretation that: "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." In other words, Carrier was there arguing for a re-opening and rehearing of the disputes on issues that were raised by the Dissenters, in flagrant violation of the Railway Labor Act. The Supreme Court in the Chicago River and Indiana Railroad case, 354 U.S. 30, held that: "Congress has set up a tribunal to handle minor disputes which have not been resolved by the parties themselves. Awards of this Board are 'final and binding upon both parties.'* * *."

Therefore, it is obvious that an "interpretation" rendered by Members and a referee outside the limitations placed upon them by the Act, would have no legal standing in law or equity. It is an abuse of sound discretion to attempt to change the force and effect of an Award on the basis of a dissent, particularly in view of the fact that such dissent is not recognized as a part of the Award by the Act. The Comptroller General of the United States in a letter to the Adjustment Board, in 1950 ruled:

> "45 U.S.C.A. 153 (m) provides:
>
> > '(m) The Awards of the several Divisions of the Adjustment Board shall be stated in writing. A copy of the Awards shall be furnished to the respective parties to the controversy, and the Awards shall be final and binding upon both parties to the dispute, * * *.'
>
> "In view of the above statutory provision making the Award final and binding upon the involved parties, the dissenting and supporting opinions rendered after the Award was made by the Board and prior to any request for rehearing could not in any way alter the final and conclusive effect of the Award. * * *. It is difficult to perceive how a dissenting opinion and supporting opinion could, in the light of the foregoing code provisions, in anywise be considered as constituting an integral part of the Award."

The confronting record here shows that the Petitioning Organization's General Chairman placed in issue Carrier's violation of Article V, Section 1 (a) and requested that the claim be allowed, as of February 7, 1956. Carrier merely asserted that it had mailed the letter within the specified time limits and stated "your request that the instant claim be allowed is not granted." Having refused to comply with Section 1 (a) by allowing the claim "as presented", the Carrier is still in violation of that Section and the violation is a continuing one. The pertinent provisions of Article V, reads as follows:

> Section 1 (a): "* * *. Should any such claim or grievance be disallowed, the Carrier shall, within 60 days from the date same is

filed, **notify** whoever filed the claim or grievance (the employe or his representative) in writing of the reasons for such disallowance. If not so notified, the claim or grievance shall be allowed as **presented**, * * *." (Emphasis ours.)

The Employes' claim reads, in part, that:

"This claim is to cover each day on which the violation continues to occur."

Therefore, it is crystal clear that the claim is a continuing one, that Carrier has refused to allow it "as presented" in violation of Section 1 (a), Article V, August 21, 1954 Agreement. As a condition precedent to the elimination of the violation under the confronting circumstances, the Carrier must allow the claim as presented under the clear and specific requirements of this Section. The violation continues to run until full compliance has been made. Any contentions to the contrary are absurd and far-fetched. This conclusion is inescapable when viewed in the light of Section 3 of the same Article, reading:

"3. A claim may be filed at any time for an alleged continuing violation of any agreement and all rights of the Claimant or Claimants involved thereby shall under this rule, be fully protected by the filing of one claim or grievance based thereon as **long as such alleged violation**, if found to be such, **continues**." (Emphasis ours.)

There is as much merit to the Dissenters' contention that the violation of Article V is not a continuing violation as "it occurred only once, at the close of the sixtieth day after appeal", as would a similar assertion that the removal of work, in violation of the Scope Rule of an Agreement, is not a continuing violation as it occurs only once. Anyone familiar with the fundamentals of collective agreements and awards of this Board, will immediately recognize the fallacy of this specious argument. The violation continues up to the time the violation is corrected in both cases. However, we are here confronted with a rule that requires, upon default, that the Employes' claim "shall be allowed as presented". Not only do we have a continuing claim, but the agreement requires that it "be allowed as presented", consequently, the requirement will not be satisfied until this mandatory provision has been met. Up to the present time Carrier has not complied with the provision by allowing the claim.

It should be remembered that Carrier could have reduced its liability in this dispute shortly after February 7, 1956, when the General Chairman brought the violation to its attention and requested that it be allowed as presented. However, Carrier preferred to stand on the assumption that the posting of the letter constituted "notice" required by Section 1 (a). It proceeded at its peril and has no one to blame but itself for the accumulation of damages since that date. In Award 7713 (Smith), involving a similar dispute, the Board sustained the Employes' claim and stated:

"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."

In Award 10075 (Webster) the Board held that: "it behooves the Carrier to mitigate its own damages." Award 6789 (Shake) involved a default by Carrier under a time limit rule, the Board said:

"The situation before us bears a striking similarity to that which results when a defendant defaults in an action at law. In such a proceeding a subsequent hearing to assess the amount of recovery is not required, in the absence of a statute to the contrary, where the action is for a liquidated sum or **the demand is ascertainable by computation from facts of record.** * * *." (Emphasis ours.)

There are a long line of Awards on this and other Divisions of the Board that fully sustains the decision reached in Award 10173. It would only prolong an already long discussion to cite them here.

An analysis of the first and second paragraphs of the Dissent will show that the Dissenters have gone far-afield in an endeavor to bolster their erroneous assertion that: "the majority has seen fit to believe the Organization and to disbelieve the Carrier." There was no conflict between the parties as to whether the Carrier posted the letter of denial, or whether the Organization received such letter. The Carrier claimed that the letter was mailed and the General Chairman denied that he ever received such letter. Neither were in a position to refute the other's contention.

The Board properly held, however, that Carrier failed to give the General Chairman timely notice by mail or otherwise. That Section 1(a), Article V, places the burden upon the Carrier to "notify" the other party of the disallowance of the claim within 60 days. The posting of notice in the U.S. mail does not meet the requirements of notification. It is indeed surprising how much difficulty the Carrier and Dissenters appear to have with the meaning of the word "notify" when any schoolboy can secure the proper meaning from a dictionary.

In Second Division Award 3690 (Johnson), the Board held:

"* * *. Webster's New Collegiate Dictionary defines the verb 'notify' as meaning 'to give notice to; to inform'. One is not informed, —notice is not given to him,—until he receives it. * * *."

It is fundamental that a person is not "notified" until he receives the communication. The posting in the U.S. Mail does not meet the requirements of due notice provided in Section 1(a), of Article V, as the Award correctly holds. See Third Division Award 9578 and Second Division Awards 3109, 3656 and 3690, supra. It is also obvious that the burden is upon the Carrier to "notify" the other party and where there is a question as to whether such notice was given, the burden would be upon it to prove the facts constituting its defense. See Awards 4538, 5136, 5643, 10229. Carrier offered no proof that it even mailed the letter, it merely asserted that it did so.

The Dissenters rely on Second Division Award 3541 (Stone), which is clearly contrary to Second Division Awards 3109, 3656, 3690, supra. Whether both parties are believed or not, would not relieve the Carrier of its obligation to "notify" the Petitioner under Section 1(a) of the disallowance of claim. Carrier failed to meet the burden of proof necessary to overcome the General Chairman's claim that he did not receive a letter of denial. In Award 1443 (McAllister) this Division held: "We are not inclined to conclude that the representatives of employes are guilty of fraud or prevarication merely upon such a claim of non-receipt."

A review of Award 9288, Docket CL-8901, will show that the Employes' claim there covers a different location, different Claimants and different issues than those posed in confronting Award 10173, Docket CL-9438. In fact, there is no showing in the former that a violation of Section 1 (a), Article V, occurred in that dispute. Consequently, there is no merit to Carrier's and Dissenters' contention that the Employes "split their cause of action." You can imagine the howls of protests and objections that would have come from the Respondent and Dissenters had the Petitioners combined the two claims and alleged that Carrier having violated Article V in Docket CL-9438, it must allow both as presented. However, this objection has previously been rejected by the Board in Awards 5659 (Wyckoff) and 6667 (Robertson). Award 5659 involved the Dispatchers and the same Carrier here. The Board said:

> "First. The Carrier's main reliance is upon legal doctrine with respect to 'splitting causes of action' and upon Award 1215. This Board is not a court of law where procedural traps are sometimes set for the unwary. But even in a court of law, the alignment of parties here is such that the doctrine is inapplicable."

The Dissenters complaint that "It is not a proper function of this Board to prescribe procedures to be used by the parties" is completely out of line when viewed in the light of the fact that a procedural rule was before it for interpretation and also the clear mandate of the Act that the Board eliminate "causes of stress" between the parties. Award 1524 supra.

From what has heretofore been said, makes it obvious that there is no merit to the Dissenter's argument. That the Award clearly disposed of the dispute submitted to it in clear and unambiguous language, which cannot be changed by the Dissenters.

I recommend that the Dissenters confine their activities to those properly coming within their authority, as was pointed out in Award 5078 (Coffey), when the Board held: "The Board's primary function is to settle disputes involving fundamental differences between parties to an agreement, leaving to them the details of applying its Awards."

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

CARRIER MEMBERS' REPLY TO LABOR MEMBER'S ANSWER TO DISSENT TO AWARD 10173, DOCKET CL-9438

Article V, Section 1(a) has been at issue in this dispute from its inception on the property and, therefore, the question of how it applies in this case is not a new issue raised in the Dissent as the Labor Member's Answer would have use believe.

/s/ D. S. Dugan

/s/ P. C. Carter

/s/ R. A. Carroll

/s/ W. H. Castle

/s/ T. F. Strunck

LABOR MEMBER'S ANSWER TO CARRIER MEMBER'S REPLY TO LABOR MEMBER'S ANSWER TO DISSENT TO AWARD 10173, DOCKET CL-9438

Through a subterfuge, Carrier Members are attempting to evade the issue. The question is not whether Article V, Section 1(a) was in dispute, but whether the point raised in their Dissent was ever within the issue considered by the parties on the property and thereby constituted a part of the dispute submitted to the Board? The record conclusively shows that it was not.

The point, raised by the Dissenters, not having been raised on the property, the Board has no jurisdiction to consider it, even if it had merit, which it hasn't. Bouvier's Law Dictionary defines jurisdiction, here pertinent, as: "Third: The point decided upon must be, in substance and effect, within the issue."

/s/ J. B. Haines
Labor Member