Award No. 10635
Docket No. SG-9668

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

D. E. LaBelle, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF RAILROAD SIGNALMEN OF AMERICA

UNION PACIFIC RAILROAD COMPANY

STATEMENT OF CLAIM: Claim of the General Committee of the Brotherhood of Railroad Signalmen of America on the Union Pacific Railroad Company that:

(a) The Carrier violated the current Signalmen's Agreement, particularly Rules 7, 9(d), 9(e), 10(a), and 31(c) when it required Signalman P. E. Peffer to leave his headquarters and relieve Interlocking Repairman at Portland and East Portland, Oregon.

(b) Signalman P. E. Peffer, whose headquarters is in outfit cars, Signal Gang No. 782, with assigned working hours of 7:30 A.M. to 4:00 P. M. Saturday and Sunday as assigned rest days, be paid 96 hours at the pro rata rate for July 7, 8, 11, 12, 13, 14, 15, 18, 19, 20, 21, and 22, 1955, that he was denied the right to work his own assigned hours; and that Signalman Peffer be paid at the overtime rate for all hours he performed service outside of his own assigned hours for July 8, 13, 14, 15, 20, 21, and 22, 1955, and 8 hours at overtime rate for service performed on his assigned rest days, Saturdays and Sundays, July 9, 10, 16, 17, 23, and 24, 1955.

EMPLOYES' STATEMENT OF FACTS: On the Oregon Division of its Northwestern District, the Carrier has what is known as the East Portland Interlocking Plant, which includes all of the interlocking plant on the east side of the Willamette River.

The Carrier has two Interlocking Repairman positions with headquarters at the East Portland Interlocking Plant. The Interlocking Repairman assigned to what is known as the first trick position has assigned hours of 7:00 A. M. to 4:00 P. M., Monday through Friday, with Saturday and Sunday as rest days. The Interlocking Repairman assigned to what is known as the second trick position has assigned hours of 4:00 P. M. to 12:00 Midnight, on Wednesday, Thursday, and Friday, and 7:00 A. M. to 4:00 P. M., on Saturday and Sunday, which are the rest days of the first trick Interlocking Repairman. There is no third trick Interlocking Repairman's position in existence at the East Portland Interlocking Plant.

The situation here involved in clearly covered by the provisions of Rule 16 (Change of Shift), which reads as follows:

> "(a) **Employes changed from one shift to another will be paid for the first shift of each change at time and one-half rate,** except where change is made in the exercise of seniority or for the convenience of employes or to employes working more than one shift or regular relief assignments. (Emphasis supplied)
>
> "(b) A Signal Department employe used to relieve an employe of another department will be paid at the overtime rate for all time worked outside the hours of his regular assignment.
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> "(c) Payment of time and one-half, as provided in this rule, will not be considered as overtime in the application of Rule (absorption of overtime)."

The emphasized portion of the above rule gives Management the right to change employes from one shift to another and provides the penalty for making such changes. This Rule was complied with in the instant case. The Organization has not challenged the applicability of Rule 16. Applying the provisions of this Rule, there is no factual basis to the alleged rule violations claimed by the Organization.

The Carrier's action is also in accordance with, and supported by, Sections 10(a) and 12(a) of the Vacation Agreement, which were quoted in the Statement of Facts.

The claim should be denied.

(Exhibits not reproduced.)

OPINION OF BOARD: There is no dispute that Claimant, P. E. Peffer held a regular assignment as Signalman in signalman gang No. 782, with hours 7:30 A. M. to 4:00 P. M., Monday through Friday with Saturday and Sunday rest days. This position was obtained by Claimant as the senior employe entitled thereto under the provisions of the Agreement between the parties.

On the Oregon Division of its Northwestern District, Carrier had what was known as the East Portland Interlocking Plant, which included all of the interlocking plants on the east side of Williamette River.

> "The Carrier has two Interlocking Repairman positions with headquarters at the East Portland Interlocking Plant. The Interlocking Repairman assigned to what is known as the first trick position has assigned hours of 7:00 A.M. to 4:00 P.M., Monday through Friday, with Saturday and Sunday as rest days. The Interlocking Repairman assigned to what is known as the second trick position has assigned hours of 4:00 P.M. to 12:00 Midnight, on Wednesday, Thursday, and Friday, and 7:00 A.M. to 4:00 P.M., on Saturday and Sunday, which are the rest days of the first trick Interlocking Repairman. There is no third trick Interlocking Repairman's position in existence at the East Portland Interlocking Plant.
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> "Claimant P. E. Peffer holds a regularly assigned Signalman's position in this Carrier's Signal Gang No. 782, with assigned work-

ing hours of 7:30 A.M. to 4:00 P.M., Monday through Friday, with Saturday and Sunday as rest days.

"On Saturday, July 2, and Sunday, July 3, 1955, the assigned rest days of the claimant, the Carrier assigned the claimant to work with Interlocking Repairman at East Portland Interlocking Plant to break in on the Interlocking Plant so that he would be familiar with the duties of the Interlocking Repairman and the interlocking facilities at the plant."

On Wednesday, July 6, 1955, Claimant worked his regular position of signalman, in signal gang No. 782, from 7:30 A. M. to 4:00 P. M. for which he was paid his regular straight time rate of pay and from 4:00 P. M. to midnight of that day he worked the position of second trick Interlocking Repairman at East Portland Interlocking Plant, for which he was paid at the time and one-half rate.

It is the claim of Claimant that he was required by Carrier to suspend work on his regular assignment as Signalman on signal gang No. 782 starting July 6, 1955 and fill the position of Second Trick Interlocking Repairman at East Portland Interlocking Plant; with hours and assignments assigned to that position. This assignment was made by Carrier to fill the position of Second Trick Interlocking Repairman who was on vacation from July 6 through July 24, 1955.

The claim as initially presented on the property included claim for 8 hours at the overtime rate for each of Claimant's rest days worked of his signalman's assignment, viz:, July 9, 10, 16, 17, 23 and 24. Adjustment of this portion of the claim was made by Carrier and is no longer to be considered.

The claim of Claimant still before us is his claim for straight time rate for the regularly assigned 8 hours not permitted to work on July 7, 8, 11, 12, 13, 14, 15, 18, 19, 20, 21 and 22, a total of 96 hours; and the difference between the 8 hours straight time received as Interlocking Repairman and 8 hours at the overtime rate for July 8, 13, 14, 15, 20, 21 and 22, his claim being that he is entitled to such overtime rate, because the work was performed outside of his own assigned hours as such signalman position which he occupied.

It is the claim of Petitioner that the Carrier violated the current Signalmen's Agreement, particularly Rule 7, 9(d) and 9(e), 10(a) and 13(c) when it required Signalman P. E. Peffer to leave his headquarters and relieve Interlocking Repairman at Portland and East Portland, Oregon.

"Rule 7. Absorbing Overtime. Employes will not be required to suspend work during assigned hours to absorb overtime.

* * * * *

"Rule 9(d) Employes worked more than five days in a work week shall be paid one and one-half times the basic straight time rate for work on the sixth and seventh days of their work week, except where such work is performed by an employe due to moving from one assignment to another or to or from a furloughed list, or

where days off are being accumulated under paragraph (g) of Rule 3.

* * * * *

"Rule 9(e) Employes used in place of regular employes, or in place of regular incumbents of relief positions, will be paid at the rate of time and one-half for work performed on his (the relieving employe's) rest days. Unassigned employes who are not assigned to a regular work period who are called for special or emergency service will be paid the overtime rate for all time worked outside of the hours of regular assignment of the regular assigned employes with whom used, or the regular hours of the employe regularly assigned to the section on which used.

* * * * *

"Rule 10. Overtime (a) Time worked preceding or following and continuous with a regularly assigned eight hour work period shall be computed on actual minute basis and paid for at time and one-half rates, with double time computed on actual minute basis after sixteen continuous hours of work in any twenty-four hour period, except that time worked during regular assigned work period will be paid for at the straight time rate. In the application of his paragraph (a) to new employes temporarily brought into the service in emergencies, the starting time of such employes will be considered as of the time that they commenced work or are required to report.

* * * * *

"Rule 31(c) Positions or vacancies of thirty calendar days or less shall be considered temporary and may be filled without bulletining. When filled, the senior furloughed employe, or employe holding an assignment in a lower class on account of force reduction, will be called and used where available, and where not available and a junior employe is used, any senior furloughed employe will upon arrival, and reporting for duty, be permitted to displace the junior employe."

There is no showing in the Record that Claimant Peffer, by reason of his seniority, had any right to perform the work of the interlocking repairman or that Carrier was required by seniority rules to assign him. Awards 5811, 9083.

Carrier agrees in the Record that Claimant Peffer was assigned to fill the position of Second Trick Interlocking Repairman and maintains that Claimant was qualified and accepted this relief work.

Carrier denies that it violated any of the Rules of the Agreement and in its ex parte submission stated, "That what was done in this instance was fully in accordance with the Agreement provisions **as well as the established practice under those provisions.**" (Emphasis supplied) There is nothing in the Record showing this point was raised on the property.

Carrier maintains that its action in this matter is clearly covered by the provisions of Rule 16 (Change of Shift) which reads as follows:

> "RULE 16. Change of Shift. (a) Employes changed from one shift to another will be paid for the first shift of each change at time and one-half rate, except where change is made in the exercise of seniority or for the convenience of employes or to employes working more than one shift of regular relief assignments."

Carrier further maintains that its action was also in accordance with and supported by Sections 10(a) and 12(a) of the Vacation Agreement.

> "10. (a) An employe designated to fill an assignment of another employee on vacation will be paid the rate of such assignment or the rate of his own assignment, whichever is the greater; provided that if the assignment is filled by a regularly assigned vacation relief employee, such employee shall receive the rate of the relief position. If an employee receiving graded rates, based upon length of service and experience, is designated to fill an assignment of another employee in the same occupational classification receiving such graded rates who is on vacation, the rate of the relieving employee will be paid.
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> * * * * *
>
> "12. (a) Except as otherwise provided in this agreement a carrier shall not be required to assume greater expense because of granting a vacation than would be incurred if an employee were not granted a vacation and was paid in lieu therefor under the provision hereof. However, if a relief worker necessarily is put to substantial extra expense over and above that which the regular employee on vacation would incur if he had remained on the job, the relief worker shall be compensated in accordance with existing regular relief rules."

Carrier further maintains that its action in its assignment of Claimant Peffer to the position of Interlocking Repairman at East Portland was justified under Rule 16(a), the Change of Shift Rule.

As we stated in Award 5811, wherein the assignment of certain employes to temporary vacancies, because of vacations, was questioned:

> "We realize fully that in some cases it is difficult to determine whether an employe is working a higher classified position temporarily or whether he is being improperly used on his regular assignment."

What is said in the foregoing quotation poses the question we are to determine here.

We have examined Award 4616 carefully. It involves the interpretation of a similar rule in the Agreement between the Signalmen with the Pennsylvania Railroad. We have carefully examined Article 2, Section 17 of said Agreement with Rule 16(a) the Change of Shift involved here and they are nearly identical.

We are of the opinion that what we are dealing with here is a change of position. Carrier does not claim that Claimant Peffer was selected because of seniority rights that required Carrier to assign him, as was the situation in Award 5811, but because, as Carrier states, "he was qualified and accepted this relief work." The Record indicates that Carrier assigned Claimant on Saturday, July 2 and Sunday, July 3, 1955, (his rest days on his regular assignment) to work with Interlocking Repairman at East Portland Interlocking Repairman to break in on the Interlocking Plant so that he would be familiar with the duties of the Interlocking Repairman and the interlocking facilities at the plant. The Record does not show whether or not Claimant Peffer was the senior signalman of his gang. It is apparent, of course, that Carrier selected him because the position required special qualifications not possessed by every man in his gang.

We are faced with the same question that was the crucial issue in Award 4616, can this action of the Carrier be interpreted to be "A change from one shift to another?" (Rule 16(a)) We doubt it. We think the rule means what it says. We do not think the rule means one employe may be assigned to another employe's position away from the job on which he holds seniority at a different rate of pay to do different work under the guise of a shift change.

We conclude this application of Rule 16(a) to the Claimant herein is a violation of the Agreement.

Carrier raises the objection that Article 12(a) and (b) and Article 30(a) of the Vacation Agreement govern this situation, not the Rules Agreement. We do not agree. This finding is not only sustained by the language of the Vacation Agreement, but also by the interpretations of these particular Articles by Referee Morse. The Vacation Agreement is not effective where it is in conflict with the Rules Agreement, and we hold that in the absence of a negotiated change as provided in Article 13 of said Agreement, we have jurisdiction to determine this claim under the Rules of the Agreement. Awards 2340, 2484, 2537, 2720, 3022, 2795, 4616.

We conclude that Carrier should be required to pay Claimant the equivalent of straight time at his signalman's rate for time he was held away from and did not work his regular position and pro rata or straight time for all of the time he was required to work the Interlocking Repairman position.

Our holding here is necessarily limited to the precise situation presented in this docket. Some mention has been made concerning the handling and practice in other types of situations. In deciding this matter, however, we have not considered any other situations nor the practices which may prevail in those situations.

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 to the extent indicated in Opinion.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 31st day of May 1962.

DISSENT TO AWARD NO. 10635, DOCKET SG-9668

The Board's opinion and the award based thereon are erroneous. On its face, it shows that the Referee either failed to comprehend the issues or decided that it would be easier to ignore them. The Referee has sustained the claim without even attempting to find a violation of an agreement provision or one awarding the penalties sought and granted. The award presents a fine example of the error of blind adherence to a single, erroneous precedent which was shown to be inapplicable. Moreover, this award settled nothing because, by clinging to a tortured misconception of our rules and deliberately ignoring the record, the Board has pretended to decide something wholly unlike the dispute existing on the property. Thus, the award furnishes no precedent or help in future problems.

The record in this docket showed that both this Carrier and this Organization had over the years understood that what was done here was not a violation of any agreement provision. As shown, vacation relief for the interlocking repairman's position at East Portland had since at least 1949 been handled in precisely the same manner as here with no question ever being raised as to the propriety of such handling.

Neither the practice nor the agreements showing the understanding of the parties were in dispute or in issue in the entire handling on the property or before the Board. Notwithstanding this lack of objection or challenge, not to mention the lack of any showing of prejudice to the Organization, the majority gratuitously and in a negative fashion dismisses from its consideration the understanding and practice of the parties with the statement that —

> "There is nothing in the record showing this point (the understandings and practice) was raised on the property." (Tenth paragraph, Opinion).

While the letters which were written in this matter in the handling on the property do not specifically detail the practice or understandings, this is not to say that the understandings or the established practice was "new matter" or that it had not been discussed on the property. Moreover, the two agreements having been made between the parties to the dispute were entirely appropriate to this record even if they had not been specifically

discussed. And the following statement from Carrier's Ex Parte Submission shows that the practice must have been "raised on the property":

> "**In the entire handling on the property,** the Organization failed to demonstrate that the Carrier's action herein violated the Agreement of was **contrary to the practice thereunder.**" (Emphasis Supplied)

The prior practice and agreements were not in any sense "new evidence." The claim here was allegedly based on the Agreement. The prior practice under the Agreement and certainly the agreed upon interpretation of that Agreement are part and parcel of the Agreement and hence of this dispute and should have been considered by the Referee. Apart from any consideration of the so-called "new evidence" problem, it is error for this Board to reject evidence on its own volition and without any objection or challenge to such evidence having been raised.

The Referee must have recognized that the practice and prior understandings compelled a denial award. Of a certainty, the understandings distinguished **Award 4616** (Referee Carmody) from this case. Thus, in order to blindly follow **Award 4616** it was necessary to eliminate the practice and understandings from consideration. And the majority has erroneously done so.

But, apart from any consideration of the soundness of **4616,** and we note in passing that the Referee avoids saying he believes it to be sound, that award is clearly inapplicable in this situation. Here the parties had agreed that the Change of Shift Rule would apply to this situation. Thus, error was compounded upon error and the dispute purportedly decided never even existed.

The opinion of the Referee raises grave doubts that he understood what was actually involved. The Claimant, a signalman, worked in vacation relief in the higher rated position of interlocking repairman although in the same seniority class. There was never any issue between the parties as to this fact. While the parties clearly understood that the Claimant did work temporarily in a higher classified position, apparently the Referee did not.

In paragraph 13, the Opinion of the Referee refers to **Award 5811** (Carter) and quotes the following therefrom:

> "We realize fully that in some cases it is difficult to determine whether an employe is working a higher classified position temporarily or whether he is being improperly used on his regular assignment."

The Referee then states, in paragraph 14, that this quotation "poses the question we are to determine here." This is inexplicable. There was no question in this case but that Claimant Peffer was temporarily working on a higher classified position. Both sides were in complete agreement on this.

Further evidence of the Referee's failure to understand the issues is found in the 19th paragraph of the Opinion where the Vacation Agreement and its applicability to this situation is discussed. The Referee states:

> "* * * The Vacation Agreement is not effective where it is in conflict with the Rules Agreement, and we hold that in the absence

of a negotiated change as provided in Article 13 of said Agreement, we have jurisdiction to determine this claim under the Rules of the Agreement."

But no one questioned this Board's jurisdiction! The Referee refers to a "conflict with the Rules Agreement" but fails to point out what this conflict is. Nor did the Carrier argue that this case was not governed by the Rules Agreement. Carrier argued that the Rules Agreement was not violated here and, on the contrary, sanctioned what was done here. Carrier also argued that the Vacation Agreement at Rule 10(a) contemplated and provided for using the Claimant as here in a vacation relief situation. Rule 10(a) refers to "an employe designated to fill an assignment of another employe on vacation" and provides what he will be paid:

> "10(a) An employee designated to fill an assignment of another employee on vacation **will be paid the rate of such assignment or the rate of his own assignment, whichever is the greater**; provided that if the assignment is filled by a regularly assigned vacation relief employee, such employee shall receive the rate of the relief position. If an employee receiving graded rates, based upon length of service and experience, is designated to fill an assignment of another employee in the same occupational classification receiving such graded rates who is on vacation, the rate of the relieving employee will be paid." (Emphasis Supplied)

This is far different, incidentally, from what the Referee here decided should be paid.

The Referee here mentions Referee Morse's interpretations of the Vacation Agreement although it seems doubtful that he even read them. In any event, he completely overlooks the fact that in those interpretations Referee Morse expressly recognized it would be entirely proper for a carrier to use a regular employe to relieve a vacationing employe. In his award dated November 12, 1942 (page 72 of the Vacation Agreement booklet), Referee Morse discussed the term "vacation relief workers" and stated that such term included —

> "those regular employes **who may be called upon to move from their job to the vacationer's job for that period of time during which the employe is on vacation.**" (Emphasis Supplied)

Moreover, the Organizations, themselves, in arguing before Referee Morse recognized the Carrier's right to utilize an employe holding a regular position. At page 68 of the Vacation Agreement booklet, the Employes stated:

> "Under such circumstances, if an employe holding a regular position is utilized to fill the position of a vacationing employee * * *."

The Referee cites a number of awards allegedly as authority for rejecting Carrier's argument as to the applicability of the Vacation Agreement.* None of them are in point.

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* **Award 2795,** one of the awards cited, does not involve the Vacation Agreement. Its citation was properly a clerical error and should have been **Award 3795.**

The cited awards concern claims in vacation situation for overtime or other additional payments under the Rules Agreement, and the involved carriers contended that the general language of Rule 12(a) of the Vacation Agreement defeated such claims. Rule 12(a) states that a carrier will not be required to assume greater expense because of the granting of a vacation than it would have if the vacation had not been granted. In other words, the general no-added-expense provisions of the Vacation Agreement were urged to defeat claims otherwise payable under the Rules Agreement.

The situation here is different. While the Carrier argued that a denial award would be entirely consistent with the general no-added-expense provisions of Rule 12(a) of the Vacation Agreement, it was not urged that the Vacation Agreement superseded the Rules Agreement. Here it was argued that a **specific** provision of the Vacation Agreement, namely Section 10(a), gave the Carrier the right to use the Claimant in vacation relief work and the Rules Agreement was not in conflict. The Referee never discusses this provision nor this contention.

Award 3022 is cited in Award 10635 on the Vacation Agreement question, but the Referee must have overlooked the fact that the position taken by the Signalmen's Organization in that dispute clearly supports the Carrier's action here. There were a series of claims in that dispute. Claims "B", "D", "F", "G" and "H" are almost identical to the situation here. In those claims time and one-half was sought under the Change of Shift Rule of the Rules Agreement when a signalman was required to fill another position while the incumbent was on vacation. In **3022** the carrier argued that it should **not** have to pay time and one-half under the Change of Shift Rule because of the general no-increase-in-expense language found in Section 12(a) of the Vacation Agreement. That argument was rejected by the Board with a finding that the Change of Shift Rule was applicable. In that case **(3022)** however, the Signalmen's Organization recognized as proper the use of the signalman to fill the other positions and successfully argued for and obtained a finding from the Board that the Change of Shift Rule was applicable to this type of situation.

Perhaps the most serious error of the Referee is that he has sustained the claim without even pretending to find an Agreement violation. The question presented was whether or not the Agreement was violated when Claimant Peffer, a signalman, relieved on the interlocking repairman's position while the regular incumbent was on vacation. The Agreement could have been violated **only** if such action was shown and found to be prohibited by some specific provision thereof. The Referee backs into a sustaining award without pointing to any Agreement provision as being violated, but solely because he rejected one of the Carrier's contentions.

It is true that the Carrier argued that the handling of this Claimant was proper under the Agreement and cited a number of Agreement provisions which provide and contemplate that regularly assigned employes could be assigned to other positions. Rule 16(a), Change of Shift, was relied upon, and this was so because the parties had over the years considered and agreed that the Change of Shift Rule applied to this situation.*

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* If Rule 16(a) does not provide for the situation here it simply means that the Carrier overcompensated the Claimant by allowing the time and one-half rate for the first shift of each of his changes.

The Referee says that this was not a change of shift and:

> "We conclude this application of Rule 16(a) to the Claimant herein is a violation of the Agreement."

This statement approaches absurdity. The Organization itself never argued that Rule 16(a) was violated. But, in any event, we submit that even though the Referee erroneously rejected Rule 16(a) as supporting the Carrier's action, such a rejection by and of itself does not furnish any basis for a sustaining award.

The Referee has here held that the Carrier's use of the Claimant Signalman in vacation relief was apparently improper without citing a single rule that was violated and without discussing any of the Agreement provisions, both in the Rules Agreement and the Vacation Agreement, which clearly contemplated what was done here and the payments to be made when done. Thus Rule 9(e) of the Agreement provides:

> "Employes used in place of regular employes or in place of regular incumbents of relief positions will be paid at the rate of time and one-half for work performed on his (the relieving employe's) rest days. * * *"

Surely this provision contemplates and provides for moving an employe from his regular assignment and the penalty.

Moreover, the very agreement which gave the interlocking repairman his vacation provides in Rule 10(a):

> "An employee designated to fill an assignment of another employee on vacation will be paid the rate of such assignment, **or the rate of his own assignment,** whichever is the greater * * *."

(Emphasis Supplied)

These provisions are ignored by the Referee in his determination to revise Rule 9(e) so as to include additional payments. This contract revision, indulged in by the majority, is shocking and clearly unwarranted and beyond the lawful powers of this Board.

For these reasons we dissent.

/s/ D. S. Dugan

/s/ P. C. Carter

/s/ R. A. Carroll

/s/ W. H. Castle

/s/ T. F. Strunck

ANSWER TO DISSENT TO AWARD NO. 10635, DOCKET SG-9668

The minority, after attacking the Referee, closes the first paragraph of its Dissent with a lame lament that "Thus, the award furnishes no precedent or help in future problems." This is a strange thing for the minority to

say because it was the minority who, after seeing the proposed award, drafted and had added what is now the final paragraph of the Opinion of Board. The avowed purpose of the proposed addition was to confine the award to this particular case.

It seems strange too that the minority did not, while suggesting modifications of the proposed award, call attention to the things which they now brand as errors.

Apparently, the minority passed up the alleged errors for the purpose of having them serve later as a basis for letting of wind, which is all that the Dissent is.

/s/ **G. Orndorff**

G. Orndorff
Labor Member