Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 41682
Docket No. SG-41715
13-3-NRAB-00003-130080

The Third Division consisted of the regular members and in addition Referee Roger K. MacDougall when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Railroad Signalmen
(
(BNSF Railway Company

STATEMENT OF CLAIM:

"Claim on behalf of the General Committee of the Brotherhood of Railroad Signalmen on the BNSF Railway Company:

Claim on behalf of M. A. Langston, for reinstatement to service with compensation for all time lost, including skill pay, with all rights and benefits unimpaired and with any mention of this matter removed from his personal record, account Carrier violated the current Signalmen's Agreement, particularly Rule 54, when it issued the harsh and excessive discipline of dismissal against the Claimant, without providing a fair and impartial investigation and without meeting its burden of proving the charges in connection with an investigation held on November 18, 2009. Carrier's File No. 35-10-0014. General Chairman's File No. 09-034-BNSF-154-TC. BRS File Case No. 14504-BNSF."

FINDINGS:

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

The carrier or carriers and the employee or employees involved in this dispute are respectively carrier and employee within the meaning of the Railway Labor Act, as approved June 21, 1934.

This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

Parties to said dispute were given due notice of hearing thereon.

The Claimant was dismissed on December 1, 2009 for a second violation of Rule G. There were a series of appeals.

The Organization raises a preliminary objection concerning time limits. The Organization's appeal letter was dated April 15, 2010. In a response, in a letter dated July 30, 2010, the Carrier says that ". . . your appeal was never received in this office. However, you provided documentation proving that your letter was delivered to BNSF on April 19, 2010 by the United States Postal Service, making a response from BNSF due no later than June 18, 2010 . . . ."

The Rule in question is number 53 in the Collective Bargaining Agreement between the parties. It states, in pertinent part:

> "A. All claims or grievances must be presented in writing by or on behalf of the employee involved, to the officer of the Carrier authorized to receive same, within sixty (60) calendar days from the date of the occurrence on which the claim or grievance is based. Should any such claim or grievance be disallowed, the Carrier shall, within sixty (60) calendar days from the date same is filed, notify whoever filed the claim or grievance (the employee or his representative) in writing of the reasons for such disallowance. If not so notified, the claim or grievance shall be allowed as presented, but this shall not be considered as a precedent or waiver of the contentions of the Carrier as to other similar claims or grievances.
>
> B. If a disallowed claim or grievance is to be appealed, such appeal must be in writing and must be taken within sixty (60) calendar days from receipt of notice of disallowance, and the representative of the Carrier shall be notified in writing within that time of the rejection of his decision. Failing to comply with this provision, the matter shall be considered closed, but this shall not be considered as a precedent or waiver of the contentions of the employees as to other similar claims or grievances. It is understood, however, that the parties may, by agreement, at any stage of the handling of a claim or grievance on the property, extend the sixty (60) calendar day period for either a decision or appeal, up to and including the highest officer of the Carrier designated for that purpose." (Emphasis added by the Organization)

The Carrier acknowledges that it failed to respond within the time limits specified. It says, however, that it can cure this defect by compensating the Claimant from the time it was supposed to reply until the time it actually did.

The Organization says that this language is very specific and no such "curing" is allowable. It says that the Carrier missed the time limit by 106 days. They say that this is beyond a cure, given the specific Agreement language.

Both parties have supplied numerous cases supporting their respective positions. Normally, in this industry, if either party misses a deadline such as this in their respective obligations outlined in a collective bargaining agreement, it is fatal to their case. However, the Carrier urges that this is not so in this particular case due to a long history between these parties.

The Carrier quotes Decision No. 16 of the National Disputes Committee (NDC 16). This decision, they say, as well as subsequent Awards adopting its logic, held generally that a late denial effectively tolls the Carrier's liability for the procedural violation as of that date. From the date of the late denial, disputes must be addressed on the merits. In this regard, they urge the Board to follow Referee Ann S. Kenis' holding in Second Division Award 13692 (SMWIA vs. UP) wherein she said that:

> "It does not necessarily follow, however, that this procedural infirmity entitles the Claimant to be restored to service. The long settled rule is that the late denial of a claim tolls the Carrier's liability for the procedural violation as of that date. From the date of the late denial, the dispute is considered on its merits if the merits are properly before the Board. Second Division Awards 10754, 11187, 12580, Third Division Awards 26239, 35604, 35473, 24298, 24269. Accordingly, the measure of damages for the Carrier's violation of Rule 35 is compensation to the Claimant at his straight time rate from the date of his dismissal until January 18, 2001, when the Carrier properly issued its declination of the claim."

The Organization quotes, amongst others, Third Division Award 23553 which reads:

> "Every Division of this Board has attempted, through its decisions, to be meticulously accurate and consistent in applying time limits as written in the Schedule Agreement. The parties in this industry are fully aware of

> the Board's position on adherence to time limits and the majority of claims have no time limit problems. We see no reason to deviate from a policy of strict adherence to time limits here. This case will be sustained on the time limit issue. The merits of the case need not be reached."

They say that similar conclusions were reached in Third Division Awards 28182, 27769, 25309, 25208, 21088, 20763, 18661, 18004, 17999, 16357 and 14354.

The argument of the Organization has much to commend it and it is, indeed, the normal application that a Board would generally adopt. On its face, the Agreement language seems quite straightforward. The Carrier missed the deadline and, hence, the claim should be "allowed as presented" as outlined in Rule 53 A. However, in this particular circumstance, further inquiry is indicated.

On August 21, 1954, as a result of Presidential Emergency Board No. 106, the parties, inter alia, entered into an Agreement detailing, in Article V, how claims and grievances were to be handled. This Agreement is the genesis of the language in the current Collective Bargaining Agreement at Rule 53 A. This language was then interpreted by the National Disputes Committee on March 17, 1965. NDC Decision 16, which dealt with an alleged continuing violation time-claim, stated that ". . . receipt of the carrier's denial letter . . ." stopped the carrier's liability arising out of its failure to comply with Article V of the August 21, 1954 Agreement. The NDC was composed of six Carrier Members and six Organization Members. There is no dispute between these parties that representatives of this Carrier and this Organization were parties to NDC Decision 16.

Many Awards have since been rendered which deal with the failure to comply with time limits. The Carrier pointed out, in detailed argument before the Board, that in each of the cases cited by the Organization, the parties were either not both signatory to the 1954 Agreement and NDC 16, or, in cases where they were, that NDC 16 was never argued before those Boards nor addressed in the Awards flowing therefrom.

The Organization presented the Board with further Awards – namely Public Law Board No. 4544, Award 133; Third Division Award 27842 and Special Board of Adjustment No. 279, Award 445 which all contain the principle, with very detailed reasoning, that to the extent that NDC 16 applies today, it does so only to time claims – not to discipline cases. The Carrier counters with numerous Awards, including Public Law Board No. 1844, Award 5 which clearly considers the issue and finds that it does apply to discipline cases as well.

The positions of the parties may be summarized as follows.

The Organization says that the plain language of the Agreement should prevail and therefore the claim must be paid as presented. In the alternative, NDC 16 only dealt with time claims and, as followed by numerous Boards of Arbitration, its implications should be limited thereto. As a result, this case should be sustained on procedural grounds.

The Carrier says there are many Awards which hold that NDC 16 also applies to discipline cases and therefore they should be liable for the time gap between the time their response was due and when it was actually given, and thereafter the Board should turn to the merits of the case.

Indeed, there are cases which cut both ways. As a result, the Board is faced with results which are at odds with what might otherwise be said to be clear contractual language. It is clear from the disputes and resulting Awards rendered since the mid-1950's that the language in the Agreement today is not as plain as it may seem. Many labor organizations have taken the view that NDC 16 does apply to this language, but only in instances of time claims. Therefore, a carrier may toll time limits by paying an employee for the time in which they did not render a decision. This is clearly at odds with the "plain" language. Further, there are many Awards which take this principle further. They have held, at least since the 1970's that this principle extends to discipline cases.

Evidence was presented to the Board that the last Agreement change between these parties, which might have addressed this time limit issue, was in an Agreement dated July 1, 2000. Thus, the issue of time limits has been arbitrated literally dozens of times, with varying results, for some 35 years from the issuance of NDC 16. For whatever reason, the parties did not address these differences in any of the many negotiations over this 35 year period. These are very sophisticated parties. They are true labor professionals, with extensive legal and experiential support on both sides of the bargaining table. They had many opportunities to change the language that is now before the Board. They did not do so. Therefore, the Board has no option but to consider that the language before it as, in fact, ambiguous, and not at all clear. Thus, the Board must turn to other ways to resolve this dispute.

There was no argument or evidence presented to the Board on the actual bargaining history of the July 1, 2000 Agreement. Indeed, it seems that the parties to that Agreement included the language, without dealing with the disparity in cases that went before. Therefore, parol evidence likely would not have assisted any Board in reaching a conclusion.

The Board is therefore left with trying to discern a principle from the plethora of cases presented. After thoroughly reading all cases presented and listening to the extremely able arguments presented by the advocates in this case, the Board reaches the following conclusions:

1. The language used in the July 1, 2000 Collective Bargaining Agreement does flow from NDC 16 and the cases decided by that joint body nearly 60 years ago;

2. The original NDC 16 decisions all involved time claims;

3. Since NDC 16, many decisions applying that logic involved time claims, but some also included discipline cases;

4. To the extent that the apparent "plain language" of the text of the current Collective Bargaining Agreement is not plain at all, a Board should limit the exceptions to what otherwise would be the plainly expressed intent of the parties;

5. To the extent prior Awards limited the time limit exception to ongoing time claims – there is some logic. A time claim, by its very nature, can be a daily occurrence which repeats for every day that an ongoing Collective Bargaining Agreement violation occurs. Therefore, in the cases of ongoing time claims, it might make some sense to say that the liability of the Carrier tolls upon the filing of the response (late though it may be); and

6. To the extent that other Boards have applied this same logic to discipline claims – the Board simply cannot agree. Discipline cases, as in this case, typically arise from singular incidents occurring at a specific time and place. The purpose of agreement clauses which limit the time frame for dealing with these cases is founded in strong policy reasons. Memories fade over time. Witnesses come and go. An employee, just as in many criminal jurisdictions, should know that after a certain time they need not worry about past incidents.

As a result, the Board simply cannot get to the merits of this case, as much as it may want to. The Claimant is warned in the strongest terms that the behavior alleged is never tolerable in this industry. He can thank his Organization for an excellent job in

presenting the case for preserving the language of deadlines in discipline cases. Without that, he would not be employed by the Carrier today.

The Carrier is entitled to ensure the Claimant is fit for duty, in all of its normal ways, prior to allowing this individual back into the workplace, and to make any deductions in backpay it normally would, including in mitigation.

AWARD

Claim sustained.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) be made. The Carrier is ordered to make the Award effective on or before 30 days following the postmark date the Award is transmitted to the parties.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Dated at Chicago, Illinois, this 18th day of June 2013.

Carrier Members' Dissent

to

Third Division Award 41682; Docket SG-41715

(Referee Roger K. MacDougall)

Pursuant to Rule 54 – Investigations and Appeals, the progression of all Brotherhood of Railroad Signalmen (BRS) discipline grievances are handled in accordance with Rule 53 – Time Limit on Claims – Grievances of the parties' Agreement. Rule 54 (H) states: "The provisions of Rule 53 shall be applicable to the filing of claims and appeals in discipline cases." Consequently, there is no basis to distinguish between a "rules" grievance and a "discipline" grievance – the same precedent governs both forms of grievances on this Carrier's property.

That being said, a National Disputes Committee was established on May 31, 1963 to interpret the provisions of Article V – Time Limits of the August 21, 1954 National Agreement. National Disputes Committee Decision No. 16 was adopted in Chicago, Illinois, on March 17, 1965. Since that time, the NRAB, as well as other Section 3 tribunals, have had countless opportunities to review and apply the provisions of Decision No. 16 to situations such as those before the Board in the instant case. Decision No. 16, as well as numerous Awards following the issuance of that Decision, have generally held that a late denial is effective to toll a carrier's liability for the procedural violation as of that date. From the date of the late denial, disputes are considered on their merits if the merits are properly before the Board.

The many Awards cited in BNSF's Submission support its contention that Decision No. 16 has long been held by the NRAB, and other Section 3 tribunals, to be dispositive of time limit violations in discipline cases for a large array of crafts throughout the railroad industry. See, for example, Second Division Award 13692 (Kenis); Third Division Awards 24298 (Carter) and 25473 (Muessig), as well as on-property Third Division Award 36305 (Nancy Eischen); Fourth Division Awards 4600 (Suntrup) and 4772 (Zusman), as well as Award No. 5 of Public Law Board No. 1844 (Dana Eischen), on-property Award 357 of Public Law Board No. 4244 (Irvin), on-property Award 63 of Public Law Board No. 4370 (Marx), on-property Award 1 of Public Law Board No. 5020 (LaRocco) and Case No. 2 of Public Law Board No. 5531 (Dennis). *Contrary to the belated argument first raised by the Organization's Labor Member during oral argument before the Referee, it is significant to note that Third Division Awards 26239 (Benn) and 35395 (Bierig) recognized that the precedent established in Decision No. 16 applied to discipline appeals submitted by the Brotherhood of Railroad Signalmen (BRS).*

The operable Agreement language involving time limits as set forth in BRS Rule 53 (A) is identical to language in other crafts' Collective Bargaining Agreements, such as that involving the Brotherhood of Maintenance of Way Employes (BMWE), where, not surprisingly, Decision No. 16 has likewise been determined to be applicable to discipline cases. See on-property Third Division Award 32889 (Wallin) and Third Division Award 35395 (Bierig), as well as on-property Award 357 of Public Law Board No. 4244 (Irvin). Furthermore, the position advocated by BRS in the instant case *for the first time during oral argument before the Referee* regarding the applicability of Decision No. 16 arbitral precedent as concerns time limit violations in discipline cases has been rejected by the majority of decisions where Decision No. 16 was raised as a defense. For a whole host of reasons, the Majority's decision in the instant case is not consistent with most of the existing precedent on this property and is palpably erroneous.

Notably, most of the Awards cited by the Organization in its Submission involved cases in which the involved carrier had failed to raise Decision No. 16 as a defense. Given the dissimilar fact patterns, it is crystal clear that those Awards are not applicable to the instant case. Furthermore, the only Awards cited by the Organization in purported support of its position that even mentioned Decision No. 16 (Third Division Awards 17999 - Dolnick, 18004 - Dugan and 28182 - Goldstein) actually rejected the Organization's position and upheld the principal established by Decision No. 16. Moreover, Third Division Award 28182 (Goldstein) enforced the applicability of Decision No. 16 where the BRS labor agreement contained language identical to that involved in the instant case.

Nevertheless, the Majority surprisingly ignored decades of precedent and ruled that Decision No. 16 should only apply to "on-going time claims," and does not apply to discipline cases. The Majority's reasons for arriving at this erroneous conclusion are equally bizarre:

- Discipline cases arise from singular incidents occurring at a specific time and place, whereas time claims can be a daily occurrence which repeats;

- Memories fade over time, witnesses come and go; and

- Just as in many criminal jurisdictions, employees should know that after a certain time they need not worry about past incidents.

Assuming arguendo, that the Majority's "reasons" have some application to this dispute, we assert that the instant discipline case, just like a continuing time claim, subjected the Carrier to continuing liability. The Claimant was dismissed on December 1, 2009 for his second violation of BNSF's Policy on the Use of Alcohol and Drugs, which resulted in the Organization filing an appeal which included a demand for the Claimant's "lost wages" on a continuing daily basis, plus reinstatement. From the Organization's viewpoint, the Carrier continued to violate the CBA, specifically Rule 54, on each and every day that the Claimant remained dismissed and was denied the opportunity to work.

As with Decision No. 16, a specific incident resulted in a single claim. The facts set forth in Decision No. 16, reveal that a position was abolished. In the instant case, an employee was dismissed. However, both situations resulted in continuing liability. (See Referee Wallin's analysis in on-property Third Division Award 32889.)

Additionally, memory retention or the availability of witnesses would have absolutely no effect on the outcome in this particular case. The Investigation was held within the required time limits, and the development of the official record upon which the Claimant's innocence or guilt was decided, was closed at 2:56 P.M. on November 18, 2009, i.e., the date and time the Investigation was completed.

The time limit violation that occurred in this case was related to the Organization's second appeal of the decision resulting from that Investigation. Even if the Majority's assumptions concerning the effect of a delay had any merit, which they do not, in this case they simply do not apply. Furthermore, Rule 54 – Investigations and Appeals allows for Investigations that are not, as the Majority has outlined, held timely. In cases of personal conduct, an investigation can be scheduled regardless of when the alleged offense actually occurred so long as it is held within 15 calendar days from the date of first knowledge.[1]

As for the other alleged "reason" for this palpably erroneous decision, the instant case is not related to any "criminal jurisdictions," nor do provisions which apply to such have any applicability to either investigations or grievances defined and governed by the parties' Agreement. The Majority's attempt to modify this long-standing process based upon a perceived inequity between criminal standards

[1] See, Third Division Award 26155 and Public Law Board No. 6540, Award 41.

and CBA requirements that have been defined over time by a preponderance of arbitral precedent is improper.

Perhaps even more troubling is the fact that the afore-mentioned "reasons" espoused by the Majority were never advanced by the Organization during the on-property handling of this case. Since its inception, the Board, in recognition of its appellate nature, has consistently rejected new arguments advanced by parties. Simply stated, it is not the Board's function to bolster either party's case. Either they make their case on the property or they don't.

In this vein, it is significant to note that during the progression of this case on the property, the Organization presented no precedent or argument that would justify ignoring the rule set by Decision No. 16 and consequently followed by other arbitral Boards for decades. As noted above, the only pertinent Awards cited by either party to the dispute actually supported BNSF's position that Decision No. 16 precludes a default on the merits of this case.

Perhaps Referee Dana Eischen said it best in Award 5 of Public Law Board No. 1844, which adjudicated the appeal of a BMWE Foreman who had been dismissed from the service of the Chicago and North Western Transportation Company:

> "Both parties cite in support of their respective positions Decisions No. 15 and 16 of the National Disputes Committee established May 31, 1963 (NDC). As noted supra, we have considered carefully all of the authorities cited by both parties. The contentions of the Organization have substantial merit and if this were a case of first impression we might well find them persuasive. But we do not sail here in uncharted waters and in our considered judgment the best indicator for the proper interpretation and application of Rule 21 in cases such as the one we have before us are the decisions of the NDC. In our considered judgment a careful reading of Decision No. 16 (a unanimous decision of the bilateral NDC) supports the position advocated herein by the Carrier. We have examined all of the awards cited by the parties construing and applying the principles announced in Decision No. 16 and conclude that those reaching a contrary result either may be distinguished on their facts or the state of the evidentiary record or else are in plain error." (Emphasis added)

And in this same vein, the logic expressed by Referee Irvin in on-property Award 357 of Public Law Board No. 4244 involving a somewhat analogous out of service drug case, is noteworthy:

> "Although the parties are different, Award 35395 is quite similar to the instant dispute, both in circumstances and prescribed time limits. We are aware that prior awards of this or other boards are not binding upon us in the same sense that authoritative legal decisions are. Nevertheless, if a dispute involves the same or strikingly similar facts and similar questions were submitted by the parties for adjudication in a previous dispute, it is axiomatic that prior decisions generally should be given great weight, except when the previous decisions are glaringly erroneous or plainly unfair. The rationale underlying this principle is that in the interest of stable and satisfactory relations, identical or quite similar situations should be adjudicated with the same expected outcome. This signifies that such decisions are based on reason, and are not merely random judgments which invite further litigation. We find no compelling cause to disregard the reasoning of Award 35395, nor has the Organization offered any decisions which counter the rationale of Award 35395."

And even if Decision 16 did not apply to discipline cases, which it does, arbitral precedent has repeatedly held that mere technical violations of procedural Rules do not constitute ground for reversal, especially when there is no showing of prejudice to the claimant.[2] Substantial precedent holds that such procedural irregularities are not fatal to discipline cases. On the contrary, such precedent upholds the assessment of discipline up to and including dismissal when the charges against the principal are proven. And in this case, there can be no question that the Claimant in the instant case *(just like the dismissed BMWE claimant in Award 357 of Public Law Board No. 4244 quoted above)* violated the Carrier's Drug and Alcohol Policy for a second time within a ten-year period, and that dismissal is the standard industry-wide penalty for this type of violation.

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[2] Third Division Awards 25451, 33955 and 37054 are examples. In Award 33955 (Rubin) the Board held: "The better rule seems to be that where the Rule specifically provides for the consequences of a late decision, that Rule must be enforced according to its terms. Where the Rule does not provide for specific consequences, all of the equities should be considered."

For all of the foregoing reasons, we vigorously dissent.

Michelle D. McBride
Michelle D. McBride

Michael C. Lesnik
Michael C. Lesnik

September 16, 2013

Labor Member's Answer to
Carrier Member's Dissent to
Award No. 41682

Usually, I would ignore the type of dissent that the Carrier Members have attached to this Award for it simply represents one party's attempt to undermine the Majority's decision through straw man arguments. But, since they cite most of the Arbitral precedent that has been rendered in support of their position, I thought it might be useful to demonstrate the unsoundness of these decisions and why they should not be followed by Arbitrators in the future.

As I touched on in my Concurring Opinion to this Award, the decisions rendered by the National Disputes Committee were meant to provide the NRAB with the parties' mutual interpretation and proper application of the provisions contained in Article V[1] when those provisions were applied to the material facts in specific disputes.[2] In the May 31, 1963, Memorandum of Agreement forming the National Disputes Committee, the parties agreed that the decisions they rendered in this connection would be final and binding[3] and outlined the process they would use in Section 8 of same, as follows:

> "When a case which has been docketed with the Third Division of the National Railroad Adjustment Board is submitted to the Disputes Committee, the party or parties submitting it will so notify the Executive Secretary of the Third Division and request that the case be held in abeyance pending action by the Disputes Committee. When the Disputes Committee has decided such case, the party or parties submitting it will so notify the Third Division, furnishing it a copy of the decision. If the decision disposes of all issues in the case, the Division will issue an award dismissing it. If an issue or issues not arising out of the interpretation or application of the provisions of the national agreements referred to in Section 2 hereof remains unsettled, either party to the dispute may request the Division to restore the case to its working calendar, in the same position with respect to other pending cases as it occupied when set aside to be held in abeyance, and proceed to make an award disposing of the remaining issue or issues." (**Emphasis added**)

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[1] May 31, 1963, Memorandum of Agreement, Section 2 – "Any dispute as to the interpretation or application of the following designated provisions of national agreements, that is: the Agreement of December 17, 1941, and all amendments thereto (Vacations); the Agreement of August 21, 1954, Articles II, IV, V and VI; the Agreement of August 19, 1960, Article III; and the Agreement of June 5, 1962."

[2] May 31, 1963, Memorandum of Agreement, Section 3 – "The jurisdiction of the Disputes Committee is limited to rendering decisions on specific disputes involving the interpretation and application of the agreement provisions specified above."

[3] May 31, 1963, Memorandum of Agreement, Section 6 – "Any decision of the Disputes Committee shall be final and binding upon all parties to the dispute."

Consistent with the foregoing, the parties submitted 24 cases to the body of the Committee for consideration. The Committee rendered 22[4] decisions, and in accordance with the above-quoted section, the Third Division NRAB issued 21[5] Awards within which it incorporated the full text of the Committee's Decision. These Awards represent a labor/management consensus on the proper "*interpretation and application*" of the provisions in Article V that were an issue in that specific dispute.

The Committee demonstrated through **Decision Nos. 3, 7, and 15**, incorporated within **Third Division Award Nos. 13528, 13529, and 13530** respectively, that the consequence for a party's failure to comply with provisions of Article V results in operation of the default penalties provided for therein. The Committee explicitly stated this in **Third Division Award No. 13530,** in pertinent part:

> "The National Disputes Committee rules that there was no extension of the time within which the Superintendent was required to render his decision on appeal, and finds that such decision was not rendered within the applicable time limit.
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> In this connection the National Disputes Committee points out that where either party has clearly failed to comply with the requirements of Article V the claim should be disposed of under Article V at the stage of handling in which such failure becomes apparent. If the carrier has defaulted, the claim should be allowed at that level as presented; and if the employe representatives have defaulted, the claim should be withdrawn.
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> Decision: The claims shall be allowed as presented, on the basis of failure of the Carrier to comply with the requirements or Article V of the Agreement of August 21, 1954.
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> This decision disposes of this case. The docket is returned to the Third Division N.R.A.B., for disposition in accordance with Paragraph 8 of the Memorandum Agreement of May 31, 1963." (**Emphasis added**)

As I demonstrated in my Concurring Opinion to this Award, the Committee's Decision No. 16 was meant to provide the NRAB with the proper application of *"allowed as presented"* in Article V-1(a) when that provision was placed in operation as a result of a Carrier defaulting on a claim filed *"for an alleged continuing violation of any agreement"*

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[4] The first two cases submitted to the National Disputes Committee were withdrawn from the Third Division by the parties in dispute before any decision was rendered by the Committee; Third Division Award Nos. 12886 and 12887 were issued respectively to cover those withdrawals.

[5] The dispute which resulted in National Disputes Committee Decision No. 16 was withdrawn from the Third Division by the parties in dispute subsequent to the Committee rendering its decision. The Third Division then issued Award No. 13780 covering that withdrawal, but to my knowledge, this is simply a standard withdrawal Award and should not be cited as precedent as it does not contain the text of the Disputes Committee's decision.

as provided for in Article V-3. The Committee's sole purpose in providing this interpretation and application of Article V, which clearly runs counter to its Decision No. 15 and the plain language of Article V, was to address the arbitral history identifying the potentially absurd results involved in the application of *"allowed as presented"* to the underlying merits of a claim alleging a violation **in the future**.

When one views the National Dispute Committee's Decisions in conjunction with the Memorandum of Agreement declaring its jurisdiction, purpose, and process, a well-defined road map is revealed that allows an Arbitrator to navigate through the conflicting precedent concerning the proper application and interpretation of Article V. More importantly, for my purpose here, the Committee's Memorandum of Agreement and its Decisions provide a template for one to test the soundness of any prior or subsequent decision rendered regarding the interpretation and application of Article V and the default penalties provided for therein.

Using this template to examine the Awards that the Carrier Members cite in their dissent, it is evident that seven of these Awards do not pass muster for the simple reason that the procedural defect in issue did not involve the "interpretation and application" of the provisions in Article V. Significantly, the rule in issue in these disputes does not contain the mandatory default language "allowed as presented" as a consequence of Carrier's failure to comply with rule. The Awards cited by the Carrier Members that fall into this category include: **Third Division Award No. 26239 with Referee Edwin H. Benn** (February 27, 1987); **Fourth Division Award No. 4600 with Referee Edward L. Suntrup** (April 21, 1988); **Fourth Division Award No. 4772 with Referee Marty E. Zusman**[6](April 18, 1991); **Public Law Board No. 5020, Case No.1, Award No. 1, with Referee John B. LaRocco**[7] (June 17, 1991); **Third Division Award No. 35395 with Referee Steven M. Bierig** (April 26, 2001).**Third Division Award No. 36305 with Referee Nancy Eischen**[8] (November 13, 2002); **Public Law Board No. 4244, Award No. 357, Case No. 364 with Referee Robert J. Irvin**[9] (March 3, 2006).

These Referees' use of Decision No. 16 to cure the particular procedural failure in issue in these cases is palpably in error given that the National Dispute Committee's Memorandum of Agreement limited its jurisdiction to the proper interpretation and application of the provisions of Article V and that Article's provisions were not before Board in any of these disputes. Moreover, Carrier Members' decision to cite the above

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[6] The language of the Rule in issue is not provided within the body of the Award, but Referee Zusman indicates that the Rule before him does not contain the default language provided for in that Article, by stating, *"We have no evidence before us that the language of Rule 27(a) provides for the Claim to be allowed as presented."*

[7] This is an on-property award, American Train Dispatchers Association v. Burlington Northern Railroad Company. Rule V(c) in issue does not contain the default language "allowed as presented".

[8] This is an property award, Brotherhood of Maintenance of Way Employes v. Burlington Northern Santa Fe Railway

[9] This is an on-property award, Brotherhood of Maintenance of Way Employes Division of the International Brotherhood of Teamsters v. BNSF Railway

awards in their **continuous** precedential assault on Article V's mandatory default penalty "allowed as presented" — is a clear indication that they can't point to any sound arbitral precedent that supports their assertion that *"...Decision No. 16 has long been held by the NRAB, and other Section 3 tribunals, to be dispositive of time limit violations in discipline cases...."*

Five of the seven remaining Awards that Carrier Members' cite do not fare any better when held up to this template. These decisions simply disregard Decision No.15 and apply the principles of Decision No.16 to a claim involving a disciplinary action without providing **any** explanation for doing so. The Awards falling into this category are: **Public Law Board No. 1844, Award No. 5, Case No. 17, with Referee Dana E. Eischen** (May 5, 1977); **Third Division Award No. 24298 with Referee Paul C. Carter** (April 14, 1983); **Third Division Award No. 25473 with Referee Eckhard Muessig** (May 23, 1985); **Public Law Board No. 5531, Case No. 2, Award No. 2, with Referee Rodney E. Dennis** (April 4, 1994); and **Second Division Award No. 13692 with Referee Ann Kenis** (June 28, 2002). Significantly, **Referee Eischen** does not cite any precedent[10] for his application of NDC 16; yet, his decision is pointed to by **Referee Carter**[11] to justify his actions, and then in turn, Referee **Kenis** points to **Referee Carter's** decision to justify her actions, but she does not point to NDC 16 within her Award.

Of the above decisions, the Award that stands out is **Second Division Award No. 13692 with Referee Ann Kenis.** It gives one the impression that a long line of precedent supports **Referee Kenis'** decision to apply the principles of NDC 16 to a case involving discipline, in pertinent part:

> "It does not necessarily follow, however, that this procedural infirmity entitles the Claimant to be restored to service. The long settled Rule is that the late denial of a claim tolls the Carrier's liability for the procedural violation as of that date. From the date of the late denial, the dispute is considered on the merits if the merits are properly before the Board. Second Division Awards 10754, 11187, 12384, 12580, Third Division Awards 26239, 35604, 35473, 24298, 24269."

But a close examination of these Awards reveals that nothing could be further from the truth, and that **Referee Kenis** has deliberately misled us in order to give force and effect to her catchy phrase "the long settled rule." Anyone who bothers to read these Awards will find that **Third Division Award Nos. 35604–Peterson and 35473–McKissick** do not involve discipline, and more importantly, there are no procedural violations

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[10]Similarly, Referee Muessig does not cite any precedent to support his application of NDC 16 to a claim involving discipline. Referee Dennis does not cite any precedent, nor does point to NDC 16, he just cuts Carrier's monetary liability off at the date of its untimely denial and puts the Claimant back to work.

[11] Referee Carter's citations were discussed in my Concurring Opinion to this Award. With the exception of the Award rendered by Referee Eischen, none of the other disputes he cited involve a violation of Article V.

discussed in either Award — that **Third Division Award No. 26239–Benn** does not involve a violation of Article V and it does not rationalize its application of NDC 16 to a case involving discipline — and that **Second Division Award Nos. 10754–Carter, 11187–Carter, and 12384–Muessig**, as well as **Third Division Award No. 24269–Scheinman,** do not involve discipline, but rather are disputes that involve an alleged work rule violation, or some other matter, with potential continuing liability.

Perhaps the most troubling of **Referee Kenis'** citations is **Second Division Award No. 12580 with Referee Robert O. Harris** (September 15, 1993), wherein the Board disposed of Carrier's failure to comply with the provisions of Article V by limiting its liability to the date of its untimely denial, holding in pertinent part:

> "Form is being placed over substance. The purpose of Rule 36 (a) is to ensure that each side has adequate notice of the position of the other and that a claim cannot be held indefinitely without answer by a carrier. Here the Carrier had taken action against Claimant and it was he who was claiming that action to be erroneous. Claimant was not disadvantaged by the delay except to the extent that the decision of the Hearing Officer that he be discharged was not finalized by the highest designated Carrier official."

The Board then went on to uphold the Claimant's dismissal.

Second Division Award No. 12580 would seem to support **Referee Kenis'** action were it not for the fact that **the Board** was subsequently **compelled** by the **United States District Court for the Northern District of Illinois, Eastern Division**, to vacate this Award — because the Arbitrator exceeded his authority when he did not apply the default penalty "allowed as presented" to the claim as a consequence of Carrier's failure to comply with Article V. In connection with the foregoing, **the Board** issued **Second Division Award No. 13005 with Referee Robert O. Harris** (July 10, 1996), wherein it held:

> "On September 15, 1993, in Second Division Award 12580 this Board denied Claimant's grievance. That decision was appealed by the Organization to the United States District Court for the Northern District of Illinois, Eastern Division and on January 20, 1995, Judge James B. Zagel issued a Memorandum Opinion and Order vacating the Award of this Board as being in excess of the Arbitrator's authority under the Agreement and remanding the matter to the Board 'for further proceedings consistent with the opinion of this Court delivered in open court on 22 December 1994.' Because this Board is required to follow the mandate of the Court, its opinion will be quoted in its entirety, as follows:

'This is a dispute between a union and a railroad over an arbitration award issued by the National Railroad Adjustment Board. The union seeks to overturn the award.

In the course of my remarks I may be referring to the board or to the arbitrator. By that reference I mean exactly the same thing. This was one of those cases in which a panel of the board was deadlocked and a neutral arbitrator was appointed and the opinion of the arbitrator was in effect the opinion of the board.

Carl Hazelwood, a union member, was fired for being intoxicated on the job and the union grieved his discharge. Under the collective bargaining agreement the railroad had 60 days to answer the grievance, or more precisely to notify the grievant in writing of the reasons for the disallowance. The contract said 'if not so notified, the claim or grievance shall be allowed as presented. '

The railroad failed to meet the deadline. Six days or so after the deadline passed, the union noted the absence of response and requested reinstatement. A few days later, four days I believe, the railroad rejected the grievance. The matter went to arbitration where the union pressed its claim on procedural grounds, which was the failure to respond in 60 days, and on the merits. There are no disputed facts at this level and both sides seek summary judgment.

The union says the arbitrator failed to comply with the requirements of the Railway Labor Act and did not confine itself to the matters within its jurisdiction. Essentially the arbitrator refused to accept what I referred to as the default theory of the union, saying that it elevated form over substance since the purpose of the contract was to ensure adequate notice to each side of their respective positions, and a notice ten days or so late did not prejudice the grievant. At most the arbitrator thought Hazelwood might be entitled to ten days' worth of damages or ten days' worth of pay.

In so concluding, the union says, the arbitrator breached the Railway Labor Act.

Simply stated, the question is whether the arbitrator could properly read the contract to provide a remedy other than the default judgment that the union sought. If he could, then all is well. If he could not do so within the applicable canons of interpretation, then he has rewritten the contract, and this is forbidden.

The applicable precedents in this circuit are few: Wilson v. CNW, 728 F.2d 963, a Seventh Circuit opinion; and two district court opinions, Miller v. CNW, 647 F. Supp. 1431, and Riley v. National Passenger Railroad Corporation, 814 F. Supp. 40.

In the two Chicago Northwestern cases, the contract said, 'If investigation is not held or decision rendered within the time limit specified herein, the charges against the employee shall be considered as having been dismissed.'

In this case the contract says, 'if the claimant is not so notified, the claim or grievance shall be allowed as presented.'

The railroad's argument is that its clause is amenable to the board's interpretation because the phrase 'within 60 days' does not appear after the phrase 'if not so notified'. This it is said is a point of distinction between its clause and the CNW's clause which did specifically refer to the time period.

The railroad says that this is a sharp contrast between the CNW clause and the clause in this case. I don't think it's a very sharp contrast at all. It seems clear to me that the word 'so' in the phrase 'if not so notified' incorporates the time period which appears in the preceding sentence. The clause here states in full, '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 employee or his representative) in writing of the reasons for such disallowance. If not so notified, the claim or grievance shall be allowed as presented, but this shall not be considered as a precedent or waiver of the contentions of the carrier as to other similar claims or grievances.'

But clarity to me is not the crucial issue; the issue, the crucial one is whether the arbitrator's reading is rationally inferable, which brings me to the arbitrator's reading.

The truth is the arbitrator read the contract as I read the contract. He thought that the 60-day limit had to be read into the clause, but he thought that the allowance of the grievance was not mandatory. Some other remedy he found would satisfy the contract, and he believed so not because of any language in the contract, but because the result would exalt form over substance.

In the arbitral precedents cited to me a few arbitrators seem to have done similar things, but in situations that are in some

cases distinguishable. Others have enforced the clause as written.

It is easy to see why the arbitrator ruled as he did. There was considerable evidence of intoxication in an employee whose duties do impact to some extent on rail safety and there was no prejudice in the ordinary sense to Hazelwood from a slight delay. On the other hand, of course, the railroad's failure to meet a 60-day time limit in this sort of case is not to be easily excused either.

Is there a way to read the arbitrator's decision as a reading of the contested clause that disagrees with the union's reading? The answer seems clearly to me to be no. If the 60-day limit were not applicable, there would be no need to address questions of form and substance or disadvantage or prejudice, yet the arbitrator did so.

On this view this board's decision - - well, let me restate that. On one view I suppose this board's decision could be construed as a reading of the contract in light of the purpose of the clause, which appears to be the arbitrator's theory. To answer the question as to whether this is a permissible view I look to the Seventh Circuit law.

In Wilson v. CNW the Seventh Circuit held that a board acts beyond its authority when it attempts, 'to alter the existing agreement by ignoring the provisions mandating the dismissal charges when the railroad fails to comply with the specified time limits.'

That sounds like this case, but perhaps there is something in the context of the Wilson award that makes it different. One of them involved a waiver or standing theory. The employee quit and thus, according to the arbitrator, lost the protection of the agreement. But this seems to me to be the same sort of case as we have here. The board read the clause in light of its purposes which did not seem to matter when an employee abandons his job to another.

In the two other award cases in Wilson again purpose was read into the contract. Two employees accused of theft were not given timely hearings under a time limit that was shorter than that allowed for less serious offenses. In effect the contract literally read would give more favorable treatment to employees charged with more serious offenses than it would for those charged with less serious offenses. So the board refused to so read the contract and, preferring substance over form, decided that all employees should be treated equally and all should be heard under the same time limit.

As in this case, the employee did get some benefit for the failure to hold a hearing in a shorter period. The benefit was payment for the delay. There is in fact in my view no real distinction between the case before me and the binding precedent of Wilson. Where the contract specifies a remedy, then that is the remedy.

In this regard one could compare Judge Aspen's opinion with Riley with Judge Shadur's opinion in Miller. Accordingly, I agree essentially with the view of the union in this matter.

This leaves, however, one last question which the carrier raises, and that is the question of reinstatement. Illinois Central says reinstatement is against public policy. It is true that reinstatement even when mandated by contract can be refused when it is against public policy, and it is not unfair to state that it is against public policy to have those charged with rail safety working while intoxicated.

This case, however, does not present very strong facts to mandate what must be a very narrow public policy exception to the enforcement of contract. The fact is in this case Hazelwood reported to work, but was not in fact working. It was his failure to work, his remaining in the locker room, that precipitated the investigation of his status, and that seems to be significant to me under the leading opinion dealing with this public policy exception in the Seventh Circuit, which is Chrysler Motors v. International Union, 959 F.2d 785, a Seventh Circuit opinion from 1992.

I base my view on this on the summary of cases as stated by the Seventh Circuit in footnote 3 of that opinion.

For these reasons I grant the union's motion for summary judgment and order the union to prepare a draft order of judgment within seven days. The railroad will have seven days thereafter to object as to form and as to the calculations of the monetary element of such a judgment.

The minute order will read that for the reasons stated open court motion for summary judgement is granted.'

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Any arbitration tribunal operating under the Railway Labor Act should be aware that Courts do not lightly review such decisions. The arbitral tribunal, like a lower Court, must pay deference to the reviewing authority. If a party to a dispute does not like the decision of a reviewing Court, the remedy is to appeal that decision, not to come back to the arbitral tribunal and attempt to attack the reviewing Court's decision. This Board is bound by Judge Zagel's decision and will follow it.

> The original decision by this Board relied on a series of cases which hold that where there is a Rule violation, such as Rule G in the railroad industry, which involves the use of substances which affect the ability of an employee to perform his or her work, the arbitral tribunal must look to the merits of the problem rather than procedural defects in the case. Judge Zagel was well aware of these decisions and discussed them, concluding that this was not the type of case where that Rule should be followed.
>
> If there is no public policy impediment to following the time dictates of the Agreement between the parties, it is clear that the Carrier failed to respond to the claim in a timely fashion. The Carrier's present contentions that it did not know who the Claimant was and that the wrong date was on the claim clearly did not mislead it as to the actual Claimant or the merits of the claim. The Carrier failed to respond to the claim in accordance with the Agreement and, accordingly, the claim must be sustained on remand from the United States District Court. Claimant will be returned to service with full backpay after complying with the applicable Carrier Rules regarding return to service."

Second Division Award No. 13005 overturning **Second Division Award No. 12580** was adopted six years before **Referee Kenis** penned **Second Division Award No. 13692.** That being the case, I find it remarkable that she would see fit to point to **Second Division Award No. 12580** as precedent to justify the method she used to dispose of Carrier's failure to comply with provisions of Article V. In light of all of the foregoing, and the perfunctory manner in which **Referee Kenis** dealt with Carrier's failure to comply with its obligations under Article V, I would submit that **Second Division Award No. 13692** lacks any of the qualities needed to be considered precedential on this subject.[12]

Turning to what is left of the Awards that Carrier Members' cite in support of their position, I find **Public Law Board No. 4730, Award No. 63, Case No. 63, with Referee Herbert L. Marx, Jr**. (March 7, 1997) the most worthy of discussion. But only because this decision has been treated as precedent on this property in disputes involving discipline where Carrier has failed to comply with the provisions of Article V.[13] Significantly, **Referee Marx** does not cite NDC 16 to provide rationalization for his decision to limit Carrier's liability to the date of its untimely denial. Instead, he cites

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[12] Yet, Second Division Award No. 13692 is cited with approval in Second Division Award No. 14040 with Referee James E. Conway (December 28, 2010) International Brotherhood of Electrical Workers v. BNSF Railway Company *and* Third Division Award No. 39868 with Referee Daniel L. Hargrove (July 31. 2009) Brotherhood of Railroad Signalmen v. Union Pacific Railroad Company.

[13] In addition to Third Division No. Award 32889-Wallin, see Third Division Award No. 41437 with Referee William R. Miller Brotherhood of Maintenance of Way Employes Division - IBT Rail Conference v. BNSF Railway Company former Atchison, Topeka and Santa Fe Railway Company.

Third Division Award No. 13167 with Referee Robert J. Ables[14] (December 15, 1964), and points to the following part of that decision:

> "Just as Rule 61 does not provide for continuing claims, but are accepted within the intention of the rules, so should it be accepted that a continuing claim is not one claim but a series of claims to which the time limit rule applies successively as each claim matures. Given such construction of 'the continuing claim rule,' it follows that each of the series of claims should be allowed (measured by days since this is the standard used in the time claim and time limit rule) for so long as the Carrier remains in default of the time limit rule. At the point the Carrier notifies the claimant in writing of its decision, the Carrier cures its procedural default and the substantive issue is joined prospectively. If the employes win on the merits, their claim will be sustained for the full period of the claim. If not, their claim will be sustained for the period in which the Carrier was in default of the time limit rule." (**Emphasis added**)

Referee Marx is then able to rationalize from the above that:

> "...in the instance of a dismissal (or, similarly, a demotion or failure to award a position), the damage inflicted on the Claimant (if the claim is a meritorious one) continues from day to day, becoming increasingly serious as long as a procedural defect is not cured."

Using this flawed logic, Referee Marx "cures" Carrier's procedural error at the date of its untimely denial on July 25, 1996, and thereby is able to find that the claim *"...remains to be resolved on the merits for the period commencing July 25, 1996."* This statement in itself identifies the fallacy of Referee Marx's logic; there are no merits to decide subsequent to July, 25, 1996 — the action that the Organization alleged violated the parties' Agreement in this dispute, occurred just once, on a date certain, when Carrier dismissed the Claimant from service on February 7, 1996. There was no Agreement violation complained of beyond that date.

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[14] This Award explicitly supports my Concurring Opinion in regard to the arbitral history demonstrating that the NRAB struggled to find the proper application of "allowed as presented" when that provision is brought into operation as a consequence of Carrier defaulting on a claim filed under Article V-3 alleging a continuing violation of an agreement , in pertinent part: "While there is a division of opinion on the point, the preponderant and more recent authority is that the claim should be allowed up to the date the Carrier actually denies the claim. See Awards 8318, Daugherty; 10401, Mitchell; 10644, Bailer; 11211, Miller; 11326, 11798, Dolnick; 12713 Reagan. These opinions and others, however, which limit compensation to the date the Carrier belatedly denies the claim, do not provide clear reasons why this conclusion has been reached. At best, there is the implied argument that continuous claims should not be sustained prospectively after the Carrier belatedly denied the claim, because of potentially absurd results, as where one union claims work which actually belongs to another union."

Referee Marx exceeded his jurisdiction by pretending that continuing liability creates a continuing violation of an agreement just so he could deliver an award based on his notion of equity. Moreover, the idea that the liability flowing from specific act which occurred on a specific date constitutes a continuing violation of an agreement is completely inconsistent with the holdings of the NRAB. For example, **Third Division Award No. 30184 with Referee Herbert L. Marx, Jr.** (April 26, 1994), wherein **the Board** held, in pertinent part:

> "The Board concludes that this is not a 'continuing violation' in the generally accepted sense. Here, the 'alleged violation' was the bulletining of a position in 1987. There was ample opportunity for the Claimant or the Organization to initiate a claim, either before or immediately after the Claimant accepted the position. Rule 700 (a) is clearly applicable. As stated in Second Division Award 6987:
>
> > 'This Board has long held that a claim is not a continuous one where it is based on a specific act which occurred on a specific date. While a continuing liability may result; it is settled beyond question that this does not create a continuing claim.'"

And **Second Division Award No. 7303 with Referee Herbert L. Marx, Jr.** (June 10, 1977) in pertinent part:

> "Whether the Carrier's letter of January 23, 1975, or the Carrier's further letter of February 20, 1975, is used as a starting point, the claim filed on May 26, 1975, is well beyond the 60-day time limit specified in Rule 27 (b). In the view of the Board, February 20, 1975, is the latest date which can be considered as the 'date of the occurrence on which the claim or grievance is based. …'
>
> The Organization states that the matter is a continuing one, making a claim timely at any point during the claimant's being withheld from return to service. Many past awards have held to the contrary. The claimant and the Organization knew on a specific date that the Carrier had determined that the claimant was disqualified from return to work. While a possible continuing liability may have been running, the disqualification itself was the 'occurrence' requiring challenge within the 60-day period. See especially Award No. 6854 (Twomey) and Award No. 6987 (Twomey)."

And **Public Law Board No. 5853 Award No. 6, Case No. 6, with Referee John C. Fletcher** (January 27, 1998), in pertinent part:

> "Absurd results would obtain if the Organization's contentions on continuing claims were to be applied to situations that actually result from a specific date certain, a specific occurrence, such as that under review here. For example, take the situation of an employee that is discharged from a carrier's service. Normally he would have 60 days to file a claim or grievance challenging that discipline. The discharged employee would not be privileged, under the notion of 'continuing claim,' to wait several years before filing a grievance and then seek to have his claim considered on its merits on the basis that each day he was not allowed to work following his termination was a continuing violation. It is the act giving rise to the alleged claim that is the controlling factor as to date of occurrence, not the ensuing consequences of the act."

(See also, Second Division Award Nos. 7843-Roukis, 12756-Fletcher, and Third Division Award Nos. 11167-Sheridan 14450-Ives, 16161-McGovern, 26328-Boyle, 28848-Zusman, 30517-Duffy, 37085-Mason and many others)

The remaining Award Carrier Members point to is **Third Division Award No. 32889 with Referee Gerald E. Wallin** (October 21, 1998). This dispute involves two disciplinary claims combined into a single docket, one in which the Claimant received a 30-day suspension as a result of one investigation, and a second where he was dismissed from service as a result of a second investigation. Carrier violated Article V when it failed to deny both claims within 60 days of receipt.

Frankly, I am surprised that Carrier Members drew our attention to this Award given that **Referee Wallin** provides the following disclaimer within, in pertinent part:

> "The proper application of NDCD No. 16 has been the subject of many Awards of the various divisions of this Board as well as several Public Law Boards. Most of them, if not all of them, have been provided to us. They have all been studied in detail. Because a few have already done a thorough and well-reasoned analysis of the proper application of NDCD No. 16, we will not attempt to do so again here. See, for example, Third Division Award 27842. On this property, however, the parties already have Award 63 of Public Law Board No. 4370, issued on March 7, 1997. This decision interpreted the identical time limits language. We will follow this precedent because to do so provides the parties with a greater degree of certainty and predictability in their claims handling processes."

It is clear from the above-quoted statement that Referee Wallin would have embraced the teachings of **Third Division Award No. 27482 with Referee Stanley E. Kravits** (April 13, 1989)[15] if he were not constrained to agree with **Referee Marx**. In deferring to this prior holding, Referee Wallin uses the same flawed logic — **that the liability is the violation**, and opines that, *"[NDC 16] operates to limit a Carrier's liability for an untimely response where the claim involved is one where liability is not fixed and continues to accrue day by day. NDC No. 16 does not impact claims where the liability is finite and already fixed."* Using this interpretation, Referee Wallin is able to allow as presented the claim involving the 30-day suspension, and then reach the merits of the claim concerning the Claimant's dismissal, subsequent to limiting the Carrier's liability to the date it eventually denied the appeal. Having essentially cleared the Claimant's record in regard to the discipline involved in the first claim, Referee Wallin is then able to find that the penalty of dismissal was too severe and therefore modifies the discipline to a 30-day suspension.[16]

The significance of Referee Wallin's decision does not flow from any profound reasoning he provides for this application of NDC 16, to the contrary, it flows from his willingness to follow Referee Marx and represent that the liability is the violation. That being the case, Referee Wallin's decision is certainly not precedential.

Having disposed of the so-called Arbitral precedents that Carrier Members cite in support their position, I would add that **The Board's** opinion expressed in **Third Division Award No. 24298**, has stood the test of time, and it is as relevant today as it was when they formed that opinion in 1989, in pertinent part:

> "The cases cited on behalf of the Carrier do not express a clear rationale as to why a tolling of Carriers' liability should occur only in appeals from decisions of the Carriers where a disciplinary decision has been grieved. Decision No. 16 contains no such rationale. Its weight derives from the composition and purpose of the Committee rendering it. The decision clearly runs counter to the last paragraph of Decision No. 15, cited above."

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[15] This "well-reasoned analysis of the proper application of NDCD No. 16" is quoted at length, with approval, in Special Board of Adjustment No. 279, Award No. 445, with Referee Arthur T. Van Wart (August 27, 1991). The Board affirmed that analysis therein, and held: "Our Board is impelled to conclude that when the claim, as here, involves discipline then NDC 16 holds no application and need not be followed. However, when discipline is not involved then NDC 16 can be followed."

[16] Carrier Members weren't happy with this result, as they made evident in their Dissent to the Award, in pertinent part: "The Majority has misapplied the application of NDCD #I6 to wipeout the Discipline assessed for being AWOL. The Majority then compounded its error by concluding that having improperly eliminated the 30 day suspension that Claimant's improper activity warranted no more than a 30 day suspension."

The Organization hopes that the detailed information it has provided in this document and in our concurring opinion will guide the Carrier to the proper application of all time limits rules in the future.

Labor Member

John Bragg

John Bragg

08/25/2014

LABOR MEMBER'S CONCURRING OPINION

TO

THIRD DIVISION AWARD NO. 41682

The Majority's rejection of the Carrier's position that the National Disputes Committee's Decision No. 16 (NDC 16) [1] may be applied to claims involving discipline is correct. The decision to fully sustain the claim because of Carrier's default therefore was proper. A special concurrence is appropriate in this case to more fully explain the background of NDC Decision No. 16 and its proper application, which will also shed more light on why the Carrier's attempt to invoke NDC 16 in this case was in error.

The language contained in Rule 53 of the parties' Agreement concerning time limits and the consequences of the Carrier's default on time limits was adopted verbatim from Article V of the August 21, 1954 National Agreement. The plain language of the Agreement, in pertinent part, commands that:

> "Should any such claim or grievance be disallowed, the Carrier shall, within sixty (60) calendar days from the date same is filed, notify whoever filed the claim or grievance (the employee 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 added)**

Carrier's reliance on NDC 16 to attempt to cure its procedural failure in a claim involving discipline is misplaced. NDC 16 is limited in scope — the Committee's intent in this particular decision was to provide the NRAB with the proper application of "allowed as presented" in Article V-1(a) when that provision was placed in operation as a result of Carrier defaulting on a claim filed "for an alleged continuing violation of any agreement" as provided for in Article V-3, in pertinent part:

> "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. However, no monetary claim shall be allowed retroactively for more than sixty (60) calendar days prior to the filing thereof..."

In pressing NDC 16's application, Carrier sought to limit its liability for its procedural failure, and relied on its ability to deliver a presentation which disguises the difference between a claim involving discipline which results in continuing liability, and a claim that alleges a continuing violation of an agreement. However, the requirement stipulated in

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[1] Signatory to the May 31, 1963, Memorandum of Agreement forming the National Disputes Committee were representatives of the Carriers' Territorial Committees for the NRAB and representatives from the Brotherhood of Railway & Steamship Clerks, Freight Handlers, Express & Station Employes; The Order of Railroad Telegraphers; Brotherhood of Maintenance of Way Employes; and Brotherhood of Railroad Signalmen.

Article V for a claim filed involving discipline is distinctly different from the requirement under that article for a claim filed alleging a continuing violation of an agreement.

The difference between the two is easily discernible in this dispute — where the claim was **not** presented as an "alleged continuing violation" under Article V-3, but rather, the claim arose from a single action by Carrier which the Organization alleged violated the Agreement. Thus, the Organization filed the claim in accordance with Article V-1(a), *"...within 60 days from the date of the occurrence on which the claim or grievance is based"* alleging that Carrier violated the Agreement *"...when it issued the harsh and excessive discipline of dismissal..."* The fact that Carrier's liability continued to accrue as a result of its singular act, dismissing the Claimant from service, cannot be construed to mean that thereafter Carrier continued to take some positive action, day after day, in violation of the parties' Agreement. Therefore, it follows, that a claim based on a disciplinary action taken by Carrier does not constitute an "alleged continuing violation of any agreement" as contemplated by Article V-3. If it were otherwise, then a Claimant involved in a disciplinary action that sought redress, could, under Article V-3, lie back for six months or even six years without losing the right to file a claim seeking reinstatement and payment of lost wages sixty (60) calendar days retroactive from the date he filed such a claim. This is clearly not the intent of this provision and the NRAB has never applied such an interpretation when presented with a claim involving discipline. In fact, the NRAB has consistently dismissed discipline claims for lack of jurisdiction if it determined that the claim was not filed in accordance with Article V-1(a), *"...within 60 days from the date of the occurrence on which the claim or grievance is based."* **(See Second Division Award No. 8924 and Third Division Award Nos. 8383, 12490, 16014 and 16697)**

Carrier, in trying to expand NDC 16 to apply to discipline cases, takes advantage of the fact that the National Disputes Committee held that, *"...receipt of the carrier's denial letter dated December 29, 1959 stopped the carrier's liability arising out of its failure to comply with Article V of the August 21, 1954 Agreement"* without seeming to have provided a reason for holding such. Carrier then uses this perceived lack of clarity in NDC 16 to misrepresent the scope of the decision's application, expand it to claims involving discipline, and assert that this decision forever changed the penalty assessed to it in the event it defaulted on any one of the obligations attributable to it in Article V. On its face, this argument is suspect. NDC 16 and the plain language of Article V does not support or even imply that Carrier's liability can be limited in a discipline case. Moreover, such an interpretation is patently unfair and effectively lets Carrier circumvent the procedural requirements of Article V with a monetary payment to the Claimant, and thereafter, Carrier is able to progress the case on its merits. Whereas any procedural failure on the Organization's part is fatal; the Claimant not only loses the monetary remedy he sought, but he is also denied the opportunity to have the merits of his case heard.

To begin to clarify NDC 16's intent, one must first understand the National Disputes Committee's purpose. The decisions rendered by this Committee were meant to provide the NRAB with the parties' mutual interpretation and proper application of the provisions

contained in Article V[2] — because the NRAB had failed to consistently interpret and apply the provisions contained in Article V from that article's inception up until the time the Committee rendered its decisions. This is particularly true in disputes involving a claim filed as a continuing violation of an agreement under Article V-3, where Carrier had defaulted and thus made the provision "allowed as presented" found in Article V-1(a) applicable to the claim. An examination of this arbitral history will confirm this and also show the true intent of NDC 16.

To bring NDC 16 into focus one must start with **Second Division Award No. 3298, with Referee Emmet D. Ferguson** (July 29, 1959) wherein the Board first identified and described a dilemma with putting into operation "allowed as presented" as a consequence of Carrier's default on a claim filed alleging a continuing violation of an agreement. Referee Ferguson, who had previously been involved in the consideration of a factually identical dispute between the parties and had found the alleged violation of the agreement without merit, did not have before him in that dispute the *"...automatic provisions of Article V of the August 21, 1954, Agreement."* In Award No. 3298, the Board acknowledged that Carrier's procedural error was fatal, but in light of the prior holding that the complained of action did not violate the agreement, did not want to create an absurdity, and therefore held that:

> "We are of the opinion that time limits fixed as agreed to by the parties should be strictly applied. This claim falls within the type known as a continuing claim. 'Continuing claims' are a device adopted by the parties to avoid a multiplicity of claims, to avoid the need for filing a new claim every day for that day's violation.
>
> Article V-1(a) of the August 21, 1954 agreement provides explicitly, 'All claims must be presented...within 60 days...Should...such claim be disallowed, the carrier shall, within 60 days...notify in writing of the reasons...If not so notified the claim or grievance shall be allowed as presented,'.
>
> At first glance the rule appears deceptively simple of application. The difficulty arises when it is attempted to put it into operation in a claim for an alleged violation in the future. If the claim is found to be valid on its merits, it should properly be allowed without any restriction on future application. On the other hand, if the claim was without merit in the first place, as we

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[2] The National Disputes Committee rendered twenty-four Decisions total, all of which involved the parties' mutual interpretation of Article V and how the provisions of that Article applied to the material facts of the specific case under consideration. The first two cases the National Disputes Committee was to consider were withdrawn from the Third Division by the parties in dispute before any decision was rendered by the Committee; Third Division Award Nos. 12886 and 12887 were issued respectively to cover those withdrawals. The text of National Disputes Committee Decision Nos. 3–15 can be found in respective order in Third Division Award Nos.: 13528, 14019, 14749, 13837, 13529, 13838, 14291, 13755, 13603, 14020, 13680, 14021, and 13530; and Decision Nos.17–24 can be found in respective order in Third Division Awards Nos.:14087, 13604, 14088, 13698, 13651, 13722, 13723, and 13652. The full text of National Disputes Committee Decision No. 16 is not readily available as that dispute was withdrawn from Third Division by the parties in dispute subsequent to the Committee rendering its decision — Third Division Award No. 13780 was issued covering that withdrawal.

have already found in this docket, the allowance on the **technical** rule violation presents a dilemma, which the framers of the rule did not anticipate except as they provided in Article V. 3. of the August 21, 1954, agreement, wherein continuing violations are recognized, defined and limited. It provides, 'A claim...for an alleged continuing violation...shall be fully protected...as long as such alleged violation, **if found to be such** continues'. This is followed by a retroactive limit of 60 days prior to filing, but the rule is silent on how long in future such claims should be granted. Having found against the merits we should not reverse our decision and create an absurdity.

We conclude by summarizing:

1. That the substantive issue claimed in this docket is without merit.

2. That a technical violation of Article V. 1. a. has been proven and should be sustained.

3. That the alleged violation not having been 'found to be such' on its merits, our allowance is limited to the period prior to the late declination and is not addressed to the substantive merits of the basic claim."

Award No. 3298 drew a heated dissent from the Labor Member who rejected the decision on the basis that the Majority's interpretation was not supported by the plain requirements of Article V. The Labor Member averred that:

"Paragraph 3 of Article V with respect to continuing violations has nothing whatever to do with the case except to relieve claimants from filing repeated claims for claimed continuing violations. The majority seizes upon the language 'if found to be such' in this paragraph as justification for limiting the allowance to which a claimant is entitled under paragraph 1 (a). There is no basis in reason for reading into paragraph 3 any limitation on paragraph 1 (a). Paragraph 3 deals solely and exclusively with the matter of filing repeated claims for continuing violations and with the extent of retroactive monetary claims in the case of such violations that have continued for more than 60 days before claim is filed.

The majority's use of the language 'if found to be such' as a limitation upon the automatic allowance of belatedly denied claims poses a real dilemma from which the majority cannot escape. In order to allow the claim from January 15 to April 11, 1956, the majority must recognize that the violation has been 'found to be such' by reason of paragraph 1 (a). This having been recognized, there is no escape from the conclusion that the duration for which the claim must be allowed is determined by the claim 'as presented.'

> It is quite apparent that the majority has been moved to disregard the plain requirements of the rule by a desire to protect the carrier from indefinite accumulation of liability by reason of a tardy denial of a continuing claim that is found not valid on its merits. There is no necessity whatever for disregarding the rule to achieve such protection. The carrier has such protection at its disposal at any time. When a carrier finds that it is required to allow a claim by failure to make timely disallowance, it can immediately correct the claimed violation. The rule specifically provides that the automatic allowance of the claim as presented is not a precedent or waiver of the carrier's contentions. If the carrier wants to test the merits of the claim it can then reestablish assignments that will give rise to new claims that can be handled on their merits within the time limit rule. If the carrier, as in this case, chooses not to follow that course the Board has no choice but to apply the rule as written and allow the claim 'as presented.'"

Subsequently, on November 13, 1961, the Board adopted **Third Division Award No. 10173, with Referee Lloyd H. Bailor** wherein the Majority did not see the dilemma described by Referee Ferguson. The Board "allowed as presented" a claim filed as a continuing violation as a result of Carrier's default under Article V, holding in pertinent part:

> "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."

The Carrier Members of the Board dissented to **Award No. 10173** and in reference to "allowed as presented," they averred that:

> "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."

The Labor Member answered the Carrier Members' dissent and referencing "allowed as presented" he averred that:

> "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."

Then, in **Third Division Award No. 10401, with Referee Richard F. Mitchell** (March 8, 1962), the Board was again asked to apply "allowed as presented" to a claim alleging a continuing violation of an agreement. In that Award, the Board followed Referee Ferguson's lead, and held, in pertinent part:

> "In a case involving the same Article V of the August 21, 1954 Agreement and the same problem that confronts us in this case, the Second Division in Award No. 3298 (Referee Ferguson) said we quote with approval:
>
> > 'We are of the opinion that time limits fixed as agreed to by the parties should be strictly applied. This claim falls within the type known as a continuing claim. 'Continuing claims' are a device adopted by the parties to avoid a multiplicity of claims, to avoid the need for filing a new claim every day for that day's violation.
> >
> > Article V-1(a) of the August 21, 1954 agreement provides explicitly, 'All claims must be presented...within 60 days...Should...such claim be disallowed, the carrier shall, within 60 days...notify in writing of the reasons...If not so notified the claim or grievance shall be allowed as presented,'.
> >
> > At first glance the rule appears deceptively simple of application. The difficulty arises when it is attempted to put it into operation in a claim for an alleged violation in the future. If the claim is found to be valid on its merits, it should properly be allowed without any restriction on future application. On the other hand, if the claim was without merit in the first place, as we have already found in this docket, the allowance on the technical rule violation presents dilemma, which the framers of the rule did not anticipate except as they provided in Article V. 3. of the August 21, 1954, agreement, wherein continuing violations are recognized, defined and limited. It provides, 'A claim... for an alleged continuing violation...shall be fully protected...as long as such alleged violation, if found to be such continues'. This is followed by a retroactive limit of 60 days prior to filing, but the rule is silent on how long in the future such claims should be granted. Having found against the merits we should not reverse our decision and create an absurdity.'
>
> The claim before us is a 'continuing claim', there is no way under the Agreement that the claim can be terminated, the claim would go on

forever; this we do not believe the parties had in mind when the Agreement was entered into.

***

I. That there is no merit in the claim before us,

II. That a technical violation of Article V-A has been proved and must be sustained.

III. That the violation not having been found to be a violation on its merits, our allowance is limited to the period prior to the late declination and is not addressed to the substantive merits of the basic claim."

The Labor Member supplied a dissent to **Award No. 10401** and referencing "allowed as presented," he averred:

> "The language of Article V which became applicable when the Carrier failed to notify, within 60 days, whoever filed the claim of its reasons for disallowance is not ambiguous. It clearly provides that 'If not so notified, the claim or grievance shall be allowed as presented...'. It does not say that the liability thus incurred will cease as of a certain time or anything of the sort."

Carrier Members answered the Labor Member's dissent and averred that:

> "In the main, the Labor Member's Dissent simply expresses dissatisfaction over his arguments having been rejected by our finding on the merits in Award 10401 that there was no violation of the Agreement by the Carrier. In addition, the weight of authority, as well as of reason, support limitations on the requirement for payment by default under Article V of the August 21, 1954 Agreement, which Article Part 4 of the claim itself placed before the Division."

A month later, in **Third Division Award No. 10567, with Referee D. E. LaBelle** (April 27, 1962), the Board was asked to apply "allowed as presented" to a claim alleging a continuing violation of an agreement. In that case, the Majority held, in pertinent part:

> "The record shows that upon the dates set forth in the claim and thereafter upon unidentified dates and occasions, work customarily performed by Agent Telegrapher Cooper, and covered by the Telegraphers' Agreement, has been performed by conductors, not parties to such Agreement.
>
> Inasmuch as the Carrier has paid from February 26, 1955 through July 3, 1956, we hold that the claim for subsequent violations after July 3, 1956, is a valid one and must be sustained in accordance with the applicable provisions of the Telegraphers' Agreement for such dates and occasions as such work was thus performed and the case will be remanded to the parties for determination of the necessary facts and for disposition on the property."

The Carrier Members of the Board provided a dissent to **Award No. 10567** and in reference to "allowed as presented," they averred that:

> "The claim submitted to the Board was that the Carrier defaulted under the time limit rule. The violation of the time limit rule was not a continuing violation. It occurred just once and the Carrier paid for that violation. This payment by the Carrier in no manner validated claims that may have arisen subsequently."

The Labor Member answered the Carrier Members' dissent to **Award No. 10567** and referencing "allowed as presented," averred that:

> "This contention, with its accompanying rationalization, has confused some referees. A prime example is Award 10401 where, after noting that the agreement makes no provision for terminating a claim under comparable circumstances, the majority proceeded to supply what it said it thought the parties meant. No such error occurred in Award 10567.
>
> The basic unsoundness of the dissenters' contention lies in the studied avoidance of any reference to the precise language of the rule. That language includes the following:
>
> > '...Should any such claim...be disallowed...Carrier shall, within 60 days...notify whoever filed the claim or grievance...in writing of the reasons for such disallowance. **If not so notified, the claim or grievance shall be allowed as presented**...'**(Emphasis ours)**
>
> The underscored language, which the dissenters would modify, is not ambiguous. It does not say that the claim will be allowed up to the time the carrier recognizes the default or makes a decision on the merits. It unequivocally says that the claim shall be allowed 'as presented'.
>
> If the parties had intended any modification or limitation they could easily have included the necessary language.
>
> Award 10567 correctly applied the language which the parties did include in the rule. And there it stopped. The majority correctly refused to invade the field of agreement revision. It is axiomatic that this Board does not have the power to revise agreements as was attempted in Award 10401 and as the dissenters would have it attempt here."

On May 3, 1962, **Third Division Award No. 10576** was adopted wherein the Board, **with Referee D. E. LaBelle** sitting as the neutral member, continued to refuse to rewrite the parties' Agreement, holding, in pertinent part:

> "While we are reluctant to reach a decision on the basis of procedural defects rather than on the merits of a claim, we are bound to such a result, when as here, the parties, by the language of their agreement, have made compliance with procedural requirements mandatory. We must also

recognize that the time limitation and the provision for written reasons for disallowance of claims have salutary purposes. The former serves to expedite the disposition of claims and the latter furnishes the Claimants with a definite basis for considering the merits of their claims in order to determine whether to accept the disallowance or proceed further.

Express time limitations in grievance procedure have been many times held to be enforceable. Application of such rules is sometimes harsh but in the interests of efficient, proper procedure they must be applied. We are not granted any discretion to extend such statutes of limitation as the parties have fixed on themselves. We can only apply their own rules. It follows that in so doing we are precluded from judging the merits of the basic dispute.

***

The claim is allowed, but no monetary allowance be allowed retroactively for more than 60 days prior to the filing thereof, in accordance with the provisions of Article V, Subsection 3 of the Agreement."

Carrier dissented to **Award No. 10576** and in reference to the application of "allowed as presented" to a continuing violation averred that:

"This Award is further in serious error in sustaining the alleged continuing violation on a technical basis without regard to the merits of the claim as originally presented. Article V, Section 3, mandatorily requires an examination of the merits of the claim. It provides for the filing of one claim covering a continuing violation '***if found to be such.***' **Second Division Award 3298** and recent Third Division **Award 10401** dated March 8, 1962 so hold."

A little over a month later, it was held in **Third Division Award No. 10644 with Referee Lloyd H. Bailer** (June 27, 1962), in pertinent part:

"With respect to the period subsequent to January 5, 1956, we think the Carrier restricted its liability, due to procedural failure, by its denial decision to the General Chairman on that date. The language of the claim 'and continuing until the violation is corrected' is terminology commonly used in claims of a continuing nature to avoid any possible contention that such claims are limited to a specific date or period, and to obviate the necessity of filing additional claims for each day involved. A party's failure to make a timely denial of a continuing claim, or to make a timely appeal from a denial of such a claim, does not mean that the substantive nature of the continuing claim therefore must be granted or denied for the unlimited future, however, regardless of the merits of the claim. To hold otherwise would lead to absurd results—such as, work properly belonging to a given craft being indefinitely lost to it because of failure to take timely

action on an appeal, or a Carrier being required for the indefinite future to pay employes for work to which they are not contractually entitled and which is properly being performed by others. The purpose of the Time Limit Rule is to provide for the expeditious handling of claims, not to fasten upon the parties a system wherein a single lapse can produce continuing or repeated injustices thereafter.

We hold, therefore, that the confronting claim may be upheld for the period after January 5, 1956 only if the merits of the claim so dictate. We find no merit in the claim. The Agent may delegate to a Clerk, as he had previously done, the authority to sign his name on bills of lading, but this delegation of authority is revocable at will when the Agent desires to sign his own name on such documents."

It is significant that in **Award No. 10644**, the Board, for the first time, describes the potential pitfalls involved in the application of "allowed as presented" to the merits of the underlying dispute as a consequence of Carrier defaulting on a claim filed alleging a continuing violation of an agreement. It is also telling that the Labor Member did not file a dissent to **Award No. 10644** given that the award followed suit with **Second Division Award No. 3298** and **Third Division Award No. 10401** in finding that Carrier's liability was limited to the date of its untimely denial of such a claim.

Approximately six months later, **the Board** had another opportunity to examine this subject and in **Third Division Award No. 10948 with Referee John H. Dorsey** (December 5, 1962), held, in pertinent part:

"In Carriers' argument before the referee it contended that if it be held that District Manager violated Article V, 1 (a) the relief granted must be restricted to the period from the initial date of the continuing violation to the date District Manager denied the claim. We find nothing in Article V, 1 (a) to support such a contention of limitation. Instead, we find that the Article, clearly and unequivocally without limitation or qualification, makes mandatory that the 'claim...be allowed as presented.'"

The Carrier Members of the Board dissented to **Award No. 10948** and referencing "allowed as presented," they averred that:

"While we disagree with the majority conclusion that the Bureau was in default under Article V in this particular case, the majority committed a serious error in construing Article V as allowing the claim that was referred to the Division. Where, as here, a sustaining award is made because a carrier officer failed to timely disallow the claim, and the merits of the claim were not before the Board, we fail to see how the claim can be sustained beyond June 12, 1957 – see Awards 10401 (Mitchell) and 10644 (Bailer), Second Division Award 3298 (Ferguson), and Fourth Division Award 1657 (Weston), as well as **8318** (Daugherty), and Interpretation No.1 to **Award 9578** (Johnson)."

The Labor Member answered the Carrier Members' dissent to **Award No. 10948** and referencing "allowed as presented," he averred that:

> "It is difficult to comprehend how the Carrier Members can disagree with the conclusion of the majority.
>
> The record plainly states that the 60-day time limit began April 11, 1957 and expired on June 9, 1957. The Bureau's letter allegedly declining the claim was dated June 12, 1957 and received by the General Chairman subsequent thereto.
>
> Article V(a) provides in part that 'If not so notified, the claim***shall be allowed as presented***.' See Third Division Awards 6361 (McMahon), 6789 (Shake), 9933 (Weston), 10500 (Hall), and 10576 (LaBelle)."

Then, in **Third Division Award No. 11211, with Referee Wesley Miller,** (March 13, 1963), it was held, in pertinent part:

> "We now address ourselves to the important matter of the extent to which a continuing claim may be allowed when the Carrier is in default under the time limit rules prescribed by Article V.
>
> This has posed a complicated problem, but it now appears that by virtue of the weight of current precedential Awards a continuing claim may be allowed prospectively only in the event that the Claim is sustained on its substantive merits. See Third Division Awards 10644, 10401, and Interpretation No. 1 of Award No. 9578, which interpretation was adopted by this Division on the 12th day of June, 1962. See also Fourth Division Award No. 1657.
>
> In our opinion, the decisions referred to above are not palpably wrong and should therefore be followed in the deciding of the instant Claim.
>
> Inasmuch as the Employes chose to contend for allowance of this Claim on one ground alone, a procedural violation of the Article V time limit rules, there is nothing in the record which would sustain an affirmative award on the substantive merits.
>
> The present Claim is distinguishable from a number of those cited to the neutral referee in that it involves the presenting and progressing of a continuing claim on purely a procedural point.
>
> The current Awards are at variance to some extent as to the method of relief to be granted to the Employes in the continuing claim type of cases when Carrier is in default under Article V. Awards 10644 and 10401 limit the allowance to the period prior to the late declination. Interpretation No. 1 to Award 9578 would limit the allowance of the Claim to the date the timely declination could have been made.

Since Awards 10644 and 10401 are at least of as much precedential force as said Interpretation No. 1, we are more persuaded by and therefore choose to follow the former which, in effect, make it necessary for the Carrier to take the affirmative action of actually declining a continuing claim.

The referee has some misgivings in regard to the automatic judgment by default theory, i.e., that theory which holds that a claim of this type is automatically allowed at the time action could have been taken by the Carrier, the default judgment speaking as of the time thereof. The difficulty with this is that a claim often involves more than payment of money. It may embrace the claim of a craft to perform a certain type of work; and if such an issue is involved in the basic claim, a default money judgment for a very limited time period may conceivably be an unsatisfactory solution of the problem.

Our Awards point up the fact that neither the Employes nor the Carrier should rely upon a procedural point alone in progressing or defending a claim for a continuing violation.

We agree with the eminent referees who, while sitting with the Board, stated that Article V of the National Agreement placed concomitant obligations upon the signatory Carriers and Organizations; and we quote with particular approval the following portion of recent Award 10644:

> '...A party's failure to make a timely denial of a continuing claim, or to make a timely appeal from a denial of such a claim, does not mean that the substantive nature of the continuing claim therefore must be granted or denied for the unlimited future....The purpose of the Time Limit Rule is to provide for the expeditious handling of claims, not to fasten upon the parties a system wherein a single lapse can produce continuing or repeated injustices thereafter...'

Therefore, except as stated in the first paragraph of this opinion, we conclude that the Claim before us should be allowed as presented for the respective time periods claimed up to, but not including, the 6th day of August, 1956, the date the authorized Carrier official actually declined the Claim." **(Emphasis added)**

The Labor Member dissented to **Award No. 11211**, averring that:

"My position as to the proper interpretation and application of the requirements that:

> '****. If not so notified, the claim or grievance **shall be allowed as presented.******' **(Emphasis ours)**

appearing in Section 1 (a), Article V, August 21, 1954 Agreement, has been clearly documented in my Answer to Carrier Members' Dissents to Awards 9578 and 10173, also, my Dissent to 'Interpretation Nos. 1 to Award Nos. 9578 and 9579', thereby eliminating the necessity to repeat. The Board has repeatedly held that it has no authority to add to, take from, or write rules for the parties, as was done here. See Awards 2765, 5079, 5472, 5483, 6365, 6595, 6611, 6757, 6759, 10035 and 10888.

It is interesting to note, however, that Carrier Members, having voted in favor of this Award, have repudiated the holding of Referee Johnson in Award 9447, reaffirmed by Award 10971 (McMillen) and others.

In panel argument, the Carrier Member introduced the plea, which prevailed upon the Referee to change his original decision of sustaining the 'claim as presented', reading as follows:

> 'It is submitted that Award 10644 represents a sounder analysis. In this later Award he said—
>
> '*** A party's failure to make a timely denial of a continuing claim **or to make a timely appeal from a denial of such a claim,** does not mean that the substantive nature of the continuing claim therefore must be granted **or denied for the unlimited future, however, regardless of the merits of the claim. To hold otherwise would lead to absurd results—such as work properly belonging to a given craft being indefinitely lost to it because of failure to take timely action on an appeal**, or a Carrier being required for the indefinite future to pay employes for work to which they are not contractually entitled and which is properly being performed by others. **The purpose of the Time Limit Rule is to provide for the expeditious handling of claims, not to fasten upon the parties a system wherein a single lapse can produce continuing or repeated injustices thereafter**. We hold, therefore, that the confronting claim may be upheld for the period after January 5, 1956 only if the merits of the claim so indicate. We find no merit in the claim.'
>
> You will note that this decision protects equally the employes and the carriers and thus cannot be said to favor either.' (Emphasis ours)

Therefore, Carrier Members are bound by the stipulation emphasis above, and are estopped from hereafter taking an opposite position, when expedient to do so."

Although the Labor Member maintains in his dissent to **Award No. 11211** that "allowed as presented" in Article V-1(a) applies to claims filed under Article V-3 for an alleged

continuing violation of any agreement — it is clear the weight of arbitral precedence has shifted in favor of limiting Carrier's liability for defaulting on these particular type of claims. It is equally clear from the Carrier Member's embracement of the reasoning in **Award No. 10644** that it is understood that this limitation on Carrier's liability only extends to claims filed for an alleged continuing violation of an agreement.

Considering the foregoing NRAB Awards, along with their associated dissents and answers to these dissents, it comes as no surprise that the National Disputes Committee felt obligated to weigh in on this subject. The Committee did just that. It selected a case at the Third Division that Carrier had defaulted on under Article V, a case which included every element of Article V–3, and then provided the NRAB with NDC 16 — the Committee's mutual interpretation as to the proper application of "allowed as presented" as provided for in Article V-1(a) when Carrier had defaulted on a claim filed under Article V-3 for an alleged continuing violation of an agreement. The Committee held in NDC 16, in pertinent part:

> "The alleged violation commenced July 17, 1959. The Local Chairman's letter dated October 5, 1959 claimed 'a day's pay***for each and every day beginning 60 days prior to the filing of this claim***.' However, the claim was not received by the carrier until October 15. The National Disputes committee rules that under the circumstances of this case the claim shall be considered 'filed' on October 15, the date received by the carrier.
>
> ***
>
> The National Disputes Committee rules that receipt of the carrier's denial letter dated December 29, 1959 stopped the carrier's liability arising out of its failure to comply with Article V of the August 21, 1954 Agreement.
>
> DECISION: Claim for compensation for each day from August 16, 1959 to December 30, 1959 shall be allowed as presented, on the basis of failure of the carrier to comply with the requirements of Article V of the Agreement of August 21, 1954, but this shall not be considered as a precedent or waiver of the contentions of the carrier as to this claim for dates subsequent to December 30, 1959, or as to other similar claims or grievances.
>
> The docket is returned to the Third Division, N.R.A.B., for disposition of the claim for dates subsequent to December 30, 1959."

The Committee's contemporaries at the Third Division NRAB, well aware of their struggle to determine the proper application of "allowed as presented" in Article V-1(a) when that provision was placed in operation as a result of Carrier defaulting on a claim filed "for an alleged continuing violation of any agreement" under Article V–3, completely understood the intent of NDC 16 and that decision's limited scope. They were cognizant of the reasoning contained in Second Division Award No. 3298 and in Third Division Award Nos. 10401, 10644, and 11211, and did not need an explanation as to why the Committee ruled *"...receipt of the carrier's denial letter dated December 29, 1959*

stopped the carrier's liability arising out of its failure to comply with Article V of the August 21, 1954 Agreement" — or — why the Committee decided that *"...the Claim for compensation for each day from August 16, 1959 to December 30, 1959 shall be allowed as presented,..."* — or — why the Committee returned the docket *"...to the Third Division, N.R.A.B., for disposition of the claim for dates subsequent to December 30, 1959."*

Shortly after the National Disputes Committee issued Decision No. 16, the Third Division NRAB demonstrated that they understood full well that the limitation on Carrier's liability did not extend any further than a claim filed which alleged a continuing violation of an agreement, holding in **Third Division Award No. 14603, with Referee David Dolnick** (June 19, 1966), in pertinent part:

> "National Disputes Committee Decision 16 held that where the claim is a continuing one, the receipt of Carrier's denial letter "stopped the carrier's liability arising out of its failure to comply with Article V of the August 21, 1954 Agreement." The denial letter was, for this purpose, received on May 7, 1960. Also see Awards 14502, 14369 and 11326.
>
> Claimants are entitled to be compensated only from August 12, 1959 to May 7, 1960."

And in **Third Division Award No. 15723, with Referee Wesley Miller** (June 30, 1967), in pertinent part:

> "In regard to mitigation of damages (here a job opportunity was apparently available October 28, 1965), the neutral referee is inclined to follow Award 15408 and other recent Awards, such as 14502, where the claim is a continuing one and Article 5 of the 1954 National Agreement is involved and NDC 16 is applicable. These decisions do not delve into mitigation of damages, but, on the contrary, grant relief by a prescribed formula. We do not reach the issue of mitigation of damages under the particular circumstances of this case."

The Board similarly demonstrated that understanding of NDC 16's intent and the limited scope of that decision's application as well, holding in **Third Division Award No. 16002, with Referee Bill Heskett** (December 8, 1967), in pertinent part:

> "The Carrier be required and ordered to allow the claim presented in the aforementioned letter of July 30, 1962, namely, that Section Laborer F. D. Magnetta be allowed payment for a call... and for each Saturday, Sunday and holiday subsequent to July 22, 1962 that the claimant is deprived of the right to service cabooses.
>
> OPINION OF BOARD: The case is here strictly on a time limit question under Article V of the Agreement. The record shows that the claim was presented to the Roadmaster in a letter dated 30 July, 1962, and it was not until 9 November, 1962, that the Roadmaster disallowed it. Since the denial of the claim was not timely, it is payable under Article V, to the date of the late disallowance, 9 November, 1962. See National Disputes

Committee Decision No. 16; Award 13780; as well as Awards 14369, 15050, 15069, 15223, 15448 and 15933." (**Emphasis added**)

The Board expressly acknowledged the limited scope of NDC 16's application in **Third Division Award No. 17667, with Referee Don Gladden** (January 20, 1970), holding in pertinent part:

> "Since this is a continuing claim, the liability of the Carrier is limited to the date when the Organization received Carrier's denial, that is, March 19, 1968. See National Disputes Committee decision No. 16 and Awards 14950, 14904, 14603, and 14502."

Now, it is true that the Carrier Members have at times had some success in convincing some arbitrators to apply NDC 16 to discipline claims. However, one should be mindful of the fact that those decisions are progeny of one or more awards on this subject penned by **Referee Paul C. Carter** — and in **Third Division Award No. 24298** (April 14, 1983), Referee Carter held, for the first time on that Division, that NDC 16 limited Carrier's liability for its procedural error in a discipline case, in pertinent part:

> "Many awards have been rendered by this Division involving late denial of claims by Carriers, especially since Decision No. 16 of the National Disputes Committee. See also Decision No. 15 of the same Disputes Committee. Decision No. 16 of the National Disputes Committee, and awards following the issuance of that Decision, have generally held that a late denial is effective to toll Carrier's liability for the procedural violation as of that date. From the date of late denial, disputes are considered on their merits if the merits are properly before the Board.
>
> We find that the proper measure of damages for Carrier's violation of Rule 49(a)1 in the dispute before us, is at his straight time rate for September 18, 1980, through and including January 28, 1981. See Award No. 5 of Public Law Board No 1844, as well as Third Division Awards No. 19842 and 21289 dealing with investigations not timely held , also Atlantic Coast Line RR v. BRAC, 120 F. 2d 812 (1954).
>
> As to the merits of the dispute, considering the offenses Claimant Bitterman was clearly guilty of, we will not award that he be reinstated to service or compensated beyond January 28, 1981."

Referee Carter's decision is noteworthy in and of itself for several reasons. First, he implies, for the first time on the Third Division NRAB, that NDC 15 and NDC 16 are interdependent — they certainly are not. Second, unable to cite precedence from any of the Divisions of the NRAB for his misapplication of NDC 16 to a discipline case, Referee Carter points to an obscure Public Law Board Award without any precedential value, two Third Division Awards, neither of which alleged an Article V violation, and a civil court decision that has no bearing on the interpretation or application of the provisions

contained in Article V, as justification for his action. Third, and most significant, Referee Carter knew, without a doubt, that NDC 16 only applied when Carrier had defaulted on a claim filed for "an alleged continuing violation of any agreement" — and he went ahead and inappropriately utilized NDC 16 in a discipline case in order to deliver a decision based on his notion of equity.

As to the latter point, one needs to look no further than the Carrier Members' dissents to the awards cited in this Concurring Opinion to know that this is true. Referee Carter served as partisan Member of the Board up until the late 1970s and he is signatory to the Carrier Members' dissents to **Third Division Award Nos. 10173, 10401, 10567 and 10576**. So, to pretend that Referee Carter was not acutely aware of the NRAB's inconsistent interpretation and application of the provisions contained in Article V from that article's inception up until the time the National Disputes Committee rendered its decisions is beyond reason. Nor is it plausible that Referee Carter was unaware that the National Disputes Committee's Decision No. 16 represented a Labor-Management consensus concerning the proper application of "allowed as presented" in Article V-1(a) when that provision was placed in operation as a result of Carrier defaulting on a claim filed "for an alleged continuing violation of any agreement" as provided for in Article V-3 — not when Referee Carter, while serving as a Carrier Member of the Board, averred in the dissent to **Third Division Award No. 10576** that:

> "This Award is further in serious error in sustaining the alleged continuing violation on a technical basis without regard to the merits of the claim as originally presented. Article V, Section 3, mandatorily requires an examination of the merits of the claim. It provides for the filing of one claim covering a continuing violation '***if found to be such.***' **Second Division Award 3298** and recent Third Division **Award 10401** dated March 8, 1962 so hold."

Even if one did not know this history or draw any conclusion from it, one thing is clear: Referee Carter's awards involving his utilization of NDC 16 to limit Carrier's liability in discipline cases lack the sound reasoning and detailed logic needed to support his application of that decision in those cases. Thus, Referee Carter's awards are devoid of any of the qualities needed to be considered precedential and one should be skeptical of any award that cites Referee Carter's decisions as precedence for the application of NDC 16 to discipline.

The better reasoned decisions regarding NDC 16's application to discipline are those that reject it. A prime example of this is **Second Division Award No. 9354, with Referee John Phillip Linn** (January 26, 1983) wherein the Majority therein rendered a decision well-grounded in the history of Article V and the proper application of NDC 16 and thoroughly rejected its use in discipline cases, holding in pertinent part:

"It is the position of the Carrier that the discipline initially imposed on Claimant should not be disturbed by this Board. Further while admitting that Mr. Radabaugh's disallowance of the claim was beyond the 60-day time limit period prescribed in Section 1(a) of Article V of the controlling Agreement, the Carrier contends that any sustaining award is appropriate only to the extent of sustaining the claim for the time lost in excess of the 60-day time period. In calculating that time, the Carrier asserts that the time should be measured from the date on which Mr. Radabaugh actually received the claim (April 13, 1979) to the date the disallowance of the claim was postmarked (June 14, 1979), a total of 62 days. Thus, it is argued that the belated denial of the claim entitles Claimant to no more than two days for time lost pursuant to his claim under Section 1(a) of Article V.

***

In partial support of its position, the Carrier has directed the attention of this Board to Decision No. 16 of the National Disputes Committee that was established in May, 1963 by various non-operating unions and Carrier members to resolve certain disputes that were submitted to the Third Division. In NDC Decision No. 16 it was alleged that commencing July, 17, 1959 the Carrier (Denver and Rio Grande Western Railroad Company) had abolished the position of a clerk and thereafter assigned work coming under the scope of the Clerk's Agreement to be performed by other crafts. A claim for the Clerk involved was filed on October 5, 1959, asking for a day's pay Commencing 60 days prior to filing of the claim and continuing until the work was returned to the scope of the Clerks' Agreement and performed by clerical employes thereunder. The claim was not received by the Carrier until October 15, 1959.

Without explanation the National Disputes Committee ruled that the Carrier's liability for payment of the claim arising out of the Railroad's failure to comply with the 60-day requirement of Article V of the August 21, 1954 Agreement ended when the Carrier's denial letter dated December 29, 1959 was received by the local chairman on December 30, 1959. The claim for compensation for each day commencing 60 days prior to receipt of the claim by the Carrier was allowed and continued through December 30, 1959 when the Carrier's denial was received by the local chairman. The docket was then returned to the third Division, N.R.A.B., for disposition of the claim on its merits for dates subsequent to December 30, 1959.

The Carrier submits that in light of NDC Decision 16 its default regarding the 60-day limitation in Article V was cured by a proper denial letter postmarked June 14, 1979. The Carrier believes that the claim should be denied from June 15, 1979 to the date Claimant was offered reinstatement and instructed to report for work, but failed to do so...

Even if this Board were disposed to follow rulings of the National Disputes Committee, it would not find NDC Decision 16 applicable to the instant dispute. The NDC case involved an alleged continuing violation, unlike the case sub judice.

As noted in Award 3298, Second Division (Ferguson) the language of Article V, Section 1(a), appears deceptively simple of application, but difficulty arises when it is attempted to put that language into operation in a claim for an alleged violation continuing in the future. The technical rule violation presents a dilemma, which the framers of the language did not anticipate except as they provided in Article V, Section 3, of the August 21, 1954 Agreement pertaining to continuing violations. Consequently, there is logic in the cut off rule of NDC Decision No. 16 to avoid the unintended result that untimely denial of a continuing claim requires that the substantive nature of such claim be granted for the unlimited future. However, that logic has no place in a dismissal action.

Article V, 1 plainly provides mutual obligations on the parties to act in a timely manner in processing claims or grievances. Under that language, this Board was held in disputes between the instant parties that it is without jurisdiction to inquire into the merits of a dispute where a claim has not been filed within 60 days from the date of the occurrence on which the claim is based. Similarly, this Board must hold that it is without jurisdiction to inquire into the merits of the instant dispute between the parties where the Carrier has failed to make notification that the claim was disallowed within the required 60-day period. The claim must be allowed."

Next, we turn to **Third Division Award No. 27482, with Stanley E. Kravit** (April 13, 1989) wherein **the Board** examined Referee Carter's decisions on this subject, along with the subsequent awards citing his decisions as precedence, and found that none of these decisions expressed a clear rational as to why Carrier's untimely denial would toll its liability in a discipline case — and further found that NDC 16 did **not** support such a determination, holding in pertinent part:

"The Board is left with the inescapable conclusion that the Carrier is in violation of Rule 44 (a) and must deal with the Organization's contention that such violation requires the Board to overturn the dismissal without reaching the merits.

A number of cases submitted and considered hold that procedural violations in disciplinary cases do not automatically entitle Claimants to be restored to service:

"It is well established that a late denial is effective to toll the Carrier's liability for a procedural violation as of the date of that denial. From the date of the late denial, disputes are thereafter considered on their merits." (Third Division Award 26239. Citations omitted.)

The rationale for these decisions arises out of Decision No. 16 of the National Disputes Committee rendered on March 17, 1965, interpreting Article V of the August 21, 1954 Agreement. That Article reads, in part:

> "(a) All claims or grievances must be presented in writing by or on behalf of the employee involved, to the officer of the Carrier authorized to receive same, within 60 days from the date of the occurrence on which the claim or grievance is based. 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 employee or his representative) in writing of the reasons for such disallowance. If not so notified the claim or grievance shall be allowed as presented, but this shall not be considered as a precedent or wavier of the contentions of the Carrier as to other similar claims or grievances." (Cited in Third Division Award 24269)

The case concerned a failure to deny a non-disciplinary Claim within 60 days of appeal. The Committee awarded compensation to the Claimant up to the date the denial was actually received, but tolled the time for denial on the merits. That is, "receipt of the Carrier's denial letter dated December 29, 1959, stopped the Carrier's liability arising out of its failure to comply with Article V of the August 21, 1954 Agreement." The case was remanded for a determination on the merits as to Carrier liability after December 30, 1959.

In its DECISION the Committee stated that its Award of compensation up to the December 29th reply date:

> "...shall not be considered as a precedent or waiver of the contentions of the carrier as to this claim for dates subsequent to December 30, 1959 or as to other similar claims or grievances." (Emphasis added. NDC Dec. No. 16, Third Division Docket CL-12336.)

Except for the insertion of the phrase "as to this claim for dates subsequent to December 30, 1959 or", the language of its Decision is identical to the language of Article V.

The Board has reviewed a line of Awards adopting Decision No. 16 as dispositive of the issue before us.

> "Many awards have been rendered by this Division involving late denial of claims by Carriers, especially since Decision No. 16 of the National Disputes Committee. See also Decision No. 15 of the same Disputes Committee. Decision No. 16 of the National Disputes Committee, and awards

> following the issuance of that decision, have generally held that a late denial is effective to toll Carrier's liability for the procedural violation as of that date. From the date of late denial, disputes are considered on their merits if the merits are properly before the Board." (Third Division Award 24298. In accord: Third Division Awards 25473 and 24269.)

In Fourth Division Award 4600, dated April 21, 1988, where the Rule (17(c)) made no reference as to what would occur if the denial by an officer of the Carrier was untimely, Decision No. 16 was also applied as precedent:

> "There is another line of Awards, however, which does address to the type of time-limits' question found in this case and the appropriate remedy for such violation...(Citations omitted.) The Board has reviewed these Awards but will cite only Second Division Award 10754 and Third Division Award 24298 as representative of the National Railroad Adjustment Boards' precedential conclusions on proper remedy for a violation of the type here at bar."

This Award makes a distinction between violations of time-limits "relating to requesting a hearing and on Carrier's obligations to render post-hearing decisions in a timely manner," and "missing time-limits on appeal of a decision after it has been rendered subsequent to an Investigation." It applies Decision No. 16 to the latter without discussing the reason for the distinction between its holding and Awards holding to the contrary on the former.

The Labor Member's Dissent to Award 4600 denies that Decisions 15 or 16 were intended to apply to disciplinary cases, and states, in part:

> "Decisions No. 15 and 16 both involved rule violations, neither of which were discipline cases. Awards 10754 and 24298 took in part that rationale and then decided it applied equally in discipline matters when in fact the National Disputes Committee never decided that such an interpretation should apply in discipline cases. If, however, those Awards had paid closer attention to the concluding remarks of Decision No. 15, they probably would have arrived at a different conclusion. That last paragraph states the following:
>
> 'In this connection the National Disputes Committee points out that where either party has clearly failed to comply with the requirements of Article V the claim should be disposed of under Article V at the state of handling in which such failure

becomes apparent. If the carrier has defaulted, the claim should be allowed at that level as presented;...'"

Cases presented by the Organization involve time limits pertaining to all phases of the investigation and appeal process. Third Division Award 23553 concerned Carrier's failure to render a decision within 7 days from an employee's request for a hearing. The Board stated:

> "Every Division of this Board has attempted, through its decisions, to be meticulously accurate and consistent in applying time-limits as written in the Schedule Agreement. The parties in this industry are fully aware of the Board's position on adherence to time-limits...we see no reason to deviate from a policy of strict adherence to time-limits here. This case will be sustained on the time-limit issue. The merits of the case need not be reached."

Third Division Award 21996 concerned the failure to render a decision within 30 days from completion of the investigation. The Board here also refused to reach the merits citing with approval the following:

> "We have consistently held that an employee who has failed to initiate action within the time limitations fixed in an agreement is barred from initiating an action at a latter date. Satisfaction of identified action within fixed agreed upon time limitations is mandatory as to each of the parties. Time limitations set by contractual agreement have the same force and effect as those found in statutes and court rules – a party failing to comply by nonfeasances finds himself hoisted by his own petard." (Third Division Award 18352.)
>
> "...time limit provisions are to be applied as written by the parties and (that) any deviation from this principle would amount to re-writing the parties' Agreement which no third party is empowered to do." (Third Division Award 21675.)

In Third Division Award 19666 the Board sustained the Claim without reaching the merits where no conference arrangement was made within 15 days after being requested. In Third Division Award 20519, where the Carrier failed to meet the time limit for timely denial of the Claim in a disciplinary matter, the Claim was similarly upheld without reaching the merits.

In Fourth Division Award 4368 the Rule read:

> "Officers receiving such appeal will render a decision thereon within thirty (30) days of date appeal is received."

The Board rejected the rationale of Decision No. 16, holding that the awards cited in support of the result reached in that case "do not involve discipline. Rather, they represent this Board's holdings in cases involving a 'belated denial of a continuing claim...'"

> The Board further held:
>
> 'Rule 17 imposes mutual obligations. The Carrier did not meet those imposed upon it. We remind the parties that Carriers consistently deny employee claims when they fail to comply with contractual time limits.'

stating that its decision was in accordance with 'a long line of precedent which far outweighs cases cited by the Carrier.' (Citing Fourth Division Award 4211.)

In Third Division Award 21755, Decision No. 16 was rejected where Carrier's highest officer failed to answer a disciplinary appeal within sixty days as required in Article V of the August 21, 1954 Agreement, which was being interpreted in that case also. The Board's rationale is simply that a contract should be interpreted as written and that the clear and unambiguous language requires the granting of the claim without reaching the merits.

The cases cited on behalf of the Carrier do not express a clear rationale as to why a tolling of Carriers' liability should occur only in appeals from decisions of the Carriers where a disciplinary decision has been grieved. Decision No. 16 contains no such rationale. Its weight derives from the composition and purpose of the Committee rendering it. The decision clearly runs counter to the last paragraph of Decision No. 15, cited above.

On the other hand, cases cited by the Organization contain clear rationales and demonstrate the equity involved in requiring equal adherence to all time-limits as well as the consistency inherent in following the clear language of the contract.

The language of Rule 44 (a) in the present case is identical to Article V in Decision No. 16. However, in that case the Claimant was on leave during the entire period involved in his Claim. There was a jurisdictional issue and apparently a question as to whether Claimant should have exercised his seniority and worked or whether he was justified in taking leave and making the claim. Under these circumstances, the Committee's ruling suggests a view of the issue on the merits as one involving a continuing grievance. This interpretation of its insertion of the phrase 'as to this claim for dates subsequent to December 30, 1959' into the language of the Rule, seems more logical than an intent to distinguish between time-limits in different phases of the disciplinary process.

> This interpretation of Rule 44 (a) is more consistent with that portion of the last paragraph of Decision No. 15, quoted in the Dissent to Fourth Division Award 4600. A contrary finding would result in the principle of default for violation of time-limits being applied against all time-limit violations by a Organization and against all procedural violations by a Carrier except for violation of the time-limit for disallowance of a Claim.
>
> The weight of the cases is clearly with the proposition that time limit requirements should be evenly applied. In addition, time-limits represent policy decisions incorporated into agreements for reasons determined by the parties. The Board must respect such decisions. This Claim will be sustained on the time-limit issue. The merits need not be reached. Claimant will be restored to service and made whole for earnings lost in accordance with the Agreement and subject to normal rules of set-off.'

The sound reasoning and logic within Second Division Award No. 9354 and Third Division Award No. 27482 is truly precedential and far outweighs the perfunctory treatment given in the awards involving Referee Carter — or the line of awards which cite his decisions as precedence.

In conclusion, this Concurring Opinion should leave the reader with a complete understanding of the correct application of NDC 16 and the reasons for which the majority was correct in rejecting the Carrier's attempt to invoke it in this case, a discipline case.

Respectfully submitted,

John Bragg

John Bragg
NRAB Labor Member
Vice President
Brotherhood of Railroad Signalmen