

NATIONAL RAILROAD ADJUSTMENT BOARD

FOURTH DIVISION

PARTIES TO DISPUTE:

**SOUTHERN PACIFIC COMPANY (PACIFIC LINES)
AND
RAILROAD YARDMASTERS OF NORTH AMERICA, INC.
SWITCHMEN'S UNION OF NORTH AMERICA**

STATEMENT OF CLAIM: Claim is made by the Switchmen's Union of North America for one day's pay at the applicable yardmaster rate for the senior qualified switchman standing for service on temporary vacancy on Yardmaster Position No. 120, on duty 7:00 A.M., January 1, 1959, Los Angeles Yard, Los Angeles Division.

PETITIONERS' STATEMENT OF FACTS:

A. AGREEMENT PROVISIONS AND REPRESENTATION RIGHTS.

1. There is in effect an agreement by and between the Southern Pacific Company (Pacific Lines) and the Switchmen's Union of North America, bearing an effective date of September 1, 1956, governing wages and working conditions of employes referred to therein as Switchmen and Switchtenders. A copy of this agreement, hereinafter referred to as the "switchmen's current agreement", has been filed with the First Division, National Railroad Adjustment Board, and is by reference made a part of this submission.

2. Prior to November 26, 1951, switchmen and switchtenders on this property were represented for collective bargaining purposes by the Brotherhood of Railroad Trainmen and their wages and working conditions were governed by an agreement between the carrier and the Brotherhood of Railroad Trainmen bearing an effective date of November 16, 1939.

3. On November 26, 1951, the Switchmen's union of North America was certified by the National Mediation Board as the collective bargaining representative of switchmen and switchtenders on this property. The scope of the Mediation Board's certification (Case No. R-2450) reads as follows:

"The Switchmen's Union of North America has been duly designated and authorized to represent for purposes of the Railway Labor Act, the craft or class of Yardmen, (Foremen, Helpers, Switchtenders, Herders and Car Retarder Operators), employes of the Southern Pacific Company, its successors and assigns."

4. Upon certification by the National Mediation Board, the Switchmen's Union of North America took over the terms and conditions of the November 16,

1939, agreement and this agreement continued in effect until superseded by the switchmen's current agreement, effective September 1, 1956.

5. Article 12 of the Switchmen's current agreement is captioned "Seniority Switchmen" and Section (a) thereof provides as follows:

"Section (a). Switchmen will be promoted in their respective yards, helper to foreman, foreman to yardmaster; seniority and ability to govern. As a prerequisite to promotion to yardmaster, it will be necessary for the applicant to have served at least one (1) year (306 days) as engine foreman in yard where promoted; except where new yards are established, senior engine foreman with one (1) year's (306 days') experience on the seniority district, shall be eligible for position as yardmaster in accordance with this Section. Should switchman promoted to yardmaster not be familiar with the work and territory which he is to supervise, he will familiarize himself with the work and territory without additional expense to the Company.

"If senior switchman standing for promotion to yardmaster is not available as result of sickness or leave of absence, and it is necessary to promote a junior switchman the senior switchman will be allowed five (5) days after becoming available to elect whether he desires to accept the promotion; if he elects to accept the promotion, the seniority date as yardmaster which would have been acquired by the junior switchman, shall be accorded the senior switchman and the junior switchman will not thereby establish a seniority date as yardmaster.

"Should switchman standing for promotion to yardmaster, or to fill vacancy as such, decline to accept, he will do so in writing, and in either case he will forfeit his right to yardmaster work for a period of six months (180 days).

"At the expiration of said six months he will be eligible for promotion and assignment to regular position as yardmaster but will not be used to fill temporary vacancies, except in event of an emergency.

"Switchmen promoted to position of yardmaster will retain their seniority as switchmen. If, after switchman is promoted to regular position as yardmaster, the position is discontinued or he is displaced, he will be privileged to exercise his switchmen's seniority to acquire a position, but will not be privileged to work as switchman, when his seniority entitles him to a regular position as yardmaster. If loses position as yardmaster and if privileged to displace a switchman, such displacement must be made within five (5) days after loss of position as yardmaster, except if on leave of absence, or if off duty account sickness or injury, displacement must be made within five (5) days from date of return.

"Should a switchman promoted to position of yardmaster be demoted, he will be privileged within five (5) days of said demotion (or if on leave of absence account sickness or otherwise within five (5) days from date of return), to displace a junior switchman. Superintendent will notify Local Chairman of such demotion within five (5) days after demotion.

"Note: The title 'yardmaster' as used in this Section will include General Yardmaster (except at large and important terminals), Assistant General Yardmaster, Yardmaster and Assistant Yardmaster."

6. This section first appeared in identical terms in the agreement of November 16, 1939, between the carrier and the Brotherhood of Railroad Trainmen.

7. There is in effect an agreement by and between the Southern Pacific Company (Pacific Lines) and the Railroad Yardmasters of North America, Inc., bearing an effective date of August 1, 1941 (reprinted with certain revisions on September 13, 1954, and on September 1, 1959), governing wages and working conditions of employees referred to therein as "day general yardmasters, night general yardmasters, assistant general yardmasters, yardmasters and assistant yardmasters." A copy of this agreement, hereinafter referred to as the "Yardmasters' current agreement" has been filed with the Fourth Division, National Railroad Adjustment Board, and is by reference made a part of this submission.

8. Prior to September 24, 1952, pursuant to certification by the National Mediation Board of September 17, 1937 (Case No. R-367), the Railroad Yardmasters of America was the yardmaster's representative for collective bargaining purposes, and wages and working conditions of such yardmasters were governed by an agreement between the Southern Pacific Company (Pacific Lines) and the Railroad Yardmasters of America, bearing an effective date of February 1, 1938, and superseded by an agreement between the same parties effective August 1, 1941.

The scope of the National Mediation Board's certification of yardmasters reads as follows:

"* * * the Railroad Yardmasters of America has been duly designated and authorized to represent general yardmasters (except those coming under provisions of Ex Parte 72 of the I.C.C.), assistant general yardmasters, assistant yardmasters, yardmasters and relief yardmasters for purposes of the Railway Labor Act."

9. On September 24, 1952, the Railroad Yardmasters of North America, Inc., was certified by the National Mediation Board (Case No. R-2581) as the collective bargaining representative of yardmasters on this property.

10. Upon certification by the Mediation Board, the Railroad Yardmasters of North America, Inc., took over the terms and conditions of the August 1, 1941 agreement, and this agreement continued in effect, subject to certain revisions and reprintings, and is now in effect as the yardmasters' current agreement.

11. The agreement covering yardmasters, effective February 1, 1938, contained the following provision as to its scope:

"Where title 'yardmaster' is used, it has reference to General Yardmasters (except as provided in paragraph (b), Article 10), Assistant General Yardmasters, Yardmasters, Assistant Yardmasters and Relief Yardmasters."

(Article 10, paragraph (b), provided that Day General Yardmasters at Oakland, San Francisco, Los Angeles, San Jose, Brooklyn, Eugene, Sacramento, Roseville, Tucson, Fresno and Bakersfield were excluded from the agreement.)

12. Article 11 of this agreement was captioned "New Positions and Vacancies" and provided as follows:

"(a) New positions and permanent vacancies will be bulletined for a period of five (5) days and senior qualified applicant will be assigned. Superintendent shall decide qualification required.

"(b) Arrangements may be made by Local Chairman and his Superintendent whereby temporary vacancies may be filled by the oldest qualified yardmaster applying for same."

13. The agreement covering yardmasters effective August 1, 1941 — the Yardmasters' current agreement — provides, in its Article 1, captioned "Scope" as follows:

"(a) The title 'yardmaster' as used in this agreement includes day general yardmasters, night general yardmasters, assistant general yardmasters, yardmasters and assistant yardmasters."

14. Article 6 of the Yardmasters' current agreement is captioned "Day Off" and Section (d) thereof reads as follows:

"(d) Position of relief yardmaster shall be established and assigned where relief requirements as established by the Company consist of six (6) days' relief service per week. In the event relief requirements are less than six (6) days per week, the Company may in its discretion establish position of relief yardmaster on a basis of six (6) days per week by supplementing the relief requirements of less than six (6) days with service on a yardmaster position to be created for less than six (6) days per week in order to provide a working schedule of six (6) consecutive days for such relief yardmaster position. Where relief requirements of less than six (6) days per week are not supplemented as provided in the preceding sentence, relief service shall be performed by the senior unassigned yardmaster, if available, in the yard where such relief requirements exist. If an unassigned yardmaster is not available, such relief may be made by the senior available qualified yardman."

15. Article 8 of the Yardmasters' current agreement is captioned "Seniority", and Section (a) thereof reads as follows:

"(a) Yardmasters included within the scope of this agreement constitute one seniority class. A yardmaster's seniority will begin from the date that he is assigned to a position by assignment notice, except as otherwise provided in this article, and shall be confined to the yard at which employed."

16. Article 9 of the Yardmasters' current agreement is captioned "VACANCIES AND NEW POSITIONS". Insofar as is material to the within claim, this Article provides as follows:

"(a) In filling vacancies and new positions and in making promotions, ability, merit, fitness and seniority shall be considered. Ability, merit and fitness sufficient, seniority shall prevail. As each superintendent is held responsible for the proper performance of all duties devolving upon the men working under his supervision, and as he is in the best position to look after the welfare of the Company, he shall be the judge of ability, merit and fitness.

"(b) New positions and vacancies of thirty (30) days' or less duration shall be filled whenever possible by the senior qualified yardmaster making request for same.

"(c) New positions or vacancies of more than thirty (30) days duration shall be advertised for five (5) days by appropriate notice as soon as they become effective. When it can be anticipated, such positions will be advertised five (5) days in advance. The advertising period of five (5) days shall begin at twelve (12) noon o'clock of the day and date appropriate notice is issued and shall run to twelve (12) noon o'clock (120 hours) of the fifth day thereafter. Notice shall indicate whether it is a vacancy or a new position and, if temporary, the probable duration, assigned hours of service and the time and date limit within which application must be filed.

"Notice shall be issued on the day and date of final day of the advertising period, except when such day and date falls on Sunday or holiday or combination of both, in which case the notice shall be issued on the next succeeding day and the senior qualified yardmaster making application for the position will be assigned thereto effective at 12:01 A. M. of the next calendar date. If a qualified yardmaster does not make application, assignment may be made to the senior qualified yardman who makes application.

(Revised effective September 1, 1958)

"On January 25 and July 25 of each year, yardmasters assigned to and having regular positions on that date will be permitted, by filing written notices on said date prior to 12:01 P. M. with the proper local officer to displace junior assigned yardmasters to be effective on February 1st and August 1st, respectively; provided, however, (1) any notice thus filed may be rejected by the Company officer responsible for operations if in his judgment the yardmaster seeking to exercise displacement as provided in this paragraph is not qualified to fill the position on which he desires to make displacement, and (2) time lost by yardmasters permitted to make displacements in the manner provided here or displaced as a direct or successive result thereof shall not be paid for, and (3) this right of displacement shall not extend to general yardmasters or night general yardmasters nor shall displacements be permitted on positions of general yardmaster or night general yardmaster by those yardmasters permitted to exercise the right of displacement provided in this paragraph or displaced as a direct or successive result thereof."

(Revised effective September 13, 1954)

B. HISTORICAL BACKGROUND

The interplay of mutual and/or conflicting interests between yardmasters and switchmen on this property has had a long and involved background. Not the least of the difficulties results from the fact that in many instances the carrier has found itself in a neutral position between the opposing contentions of the respective parties.

Basically, the major areas of conflict have centered around the following issues: (1) the exclusive right of switchmen to consideration for promotion to yardmasters; (2) the right of yardmasters to retain their seniority rights as

switchmen and to revert to switchmen status and perform such service when unable to hold regular yardmaster positions; and (3) the right of switchmen holding seniority as yardmasters but not assigned as such (unassigned yardmasters) to perform temporary or incidental yardmaster service to the exclusion of other switchmen who have not acquired a seniority status as a yardmaster.

In part to eliminate some of the more critical controversies and to define and clarify the respective rights of the parties, the Railroad Yardmasters of America, the Brotherhood of Railroad Trainmen and the carrier entered into a so-called "Tri-Party Agreement" on September 7, 1939. This agreement reads as follows:

Tri-Party Agreement

It is agreed between the Southern Pacific Company (Pacific Lines), Brotherhood of Railroad Trainmen, and Railroad Yardmasters of America, that their mutual interests warrant, will be better served and protected, by the adoption of this tri-party agreement pertaining to the promotion of yardmen and yardmasters. Therefore, it is mutually agreed between the signatories to this agreement that, the following rules shall become effective on the date this agreement is executed, to-wit:

Section 1.

If the senior yardman standing for promotion to yardmaster is not available as result of sickness or leave of absence, and it is necessary to promote a junior yardman, the senior yardman will be allowed five (5) days after becoming available, to elect whether he desires to accept the promotion; if he elects to accept the promotion, the seniority date as yardmaster which would have been acquired by the junior yardman, shall be accorded the senior yardman, and the junior yardman, will not thereby establish a seniority date as yardmaster.

Section 2.

A yardmaster or yardman promoted to an official position in the Company's service, or being exclusively employed by either the Brotherhood of Railroad Trainmen or the Railroad Yardmasters of America, will, in either event, retain their seniority as yardmaster and yardman.

It is further agreed that Sections 1 and 2 of this Agreement hereby become a part of the current agreement between the Southern Pacific Company (Pacific Lines) and the Brotherhood of Railroad Trainmen, effective March 1, 1927, and of the current agreement between the Southern Pacific Company (Pacific Lines) and the Railroad Yardmasters of America, effective February 1, 1938, and that said Sections 1 and 2 of this agreement shall be incorporated and become a part of future agreements between the aforesaid parties unless otherwise mutually agreed.

Signed. A. Cooley
Vice-Chairman, General Committee
Brotherhood of Railroad Trainmen

Signed. R. J. Brooks
General Chairman
Brotherhood of Railroad Trainmen

Signed. Thos. F. Goodwin
General Chairman
Railroad Yardmasters of America

Signed. R. E. Beach
Assistant to General Manager
Southern Pacific Company
(Pacific Lines)

San Francisco, Calif.
September 7, 1939.

In accordance with its specific terms, Section 1 of the above agreement has since been incorporated and now appears in identical terms as a part of Article 12, Section (a) of the Switchmen's current agreement (which, as noted, first appeared in the agreement of November 16, 1939). Section 1 of the above agreement has also been incorporated in the agreement covering yardmasters and now appears in substantially the same terms as Article 8, Section (d) of the Yardmasters' current agreement.

Section 2 of the above agreement has since been incorporated and now appears in substantially the same terms as Article 25, Section (d) of the Switchmen's current agreement. It also has since been incorporated in the agreement covering yardmasters and now appears in substantially the same terms as Article 8, Section (k) of the Yardmasters' current agreement.

It will be noted that this tri-party agreement deals solely and exclusively with the seniority and promotion rights of yardmen (switchmen) and yardmasters.

Apart from the Tri-Party Agreement of September 7, 1939, there has been no agreement duly executed by all of the parties concerning the rights, if any, of switchmen to perform yardmasters' work under any conditions.

However, the carrier and the duly accredited representatives of its yardmasters did enter into an agreement permitting the use of the senior qualified yardman (switchman) to perform yardmaster relief service where the relief requirements are not met by the establishment of regularly assigned relief yardmaster positions and when and if an unassigned yardmaster is not available. This provision now appears as Article 6, Section (d) of the Yardmasters' current agreement.

No agreement has ever been entered into by the yardmaster's accredited representative providing that a switchman who does not also hold seniority as a yardmaster may properly be used on any yardmaster vacancy or to perform yardmaster service under any other circumstances, except by promotion and assignment to a yardmaster position by bulletin.

For a number of years prior and subsequent to the adoption of the Tri-Party Agreement of September 7, 1939, employees of the yardmaster class were very stable and relatively few temporary vacancies occurred in this class of employment. Most of the employees promoted to and holding seniority as yardmasters were actually assigned to yardmaster positions and working as such on a regular basis. Further, before the advent of the shorter work week for yardmasters on this property on March 1, 1956, regularly assigned yardmasters were working a six-day week and, on the whole, such employees displayed little or no interest in requesting additional temporary yardmaster service. More-

over, at practically every location where yardmaster service was required, a number of qualified switchmen had been promoted to yardmasters and were therefore available as unassigned yardmasters to perform yardmaster service on an incidental basis when required to relieve yardmasters on temporary vacancies.

However, it occasionally happened that no unassigned yardmaster was available for service as a yardmaster on a temporary yardmaster vacancy on a certain shift or at a certain location. On such occasions, pursuant to the terms of the Yardmasters' Agreement, such temporary vacancy would first be filled by the senior qualified yardmaster making request to be used on such vacancy. In the absence of a specific request, carrier would generally fill such temporary vacancies by using a switchman who was otherwise qualified for promotion to yardmaster. In such instances the switchman so used would be compensated at the yardmasters' rate of pay, although he did not in fact acquire the seniority status of a yardmaster.

As a result of the occasional use of switchmen to perform service on temporary yardmasters' vacancies in the absence of an available unassigned yardmaster or a request from an assigned yardmaster for such vacancy, a number of incidental problems arose between the carrier and its switchmen concerning the proper selection of the switchman to be used with respect to seniority, location of work, shift on which vacancy existed, and willingness of such switchman to assume the responsibility and possible attendant inconvenience of being removed from a regular switchman assignment.

In order to meet some of these problems and to provide for a definite understanding with respect to the use of a switchman on a yardmaster vacancy to the extent that a switchman was to be used, the carrier and the representative of its switchmen entered into an agreement providing that should the senior switchman standing for promotion or to fill a vacancy as yardmaster decline to accept, he would do so in writing and would forfeit his right to yardmasters' work for six months and that thereafter he would again be eligible for promotion and assignment to a regular yardmaster position but would not be used to fill a temporary vacancy, absent an emergency. These provisions first appeared in the seniority and promotion rule of the agreement of November 16, 1939, and in identical terms are now contained in paragraphs 3 and 4 of Article 12, Section (a) of the Switchmen's current agreement.

Although these parties subsequently considered the advisability of placing an interpretation on Article 12, Section (a) of the agreement, specifying the procedure to be used when and in the event it became necessary to use a switchman to fill a temporary vacancy on a yardmaster position, no such general interpretation of Article 12, Section (a) of the Switchmen's Agreement has ever been made.

However, from time to time the carrier and the respective of its switchmen did reach understandings to dispose of certain specific problems arising from the use of switchmen to perform yardmaster service. For example, on July 18, 1941, the parties reached an understanding with respect to the use of switchmen who do not have the required service to qualify for promotion to yardmaster in event there were no qualified available switchmen or such qualified men had declined yardmaster service and it became necessary to use a switchman to fill a temporary vacancy in a yardmaster position. This understanding was set forth in a letter dated July 18, 1941, reading as follows:

"YDM 192-39
July 18, 1941

"Mr. R. J. Brooks, General Chairman,
Mr. E. J. Durnil, Vice-Chairman,
Mr. A. Cooley, Secretary
General Grievance Committee,
Brotherhood of Railroad Trainmen,
Pacific Building, San Francisco, California.

Gentlemen:

"Pursuant to the provisions of Article 37 of the Yardmen's Agreement which became effective November 16, 1939, Messrs. R. J. Brooks, E. J. Durnil and A. Cooley, as officers of the General Grievance Committee, Brotherhood of Railroad Trainmen, met with Mr. R. E. Beach, Assistant Manager of Personnel, Southern Pacific Company (Pacific Lines), in the latter's office, 65 Market Street, San Francisco, California, at 10:30 A. M., Friday, July 18, 1941, for the purpose of considering the advisability of placing an interpretation on Article 12, Section (a) of the Yardmen's Agreement aforesaid.

"This meeting was influenced as a result of reports received to the effect that, in some yards, due to the large number of senior yardmen who have served at least one (1) year (306 days) as engine foreman in the respective yards, declining to accept promotion to position of yardmaster and to fill vacancies as such, creating a situation where, in some instances it is reported there are not any available yardmen with the required 306 days service as engine foreman in the respective yards to fill vacancies in yardmaster positions or eligible for promotion to position of yardmaster.

"It was the consensus that the Company and a representative of the Brotherhood of Railroad Trainmen should investigate with respect to conditions in all yards of the Southern Pacific Company (Pacific Lines), and that we should not undertake the writing of an interpretation to Article 12, Section (a) of the Yardmen's Agreement, until both sides have made such investigation. Therefore, it was agreed that this conference would be recessed to be later resumed at the call of either a representative of the Company or the General Chairman of the Brotherhood of Railroad Trainmen, with the understanding that, during the interim — when the conditions hereinabove described exist in any yard — the Company will meet the situation, so far as it may be necessary to use yardmen to fill temporary vacancies in yardmaster positions, by using the senior yardman who has served less than 306 days as engine foreman in the yard in which the vacancy as yardmaster is to be filled by a yardman, and that claims will not be presented or considered as a result of using such yardman to fill the vacancy of yardmaster.

"Please sign your name in the space provided on this letter indicating your concurrence with respect to this conference.

Yours truly,

/s/ R. E. Beach

"CONCUR

/s/ R. J. Brooks
/s/ E. J. Durnil
/s/ A. Cooley"

Again, on September 28, 1954, the carrier and the present representative of its switchmen reached an understanding with respect to applying the service of extra switchmen used to fill temporary vacancies on a day-to-day basis on yardmasters' positions so as to limit their availability for subsequent service as switchmen on the same date. This understanding was set forth in a letter dated November 9, 1954, reading as follows:

"YDM-79-10
November 9, 1954

"Mr. Neil P. Speirs, General Chairman
Switchmen's Union of North America
268 Market Street, Room 333
San Francisco 11, California

Dear Sir:

"Referring to your letter dated September 23, 1954, in connection with the handling of extra yardmen used to fill vacancies on yardmaster's positions on a day-to-day basis under the provisions of Article 12, Section (a), Yardmen's Agreement.

"The above-described subject was discussed with you in conference September 28, 1954.

"For the purpose of precluding an extra yardman (including those who have seniority as yardmasters, but are unable to hold regular assignment as such) who works as a yardmaster from again exercising seniority to work as a yardman the same date to the exclusion of other extra yardmen who have performed no service that date, it is agreed that when an extra yardman is called from the extra board and used to fill a vacancy in the yardmaster class on any date, he will not be considered available for subsequent service as a yardman the same date if there are any other extra yardmen available on the extra board who have performed no service that date.

"If there are no extra yardmen available who have not performed service, the extra yardman who has worked as a yardmaster will be called in his turn for subsequent service as a yardman.

"In connection with the above, it is distinctly understood, however, that service performed by a yardman in the yardmaster class will not under any circumstances be considered as work coming under the scope of the Yardmen's Agreement.

"The foregoing will become effective November 29, 1954, and will continue in effect until the expiration of ten (10) days' written notice given by one party to the other for its cancellation.

"If the above correctly sets forth what was agreed to, please so indicate by signing in space provided for in lower left-hand corner of this letter.

Yours truly,

(Signed) L. D. Bush

CONCUR:

(Signed) Neil P. Speirs
General Chairman
Switchmen's Union of North America"

It will be noted that nothing contained in Article 12, Section (a), or any of the understandings reached in connection therewith purports to be a representation by the carrier that switchmen as such have any inherent right under any circumstances to claim service on temporary yardmasters' vacancies or that carrier could, as a matter of law, or did make binding agreements with its switchmen regarding the manner in which yardmasters' temporary vacancies would be filled so as to allocate any of such work to switchmen **to the exclusion of yardmasters**. On the contrary, Article 12, Section (a) is a promotion rule only and the understandings referred to make it perfectly clear that they are intended to and do apply only in the event and to the extent that it is **necessary** to use switchmen to fill yardmasters' temporary vacancies and that it is distinctly understood, and acknowledged by the switchmen's representative, that service performed by a switchman in the yardmaster class is not **under any circumstances** to be considered as work coming under the scope of the Switchmen's Agreement.

Within the framework of the above general analysis, the carrier and its switchmen employees have evolved a pattern or practice with respect to the selection and use of switchmen in instances where it becomes necessary to use a switchman to fill a temporary vacancy in yardmaster service. Briefly, this practice may be summarized as follows:

A. The senior assigned qualified switchmen on the same shift as the temporary yardmaster vacancy, who has not forfeited his right to consideration by a prior refusal to serve, will be used on the yardmaster's vacancy (See Settlements YDM 148-2556 and YDM 148-2709, Petitioners' Exhibits "A" and "B," respectively). Such switchman, even if then on a day off, should be used in preference to other switchmen (See Settlement YDM 192-105, Petitioners' Exhibit "C").

B. Where there is no qualified switchman assigned on the same shift as the temporary yardmaster vacancy, then the senior of all qualified switchmen assigned on the other two shifts, even if then on a day off, should be used (see Settlements YDM 148-3794, YDM 148-3282, YDM 148-3281 and YDM 148-3362, Petitioners' Exhibits "D," "E," "F" and "G," respectively).

C. Where the only assigned qualified switchman, who has not forfeited his right to consideration for yardmasters' work, is on another shift he should be called and used, if rested, even though he was previously used for service that same day (see Settlement YDM 148-3264, Petitioners' Exhibit "H").

D. A switchman otherwise qualified but who has refused prior yardmaster service should not receive consideration or be used (see Settlements YDM 148-1897, YDM 148-3760 and YDM 148-3794, Petitioners' Exhibits "I," "J" and "D," respectively).

E. Where there is no qualified switchman available, the senior of all non-qualified switchmen with equal capabilities, assigned on the same shift on which the vacancy occurs should be used (see Settlement YDM 148-2630, Petitioners' Exhibit "K").

Consistent with the exclusive right of the Carrier and the representatives of the craft or class of switchmen to agree upon interpretations of the Switchmen's Agreement, the practice exemplified by the above-referred-to settlements constitute no more than an orderly manner of determining which switchmen will be used for yardmaster work when it becomes necessary to obtain a yardmaster from the ranks of the switchmen. Said settlements do no purport to say when it will be necessary to use switchmen to fill yardmaster vacancies; nor could they. It may properly be said that the right of the parties to bargain with respect to the use of switchmen to fill temporary vacancies on yardmasters' positions is limited to the selection of the proper switchman according to criteria of seniority, qualifications, willingness, availability, zone (if any) and shift.

There is no contractual obligation, expressed or implied, in any agreement between the carrier and its switchmen which requires the use of switchmen to fill yardmaster temporary vacancies of the character here involved, and what is more important, there is no agreement between the carrier and the representative of the craft or class of yardmasters permitting the use of switchmen to fill such vacancies. This will be further discussed infra.

As indicated above, for a number of years prior to the adoption of the shorter work week for yardmasters on March 1, 1956, yardmasters as a class were more or less steadily employed and did not display any particular interest in the filling of occasional temporary yardmaster vacancies on a day-to-day basis. On the whole, such vacancies constitute a relatively minor portion of the totality of yardmaster work and the extent to which such vacancies were not filled by unassigned yardmasters was of no significant import. Apparently assigned yardmasters did not care to interrupt their routine work habits or sacrifice their single day off merely to request or make claim for such occasional additional work. Occasionally an assigned yardmaster or his representative would assert a claim that the yardmaster, rather than a switchman, should be used to fill a temporary yardmaster vacancy even though the yardmaster had no formal request, but such claims were never vigorously pursued and it was more or less assumed that the yardmaster did not care to be disturbed if he had not specifically requested the temporary vacancy (See Settlement YDM 148-1913, Petitioners' Exhibit "L").

Therefore, in the absence of an available unassigned yardmaster or a specific request by an assigned yardmaster, the carrier usually proceeded to fill the occasional temporary yardmasters' vacancies with the qualified switchmen, as determined by the requisite criteria under the interpretation of the Switchmen's Agreement.

However, following the adoption of the yardmasters' shorter work week and the attendant establishment of more regular and regular relief yardmaster assignments, the frequency of the yardmasters' temporary vacancies was to some extent increased and regularly assigned yardmasters became

more readily available and willing to assume occasional temporary additional yardmaster service on other shifts or on days off.

At or about this time the statutory representative of carrier's yardmasters (a joint petitioner in this case) asserted that under the terms of the yardmasters' current agreement, the right to perform yardmasters' service as such was restricted to employees holding seniority in the yardmaster class and that, notwithstanding any past practice to the contrary, a temporary vacancy in yardmaster service should be filled by a yardmaster whether or not any yardmaster had made a specific request for the vacancy. This assertion was a part of the more basic proposition of contract construction that work of a class included in an agreement belongs to the employees on whose behalf it was executed and unless otherwise specifically provided in the agreement such work cannot ordinarily be delegated, assigned or performed by others not within the purview of the agreement without violating the agreement. The yardmasters' organization contended that, under the terms of the yardmasters' current agreement, service of the yardmasters' class must be performed by yardmasters and, except in the very limited instances involved in filling out a relief requirement under Article 6, Section (d), may not be performed by switchmen who have not established seniority rights as yardmasters without violating the contractual rights of yardmasters. Accordingly, it asserted claims on behalf of yardmasters who had not specifically requested temporary vacancies for compensation on occasions when switchmen were used in the absence of unassigned yardmasters to perform yardmaster service on such vacancies. In these circumstances, it contended, the use of a switchman was a violation of the agreement covering yardmasters.

In response to this argument and in defense of the asserted claims, it was the carrier's position that under the specific terms of the yardmasters' agreement a regularly assigned yardmaster who desires to be used on a temporary vacancy must make request for the same and that there was no requirement that assigned yardmasters be used to fill such vacancies in the absence of a specific request. Accordingly, the carrier urged that the absence of a specific prohibition in the yardmasters' agreement against the use of a switchman to fill such temporary vacancies coupled with the past silence on the part of the yardmasters in the occasional past use of such switchmen under these circumstances tended to establish that the use of a qualified switchman to fill a yardmaster's temporary vacancy in the absence of an unassigned yardmaster or a specific request from an assigned yardmaster was not improper.

The carrier and the representative of its yardmasters (petitioners) therefore joined issue on the question of whether by reason of any expressed or implied joint or tri-party agreement or by practice or acquiescence the carrier could properly use a switchman not holding seniority as a yardmaster to fill a yardmaster temporary vacancy in the absence of an unassigned yardmaster or an assigned yardmaster making request.

A claim involving these precise facts (and presenting an issue identical in all respects to the issue involved in the within claim) was submitted by the parties to this tribunal, where it was assigned Docket No. 1184. Disposition of the dispute in that docket required a determination of the limitation, if any, on the carrier's right to use a qualified switchman who had not, at that time, established seniority as a yardmaster, to fill a yardmaster's temporary vacancy.

The yardmasters' organization contended on behalf of the claimant in that case (an assigned yardmaster who had not made specific request to be used on the subject vacancy) that although the yardmasters had conceded the carrier the right under the provisions of Article 6, Section (d) of the Yardmasters' Agreement to use a qualified switchman to fill out a relief requirement which could not otherwise be met on the day off of a yardmaster position, it had no right to use a switchman to perform yardmaster service on a temporary vacancy under Article 9, Section (b), and that that provision and the scope rule of the agreement required that such service be performed only by a member of the class or craft of yardmasters. In this connection attention is directed to the "Position of the Employees" in Docket No. 1184 covering case disposed of by this Division in its Award No. 1178.

The carrier contended that under Article 9, Section (b), the claimant yardmaster had no right to the subject yardmaster's vacancy since he had failed to make request for same and that in these circumstances it was privileged to use a qualified switchman.

In its Award No. 1178 (Docket No. 1184), this Division of the Adjustment Board considered the issue framed by it as follows:

"In the absence of a request from any assigned or unassigned yardmaster, may Carrier fill a temporary yardmaster vacancy of thirty (30) days' or less duration, from qualified yardmen, or is Carrier limited to fill the position with an available yardmaster?"

The Board decided that the yardmaster's temporary vacancy should have been filled by an available yardmaster, and sustained the claim.

It reasoned:

"The subject vacancies were not 'relief requirements' covered by Article 6(d). We believe that the intent of Article 6(d) was no broader than to permit the use of yardmen to the limited purpose specifically defined in that Article. It does not authorize the Carrier to treat a qualified yardman as the equivalent of a yardmaster in every case in which no yardmaster has requested assignment to the temporary new positions and vacancies contemplated by Article 9(b). The contention of Carrier with respect to construction of Article 9(b) treats of a request by a yardmaster as the condition precedent to any obligation on the Carrier to fill a temporary vacancy by appointment of a yardmaster thereto. If we were to accept this contention, we would have to hold that, in the absence of a request made by a yardmaster, the Carrier would be free to fill the temporary vacancy with any individual, whether yardmaster, yardman, or a person of any other qualification or lack thereof. We do not think this is the intent of Article 9(b).

"We are of the opinion that Article 9(b) was intended to affect Article 9(a) and nothing more. It was intended to provide that, in the event of a temporary vacancy for which more than one 'qualified yardmaster' makes a request, the 'senior' of those making request shall be given the work 'whenever possible'. Thus, it relates only to the matter of relative seniority, among those who make request."

(Emphasis in original)

The Board concluded:

"If, as in the instances involved in this claim, no yardmaster makes request, the temporary vacancy is nonetheless yardmaster's work and does not become yardman's work. Nor is it made yardman's work by Article 6(d). The temporary vacancy should have been filled by an available yardmaster." (Emphasis ours.)

On June 24, 1957, the Fourth Division, National Railroad Adjustment Board, issued its Order to accompany Award No. 1178, Docket No. 1184, ordering the carrier to make effective the attached Award Number 1178 as therein set forth.

From and after this date, pursuant to the terms of Award No. 1178 and the order of the Adjustment Board, the carrier has consistently called and used an assigned yardmaster to fill a temporary vacancy on a yardmaster position in the absence of an available unassigned yardmaster or a yardmaster who had made a specific request for such vacancy.

C. THE SPECIFIC FACTS OF THE WITHIN CLAIM.

On January 1, 1959, a temporary vacancy existed on Yardmaster Position No. 120, starting time 7:00 A. M., Los Angeles Yard, Los Angeles Division. In the absence of an available unassigned yardmaster or a yardmaster who had made request for that service, an assigned yardmaster was called and used to fill the vacancy.

The Switchmen's Union of North America, "hereinafter referred to as the organization," presented and progressed a claim for one day's pay at the applicable yardmaster rate for and on behalf of the senior qualified switchmen available for service on Yardmaster Position No. 120, January 1, 1959, based on its contention that Article 12, Section (a) of the agreement between the carrier and its switchmen required that switchmen be used on such temporary yardmasters' vacancies.

PETITIONERS' POSITION

THE ISSUES PRESENTED

There are two issues involved in the instant docket:

I. Whether this Division of the Adjustment Board has jurisdiction over the subject matter and;

II. As to the merits of the dispute, whether the senior qualified switchman who has not been promoted to and acquired seniority status as a yardmaster has a contractually enforceable right to be used to fill a temporary yardmaster vacancy of less than thirty days' duration in the instances where there is no available unassigned yardmaster and no assigned yardmaster has made request to be used on the temporary vacancy.

I. JURISDICTION OF SUBJECT MATTER

The subject matter of the dispute presented herein is the right to claim and perform service as a yardmaster on temporary yardmaster vacancies of less than thirty days' duration. The question of selection, promotion to yardmaster and establishment of seniority as such is not involved. Rather, this

dispute presents the claim wherein it is asserted by the organization that a switchman who has no seniority status as a yardmaster nevertheless has an enforceable contract right to be used as a yardmaster on a yardmaster's temporary vacancy. The subject matter is the right to a yardmaster's temporary vacancy and the dispute involves the question of whether such vacancy is properly allocated to yardmasters and governed by the terms of the Yardmasters' Agreement—as petitioners contend—or whether such vacancy is allocated to switchmen and, under the terms of the Switchmen's Agreement, must be filled by switchmen—as the organization contends. The dispute therefore presents a "Yardmaster's issue" as distinguished from a "switchmen's issue," and is, in consequence, a yardmasters' dispute.

By the terms of the Railway Labor Act (U.S. Code, Title 45, Chapter B) the Fourth Division of the National Railroad Adjustment Board is granted jurisdiction over disputes involving all other employees of carrier's over which jurisdiction is not given to the first, second, and third divisions (Sec. 3, First (h)). As judicially determined, the subject matter of this jurisdiction of the Fourth Division includes the exclusive right to consider and decide a yardmaster's dispute. Accordingly, the Fourth Division has exclusive jurisdiction over the subject matter of this dispute and is the appropriate division of the Adjustment Board to which such dispute must be referred under the terms of Section 3, First, (i) of the Railway Labor Act.

II. CONSIDERATION OF MERITS

Petitioners submit the following position on the merits of this dispute:

The Petitioners, parties to the controlling agreement, are in accord that the use of an assigned yardmaster to fill the vacancy on yardmaster Position No. 120 at Los Angeles on January 1, 1959, under the circumstances that there were no yardmasters available who had made request for the vacancy, reflected the proper application of the agreement covering yardmasters as interpreted by Award No. 1178 of the Fourth Division, National Railroad Adjustment Board. Petitioners are further in accord that the use of a switchman to fill said vacancy would have resulted in violation of the provisions of Article 9(a) and (b) of the agreement covering yardmasters as interpreted by said award.

It is the position of the Petitioners that there is no provision of the current agreement covering switchmen giving switchmen the right to fill vacancies of yardmasters and, therefore, that there was no violation of any provision of said agreement in the circumstances of the within claim.

In handling the within claim on this property the only provision of the current agreement covering switchmen cited by the organization in support of its position in this case, was Article 12, thereof, which is quoted *supra*.

That provision of the Switchmen's Agreement relates only to the promotion of switchmen to yardmasters. It has no relationship whatever to the allocation of yardmaster's work or the manner of filling the positions of yardmaster. It is well established that the carrier could not lawfully deal with the Switchmen's Union of North America in connection with matters regulating the class or craft of yardmasters unless that organization was the certified collective bargaining agent for that craft. Said organization is not the representative of the craft of yardmaster on this property. Such representation is held by the Railroad Yardmasters of North America, Inc. Consequently, the manner of filling vacancies of yardmasters being a matter

addressing itself to the parties to the agreement covering yardmasters, the carrier could not lawfully enter into an agreement with the organization representing switchmen, that switchmen would be used to fill yardmaster vacancies unless such an agreement were concurred in by the designated representative of the craft of yardmaster. Attention is again directed to the fact that the use of switchmen to fill vacancies of yardmaster as in the instant case was challenged by the yardmasters' organization and their position was upheld by this Division's Award No. 1178.

Further in connection with the exclusive right of the Petitioners to negotiate with respect to filling vacancies of yardmasters, attention is directed to the record and "Findings" of the Board in connection with First Division Docket No. 6976, disposed of by Award No. 4078.

The practice of using switchmen to fill vacancies of yardmaster under circumstances as in the instant case, which prevailed prior to rendition of Award No. 1178, can no longer be construed as anything other than an understanding between the carrier and the switchmen's organization that, as between these parties, the use of switchmen to fill yardmaster vacancies is not objectionable. This understanding between these parties does not, however, operate to require or permit the use of switchmen to fill vacancies of yardmasters in contravention of the yardmasters' agreement or when such use of switchmen does not have the concurrence of the yardmasters' organization.

If it were first agreed between the parties to the yardmasters' agreement that it was proper to go outside the ranks of yardmasters to obtain someone to fill a yardmaster position, it would, of course, be proper for carrier and switchmen's organization to negotiate as to which switchman or in what order switchmen would be used for this work. As discussed supra, the Petitioners have agreed that as to certain temporary vacancies on relief assignments a qualified switchman may be used for the yardmaster service when an unassigned yardmaster is not available, and understandings have properly been had between switchmen's organization and the carrier concerning the proper switchmen to be used in that circumstance. As previously stated the Railroad Yardmasters of North America, Inc., is the statutory bargaining agent of carrier's yardmasters and only that organization, together with carrier, can negotiate valid understandings as to how yardmaster temporary vacancies will be filled. Thus, no amount of past practice, no matter how consistent, can overcome the effect of the law that only the certified statutory representatives can negotiate respecting the rules and working conditions of the class or craft of employees covered by the scope of the agreement or the clear and unambiguous provisions of the Yardmasters' Agreement allocating such work to yardmasters. As previously indicated herein the subject matter of this dispute—the right to fill temporary yardmaster vacancies—has formerly been considered by the appropriate division of the Adjustment Board and in its Award No. 1178, the Fourth Division determined that under the provisions of Articles 6(d) and 9(a) and (b) of the Yardmasters' Agreement, a yardmaster should properly be used to fill temporary yardmasters' vacancies of the kind involved in this claim. Accordingly, the carrier is no longer using switchmen to fill vacancies of yardmasters under circumstances covered by that Award which are the same as those herein. It is clear that no enforceable rights of switchmen have been affected by this Award or by the changes brought about by it, and that, therefore, the claim asserted herein is without merit and must be denied.

The organization, in asserting the within claim, argued that carrier had made binding and interpretative settlements applicable to the agreement

covering switchmen clearly allocating the within claimed yardmaster work to switchmen, and that binding and interpretative settlements made with the yardmasters' organization show that the carrier had reached settlement agreement with the yardmaster representatives that unless a yardmaster requested temporary yardmaster work of thirty days or less duration, a valid claim to the work by a yardmaster would not exist.

As has been shown, *supra*, Article 12, Section (a) of the Switchmen's Agreement relates only to the promotion of switchmen to yardmasters—an issue not involved herein—and that neither that provision nor any other provision of the agreement purports to grant switchmen any right to be used as yardmasters on yardmaster temporary vacancies. Therefore, no interpretation of that agreement provisions could give to switchmen right to fill yardmasters' vacancies. Furthermore, the allocation of yardmaster work, including the filling of yardmaster vacancies is a subject matter for negotiation between the Petitioners and must be determined by reference to the terms of the Yardmasters' Agreement. Thus, the carrier and its switchmen could not enter into any enforceable agreement purporting to create a vested right for switchmen to be used on yardmaster temporary vacancies or any interpretation that would not be subject to the superior rights of yardmasters to such work. Therefore, to the extent that any settlements, practices or other interpretations of the Switchmen's Agreement suggest that switchmen may ever properly be used under Article 12 of that agreement on yardmaster temporary vacancies, such interpretation must be taken only as meaning that Article 12, Section (a), permits the use of a switchman insofar as the carrier and the switchmen's organization is concerned but does not make it mandatory that a switchman be used nor **override any objection to such use that might be, and has been voiced by the yardmasters' organization.** Carrier obviously did not allocate the within claimed yardmasters' work to switchmen; as a matter of law it could not do so without concurrence of the statutory representative of the craft of yardmaster.

The full, final, and complete answer to the balance of the organization's argument in support of the claim is found in Award 1178 of this Division. In interpreting the provisions of the Yardmasters' Agreement, that Award said that in the absence of an available unassigned yardmaster or a request by an assigned yardmaster, the service on a temporary yardmaster vacancy " * * * is nonetheless yardmaster's work and does not become yardmen's (switchmen's) work." Under the mandate of that award temporary vacancies must therefore be filled by yardmasters. It follows that the organization's remaining argument is without substance since it fails to accord any significance to Award 1178 of this Division.

It is obvious that the carrier would be placed in an untenable, in fact impossible, position if it were required to respect Award No. 1178, and at the same time allow penalties to switchmen who could not properly be called for yardmaster service without violation of the Yardmasters' Agreement, as interpreted by that award. As previously stated, the carrier is complying with the Yardmasters' Agreement, as interpreted by Award No. 1178, by calling yardmasters for vacancies such as those here involved. Carrier repeats that it cannot comply with settlements and practices prevailing prior to the rendition of Award No. 1178, without violation of the Yardmasters' Agreement as interpreted by that award.

By no amount of legerdemain or convoluted reasoning can the organization escape the following simple, basic and compelling conclusions:

1. There is no provision in the Switchmen's Agreement which expressly or by reasonable implication grants switchmen an absolute right to be used as yardmasters on temporary yardmaster vacancies of the kind made subject of this dispute.

2. By law, the Railroad Yardmasters of North America, Inc., is made the authorized bargaining agent of carrier's yardmasters and has the sole right to negotiate with carrier agreements with respect to the rate of pay, rules and working conditions of yardmasters—including provisions which determine how and by whom temporary yardmaster vacancies shall be filled.

3. Carrier could not as a matter of law and did not make any representation to its switchmen that they had any exclusive rights to be used to fill temporary yardmaster vacancies of the kind here involved.

4. Any prior practices that resulted in the use of switchmen to fill temporary yardmaster vacancies are subject to the superior rights of yardmasters and in view of the assertion by yardmasters of their right to fill the vacancies in question, the continuing use of switchmen to perform yardmaster work must be determined by reference to the terms of the Yardmasters' Agreement.

5. To the extent that there is any past practice indicating that switchmen occasionally were used to fill temporary yardmaster vacancies of the character in dispute, such practice must be taken to indicate merely that the carrier and its switchmen regarded Article 12, Section (a), of the Switchmen's Agreement as permitting the use of switchmen but not making their use mandatory.

6. Carrier's use of switchmen to fill temporary yardmaster vacancies in these circumstances did not ripen into an absolute contract right to the work in dispute; it was a privilege dependent upon the continuing acquiescence of yardmasters.

7. So long as the yardmasters acquiesced in the carrier's use of switchmen to fill temporary yardmaster vacancies of the kind here involved, the carrier's only obligation to its switchmen was to use the proper switchman as determined by the criteria established by the switchmen and the carrier.

8. Yardmasters have indicated that they no longer intend to acquiesce in the occasional use of switchmen to fill temporary yardmaster vacancies.

9. Award 1178 of the Fourth Division has established that under the terms of the Yardmasters' Agreement, service on vacancies of the kind in dispute is yardmasters' work and must be performed by yardmasters if available.

10. The carrier is respecting Award 1178 and pursuant to pronouncements therein contained, in the absence of an unassigned yardmaster, or a specific request from an assigned yardmaster, carrier is using available assigned yardmasters to fill temporary yardmaster vacancies of the kind in dispute.

11. The subject matter of the dispute determined by Award 1178 is identical to the subject matter of the present dispute; the effect of that award, if carrier is to avoid penalties under the Yardmasters' Agreement, is to preclude the carrier from the use of switchmen on temporary yardmaster vacancies of the kind in dispute.

12. Any award rendered on the subject matter of the within claim which is different from and inconsistent with Award 1178 of the Fourth Division or which imposes upon the carrier an obligation to its switchmen to do that which it clearly cannot do under agreement between the yardmasters and the carrier, would settle nothing but would only result in further strife and uncertainty and renewal of the dispute which was settled by Award No. 1178. Certainly with the rendition of that Award, the yardmasters and the carrier had every reason to expect that compliance with its pronouncements would not result in embroiling the carrier in a dispute with its switchmen with respect to the filling of yardmaster vacancies and consequent perpetuation of the dispute.

CONCLUSION

In view of the argument and evidence presented above, petitioners submit that they have conclusively demonstrated that the issue here involved has been previously adjudicated by the Fourth Division, National Railroad Adjustment Board, in its Award 1178; that there is thus no merit to the contentions of the organization and that the claim asserted by the organization must therefore be denied in its entirety.

All data herein submitted have been presented to the duly authorized representatives of the employees and are made a part of the particular question in dispute.

Petitioners request oral hearing.

EMPLOYES' STATEMENT OF FACTS: A regularly assigned Yardmaster was called and used to fill a temporary vacancy existing on Yardmaster Position 120, on duty 7:00 A. M., January 1, 1959, at the Carrier's Los Angeles Yard. The regularly assigned Yardmaster used on the temporary vacancy existing on Position 120 had not made request for the temporary vacancy of thirty (30) days or less duration.

A Switchman was available at Los Angeles Yard for the temporary vacancy existing on Yardmaster Position No. 120, January 1, 1959.

Claim was duly entered on behalf of claimant and handled to a conclusion on the property with a statement of claim reading as follows:

"Claim is made for one day's pay at the applicable Yardmaster rate for the senior qualified Switchman standing for service on temporary vacancy on Yardmaster Position 120 on duty 7:00 A. M., January 1, 1959, Los Angeles Yard, Los Angeles Division."

During the handling of the claim referred to next above on the property only the representatives of claimant, and designated officers of the Carrier, participated.

When agreement for disposition of the claim could not be reached between claimant's representative, and the Carrier, the case and claim was submitted

ex parte to the First Division of the National Railroad Adjustment Board, by claimant's representative, where it is presently pending disposition under Docket Number 37481. Oral hearing in the case was requested and the two parties to the dispute have been advised that hearing will be commenced at 10:00 A. M., Monday, November 14, 1960.

EMPLOYEE'S POSITION: The employee's position in the instant case will be advanced on two counts. First, the petitioners are improperly before your Board with the claim and contention they have advanced, and Secondly, without prejudice to our position under First, the claim should be sustained on its merits.

FIRST

The Fourth Division of the National Railroad Adjustment Board should not assume jurisdiction of the dispute advanced by petitioners because petitioners have not complied with the procedural requirements of Circular No. 1, National Railroad Adjustment Board, and the Railway Labor Act, as amended.

The petitioners have not presented data in connection with the case to representatives of claimant, nor have petitioners discussed the various aspects of the case in conference, as required by the Railway Labor Act, as amended. In fact, the Railroad Yardmasters of North America, Inc., have not even mentioned to representatives of claimant that a dispute of the nature referred to in Statement of Claim is in existence, and the first advice to claimant's representative that Switchmen's Union of North America was involved in any dispute with Railroad Yardmasters of North America, Inc., came in the form of a letter dated October 17, 1960, signed by Mr. Patrick V. Pope, Executive Secretary of the Fourth Division, National Railroad Adjustment Board, advising that the Southern Pacific Company (Pacific Lines) and Railroad Yardmasters of North America, Inc., had referred a dispute to your Board consistent with the Statement of Claim herein. Moreover, provisions of Circular 1, National Railroad Adjustment Board, relate:

"Classes of Disputes

* * * disputes * * * shall be handled in the usual manner up to and including the chief operating officer of the Carrier designated to handle such disputes * * *

No petition shall be considered by any division of the Board unless the subject matter has been handled in accordance with the provisions of the Railway Labor Act, approved June 21, 1934."

It is also the employee's position that the provisions of Circular 1, National Railroad Adjustment Board, do not provide for a Carrier and an Organization to join as "petitioners" and advance a dispute involving another Labor organization governed by the same Circular 1 and there is no language in Circular 1 to permit it.

In addition to the procedural defects on the part of petitioners as referred to above, the claim herein is one coming under the jurisdiction of the First Division, National Railroad Adjustment Board, for it involves the claim of a "Yard service employee" and yard agreement rules relating to said yard service employee. For practical purposes the claim here is identical to that presently covered by the First Division's Docket 37481. The case of Docket

37481 refers to the same yard rule and some fifteen (15) yard settlements (the same yard settlements are also included herein under position of merit). Additionally, the First Division has assumed jurisdiction of several prior yard service employe cases from this property where yardmaster pay was claimed. See First Division Awards 4078, 12217, 12218, 17121 and 18686.

For the reasons stated herein under FIRST, the Fourth Division of the National Railroad Adjustment Board is respectfully requested not to assume jurisdiction of this dispute, and to dismiss it.

SECOND

The claim of the switchman employe herein is one of clear merit that should receive a favorable finding. Without waiving or receding from our position under First, and should your Board decide to look at this case on its agreement merit, the following is respectfully submitted for consideration.

A yard agreement covering Rates of Pay and Rules in effect on the date of the instant claim is on file with the First Division, National Railroad Adjustment Board, and is by reference made a part of this submission. The following provisions of the yard agreement are directly involved in this dispute:

"ARTICLE 12

Section (a). Switchmen will be promoted in their respective yards, helper to foreman, foreman to yardmaster; seniority and ability to govern. As a prerequisite to promotion to yardmaster, it will be necessary for the applicant to have served at least one (1) year (306 days) as engine foreman in yard where promoted; except where new yards are established, senior engine foreman with one (1) year's (306 days') experience on the seniority district, shall be eligible for position as yardmaster in accordance with this Section. Should switchman promoted to yardmaster not be familiar with the work and territory which he is to supervise, he will familiarize himself with the work and territory without additional expense to the Company.

If senior switchman standing for promotion to yardmaster is not available as result of sickness or leave of absence, and it is necessary to promote a junior switchman the senior switchman will be allowed five (5) days after becoming available to elect whether he desires to accept the promotion; if he elects to accept the promotion, the seniority date as yardmaster which would have been acquired by the junior switchman, shall be accorded the senior switchman and the junior switchman will not thereby establish a seniority date as yardmaster.

Should switchman standing for promotion to yardmaster, or to fill vacancy as such, decline to accept, he will do so in writing, and in either case he will forfeit his right to yardmaster work for a period of six months (180 days).

At the expiration of said six months he will be eligible for promotion and assignment to regular position as yardmaster but will not be used to fill temporary vacancies, except in event of an emergency.

Switchman promoted to position of yardmaster will retain their seniority as switchmen. If, after switchman is promoted to regular position as yardmaster, the position is discontinued or he is displaced, he will be privileged to exercise his switchmen's seniority to acquire a position, but will not be privileged to work as switchman, when his seniority entitles him to a regular position as yardmaster. If loses position as yardmaster and if privileged to displace a switchman, such displacement must be made within five (5) days after loss of position as yardmaster, except if on leave of absence, or if off duty account sickness or injury, displacement must be made within five (5) days from date of return.

Should a switchman promoted to position of yardmaster be demoted, he will be privileged within five (5) days of said demotion (or if on leave of absence account sickness or otherwise within five (5) days from date of return), to displace a junior switchman. Superintendent will notify Local Chairman of such demotion within five (5) days after demotion.

NOTE: The title 'yardmaster' as used in this section will include General Yardmaster (except at large and important terminals), Assistant General Yardmaster, Yardmaster and Assistant Yardmaster."

"YDM 192-39
SOUTHERN PACIFIC COMPANY (PACIFIC LINES)

July 18, 1941

Mr. R. J. Brooks, General Chairman
Mr. E. J. Durnil, Vice-Chairman
Mr. A. Cooley, Secretary
General Grievance Committee
Brotherhood of Railroad Trainmen
Pacific Building, San Francisco, California

Gentlemen:

Pursuant to the provisions of Article 37 of the Yardmen's Agreement which became effective November 16, 1939, Messrs. R. J. Brooks, E. J. Durnil and A. Cooley, as officers of the General Grievance Committee, Brotherhood of Railroad Trainmen, met with Mr. R. E. Beach, Assistant Manager of Personnel, Southern Pacific Company (Pacific Lines), in the latter's office, 65 Market Street, San Francisco, California, at 10:30 A. M., Friday, July 18, 1941, for the purpose of considering the advisability of placing an interpretation on Article 12, Section (a) of the Yardmen's Agreement aforesaid.

This meeting was influenced as a result of reports received to the effect that, in some yards, due to the large number of senior yardmen who have served at least one (1) year (306 days) as engine foremen in the respective yards, declining to accept promotion to position of yardmaster and to fill vacancies as such, creating a situation where, in some instances it is reported there are not any available yardmen with the required 306 days service as engine foreman in the respective yards to fill vacancies in yardmaster positions or eligible for promotion to position of yardmaster.

It was the consensus that the Company and a representative of the Brotherhood of Railroad Trainmen should investigate with respect to conditions in all yards of the Southern Pacific Company (Pacific Lines), and that we should not undertake the writing of an interpretation to Article 12, Section (a) of the Yardmen's Agreement, until after both sides have made such investigation. Therefore, it was agreed that this conference would be recessed to be later resumed at the call of either a representative of the Company or the General Chairman of the Brotherhood of Railroad Trainmen, with the understanding that, during the interim—when the conditions hereinabove described exist in any yard—the Company will meet the situation, so far as it may be necessary to use yardmen to fill temporary vacancies in yardmaster positions, by using the senior yardman who has served less than 306 days as engine foreman in the yard in which the vacancy as yardmaster is to be filled by a yardman, and that claims will not be presented or considered as a result of using such yardman to fill the vacancy of yardmaster.

Please sign your name in the space provided on this letter indicating your concurrence with respect to this conference.

Yours truly,

(s) R. E. Beach

CONCUR:

(s) R. J. Brooks

(s) E. J. Durnil

(s) A. Cooley"

"SOUTHERN PACIFIC COMPANY
65 Market St., San Francisco 5

March 17, 1953
YDM 192-39

Mr. Neil P. Speirs, General Chairman
Switchmen's Union of North America
Room 333 — 268 Market Street
San Francisco, California

Dear Sir:

As a result of yardmen being assigned to relief positions with on duty times in different starting time periods on the various days of their work week under Agreements signed at Washington, D.C., May 25, 1951, question has arisen as to their status for yardmaster's work on their days off under Article 12, Section (a), Yardmen's Agreement and accepted settlement in claim of Yardman C. J. Wheeler, Portland Division, dated March 15, 1935, file YDM 192-105.

"In discussing this question with you in conference today it was agreed that in the future such yardmen would be considered as being in the same starting time period and zone (where zones exist) on their days off as they were on their assignments as yardmen the day immediately preceding their days off.

Space is provided in the lower left-hand corner of this letter for your signature of concurrence.

Yours truly,

(s) L. D. Bush

CONCUR:

(s) Neil P. Speirs

General Chairman, Switchmen's Union of North America"

It is the organization's position in this claim that the applicable agreement provisions have long been interpreted by binding settlements that clearly show the within claimed work to be work of switchmen, not yardmasters under the conditions involved; that the representatives of the Yardmasters have likewise made settlements with the company which also show that this work forming the basis of the instant claim has been clearly allocated to switchmen; that the company has consistently caused its switchmen, with the full agreement of its switchmen and their representatives, to perform the within claimed work on a basis of exclusive right for approximately thirty (30) years; that the carrier's own manifestations and positions in claims handled to both the First and Fourth Divisions of the National Railroad Adjustment Board, binds the carrier in their obligations to switchmen in the instant claim; accordingly, the claimants should be compensated for their loss by a sustaining award.

FIRST

THE CARRIER HAS MADE BINDING AND INTERPRETATIVE YARD SETTLEMENTS CLEARLY ALLOCATING THE WITHIN CLAIMED YARDMASTER WORK TO SWITCHMEN:

For a long number of years this carrier has been in full agreement with the organization representing the class and craft of switchmen on this property (termed yardmen prior to September 1, 1956), that switchmen will be used for all temporary yardmaster vacancies of 30 days or less duration under conditions where one holding seniority as yardmaster had not made request for such temporary work. Such agreement has been reached over and over again in binding and interpretive settlements made under the applicable provisions of the Yard Agreement.

If any yardmaster (whether assigned or unassigned) is to be properly used for temporary yardmaster work of thirty (30) days or less duration to the exclusion of a switchman, such yardmaster desiring the temporary work must make a request for the temporary work. Such requests are provided for, and made, under the provisions of Article 9, Section (b) of the current Yardmasters' Agreement reading:

"(b). New positions and vacancies of thirty (30) days' or less duration shall be filled whenever possible by the senior qualified yardmaster making request for same."

Since in the instant claims no request was made by any yardmaster at the carrier's Los Angeles yard for the temporary yardmaster work, the carrier was obligated to use switchmen in line with many binding interpretive settlements which have been agreed to by claimant's representative

(General Chairman) and carrier's highest officer designated to handle such claims. The use of a yardmaster for the work without a request being made by him, was a direct violation of the agreements reached in the settlement letters, and was done without consulting the representative of the carrier's switchmen, and without the concurrence of the claimant's General Chairman.

Attached as the organization's Exhibit "A" is a reproduction of the Carrier's August 19, 1959 letter, file YDM 148-5423, wherein the instant claim was denied. It will be noted the carrier admits:

"On January 1, 1959, vacancy existed on Yardmaster Position No. 120, starting time 7:00 A. M. In the absence of an available unassigned yardmaster or yardmaster who had made request for that service, an assigned yardmaster was called and used to fill the temporary vacancy involved."

Attached as the organization's Exhibit "B" is a reproduction of the organization's acceptance of a settled claim in favor of Switchman E. E. Jones, Suisan Yard, when not used for temporary yardmaster work. Note the conditions of the settlement—carrier's file YDM 148-3794—wherein Switchman Jones was paid for dates other switchmen were improperly used. For purposes in connection with the instant case, Jones was not allowed pay for temporary yardmaster work on dates that yardmasters made request for the temporary yardmaster work, and those dates of claim (June 6 and July 4, 1956) were not handled further by the claimant's General Chairman on the basis that a yardmaster had made a request for the work those dates. Note also the conditions of the settled claim under which the carrier called switchmen for the temporary yardmaster service.

"Account no unassigned yardmasters or yardmasters who made request for vacancies available, vacancies for yardmaster at Suisan on dates listed below were filled by switchmen as follows:"

The settlement shown as Exhibit "B" clearly recognizes an accepted understanding that (1) yardmasters do not stand for temporary yardmaster work unless they request it, and (2) the proper switchman standing for service must be used, else carrier has the obligation to compensate him for his loss of the yardmaster work.

Attached as the organization's Exhibit "C" is a similar settlement covered by the carrier's file YDM 148-3760, understanding interpreting Article 12, Section (a) of the current Yard Agreement, wherein agreement is reached regarding the meaning and application of the yard rules to switchmen.

Attached as the organization's Exhibit "D" is a reproduction of the organization's acceptance of a settled claim covered by the carrier's file YDM 148-2556, where the proper switchman standing for temporary yardmaster work was not used for such work and the carrier properly allowed him pay for a yardmaster's day account not used. Note that carrier's highest officer designated to handle such claims allowed the claim for the following reason:

"In the absence of an available unassigned yardmaster or assigned yardmaster who had made request for the vacancy existing on Position No. 2, October 19, 1952, the claimant, who was the senior assigned qualified engine foreman starting work between the hours of 2:30 P. M. and 4:00 P. M. that date in the same location where

incumbent of Yardmaster Job No. 2 works, should have been used. We will, therefore, allow him a days' pay at yardmaster's rate, applicable October 16, 1952, in addition to compensation allowed his for service performed that date, in accordance with settlements in our files YDM 148-1383, dated March 19, 1948 and YDM 148-1975, dated May 3, 1951.

Adjustment will be made accordingly." (Emphasis ours.)

Thus, when a yardmaster does not make a request for temporary work, the switchman standing for the service should be used. If he is not used, the yardmaster payment due him is to be made "in addition to compensation allowed him for service performed that date."

Attached as the organization's Exhibit "E" is a reproduction of the carrier's December 22, 1952 letter, file YDM 148-2341, wherein carrier's highest officer disposed of a claim for yardmaster work to the senior switchman standing for such work. Note the conditions of the claim. A yardmaster did not make a request for the temporary service, but the yardmaster was called for the temporary service. The claim was settled, by the carrier's officer, in favor of the senior qualified yardman standing for the temporary yardmaster work. Note particularly the condition of the considerations leading to the adjustment of the claim:

"In the absence of an available unassigned yardmaster or assigned yardmaster who had made request for the vacancy existing on Position 7, March 14, 1952, the claimant, who was the senior qualified yardman starting work between the hours of 10:30 P. M. and 12 Midnight, should have been used. We will therefore allow him a day's pay at the assistant yardmaster's rate applicable on March 14, 1952, in addition to compensation allowed him for service performed that date, in accordance with settlements in our files YDM 148-1383, dated March 19, 1948, and YDM 148-1975, dated May 3, 1951.

Adjustment will be made accordingly."

Attached as the organization's Exhibit "F" is a reproduction of an agreed-to interpretation of the yard agreement covering the use of switchmen for yardmaster work on the days off of their yard assignment. Note that the letter understanding of settlement nature was reached in March of 1935, and further that it interpreted the use of switchmen for yardmaster work under Article 12, Section (a) of the Yard Agreement. The conditions of this settlement covered by the carrier's file YDM 192-105 was still in effect on the date of the instant claim.

Attached as the organization's Exhibit "G" is a reproduction of the organization's acceptance of the carrier's letter of adjustment, file YDM 148-3638, covering payment to Switchman Gray when not used for temporary yardmaster work. Note the basis for the claim for the yardman claimant who was by-passed for the work in favor of a yardmaster:

"Service of a yardmaster was needed in El Paso Yard each Sunday June 12 and 26, 1955, at 3:00 P. M., and an assigned yardmaster with day off on Sunday was used each date for that service.

Claim is presented in favor of Yardman Gray for one day at yardmaster's rate of pay, each date, June 12 and 26, 1955, alleging

he should have been used to perform service as yardmaster on those dates instead of Yardmaster Fanning.

This claim was discussed in conference September 19, 1956, at which time it was agreed that you would withdraw claim for June 12, 1955, because of conflicting facts. Records indicate that no effort was made to call the claimant for the yardmaster service in question June 26, 1955, and in those circumstances it was agreed to allow the claimant one day's pay at yardmaster's rate * * *

Attached as the organization's Exhibit "H" is a reproduction of the organization's acceptance of a settled claim in favor of Switchman Jordan, Watsonville Junction Yard, who, on the various dates of claim, was not used for temporary yardmaster work arising on various yardmaster assignments. Note in the settled claim of Exhibit "H" (carrier's YDM 148-3264), that switchmen were used for all of the temporary yardmaster work involved, except on date of September 11, 1954, when Yardmaster Loftin was called for temporary vacancy existing on Job No. 15. The carrier's officer adjusted all dates of claim by stating:

" * * * since a yardman stood to be used each date in question, in the above described circumstances, the claimant properly stood for the service claimed each day under the provisions of Article 12(a), Yardmen's Agreement. He will therefore be allowed one day at the applicable assistant yardmaster or yardmaster's rate each date involved." (Emphasis ours.)

Attached as the organization's Exhibit "I" is a reproduction of the organization's acceptance of a settled claim covered by the carrier's file YDM 148-1897. Again, as in the settled claim of Exhibit "H," the carrier used a switchman for the temporary yardmaster work, but the wrong one. It is notable that the switchman used on a date preceding date of claim was under the following conditions as stated by carrier:

"In the absence of a qualified yardman working on the third shift, an available unassigned yardmaster or a yardmaster requesting vacancy, Martin was used each date September 23 and 24, 1949, to fill vacancy as yardmaster on Job No. 3, hours 10:30 P. M.-6:30 A. M."

Attached as the organization's Exhibit "J" is a reproduction of the organization's acceptance of a settled claim of a switchman for temporary yardmaster work, showing the correct use of switchmen for yardmaster work. The settlement (YDM 148-3282) shows that the carrier and the organization are in agreement on the following conditions:

"Since no one having yardmaster's seniority made request to fill the vacancy in question and there were no qualified yardmen holding assignments working in the same shift range as Yardmaster Position No. 5, March 4, 1955, the senior qualified yardman holding a yard assignment working on one of the other starting time periods stood for the service in question, under the provisions of Article 12, Section (a), Yardmen's Agreement. Records indicate the claimant was in that status and since he was available and not used, he will be allowed one day at yardmaster's rate of pay, March 4, 1955."

Attached as the organization's Exhibit "K" is a reproduction of the organization's acceptance of a settled claim (YDM 148-3281) similar to the claim evidenced as Exhibit "J."

Attached as the organization's Exhibit "L" is a reproduction of the organization's acceptance of a settled claim covered by the carrier's file YDM 148-2709. Sheets 2 and 3 of Exhibit "L" reproduce the carrier's letter of October 21, 1953, file YDM 148-2709 wherein the claim was initially denied. Note claimant switchman was properly used to fill General Yardmaster's Position No. 1.

Attached as the organization's Exhibit "M" is a reproduction of the organization's acceptance of a settled claim to a switchman who had not yet acquired 306 days as engine foreman under conditions where claim was being made for work arising on a temporary yardmaster vacancy. A yardmaster had not requested the temporary service, and a qualified switchman was not available for the service. In Exhibit "M" (carrier's YDM 148-2630), it is notable that the carrier stated:

"However, since a yardman junior to the claimant (but no more qualified than he) was used in the absence of others properly standing for work as Assistant Yardmaster work each date, July 17, 18, 19, 20 and 21, 1952, this particular case will be disposed of by allowing Yardman Whitaker a day's pay at the applicable assistant yardmaster's rate each date * * *" (Emphasis ours.)

Attached as the organization's Exhibit "N" is a reproduction of acceptance letter concerning claim covered by carrier's YDM 148-3362. It is particularly notable that the carrier made the following assertion when adjusting that claim:

"At 7:30 A. M. on Saturday, February 19, 1955, a vacancy existed on Assistant Yardmaster Position Y-21, and Yardmaster Barnett, assigned to Yardmaster Position Y-13 at Roseville, day off Saturday, was used to fill the vacancy in question. He performed service thereon from 7:30 A. M. to 3:30 P. M. and was allowed one day at yardmaster's overtime rate of pay.

"At time vacancy existed, there was no yardmaster available with request to work Yardmaster Position Y-21, nor were there any yardmen qualified and available working in the same shift range as the yardmaster vacancy, nor were there any qualified yardmen senior to Yardman Carlini on any other shift range.

Under the circumstances existing in this case, Yardman Carlini properly stood for service as yardmaster on position Y-21, on duty 7:30 A. M., February 19, 1955. Since he was improperly withheld from that service, we will allow him one day at yardmaster's rate of pay in addition to compensation earned that date. Adjustment will be made accordingly." (Emphasis ours.)

SECOND

BINDING AND INTERPRETIVE SETTLEMENTS MADE WITH THE YARDMASTERS' ORGNIZATION REPRESENTING THE CARRIER'S YARDMASTERS ALSO SHOW THAT THE CARRIER MASTER REPRESENTATIVES THAT UNLESS A YARDMASTER

REQUESTED TEMPORARY YARDMASTER WORK OF THIRTY DAYS OR LESS DURATION, A VALID CLAIM TO THE WORK WOULD NOT EXIST.

This carrier likewise reached settlement agreements with the chosen representatives of their yardmasters that a request must be made by a yardmaster under Article 9, Section (b) of the Yardmasters' Agreement for any temporary yardmaster vacancy of thirty (30) days or less duration before a yardmaster properly stood to be used for temporary yardmaster work of thirty (30) days or less duration. In the absence of any such request from a yardmaster for the temporary yardmaster work, the settlements between the carrier and the Yardmasters' General Chairman clearly show that a switchman (yardman) was, and is, properly to be used for the temporary yardmaster work.

Attached as the organization's Exhibit "O" is a reproduction of a letter dated February 7, 1950 addressed to the General Chairman of the Yardmasters, signed by carrier's highest officer designated to handle such claims.

In the claim of Exhibit "O," covered by carrier's file YDM 148-1913, a temporary vacancy arose on regular yardmaster position No. 2 on September 16 and 17, 1949. A qualified yardman was used each date to fill the temporary yardmaster vacancy. Yardmaster Wehrsted, the claimant, did not make a request under Article 9, Section (b) of the Yardmasters' Agreement for the temporary vacancy, but claimed a right to the vacancy and work without having made such request. The carrier's highest officer denied Mr. Wehrsted's claim and stated:

"At the conference I stated that Mr. Wehrsted did not stand for service as yardmaster on Position No. 2 September 16 and 17, 1949, and that it was proper to use a qualified yardman to fill the position those dates. Claim for September 16 and 17, 1948 is denied."

The decision of the carrier's designated officer in the claims of Yardmaster Wehrsted, September 16 and 17, 1949, was accepted by Mr. Wehrsted's General Chairman on February 8, 1950. Moreover, the General Chairman, in further reference to the withdrawn claims of September 16 and 17, 1949, by letter of March 15, 1950, advised carrier's officer in pertinent part as follows:

"In view of correspondence, and our recent withdrawal of two claims for Yardmaster Wehrsted, of Stockton Yard, said correspondence, referred to signed by Mr. E. D. Moody, at that time Superintendent of the Western Division, states, and we accepted facts, as yardmen were to fill position Yardmaster Wehrsted claimed time on, claim was withdrawn, per conference in your office, Fred Jones present, as per our tri-party agreement, it is my understanding, that it is proper to use qualified yardmen, to fill vacancies of yardmasters, when there are no extra or unassigned yardmasters available."

Attached as the organization's Exhibit "P" is a reproduction of the carrier's letter of November 3, 1949, file YDM 148-1861, wherein the claim of a senior yardmaster (Wright) made claim for a yardmaster day when a yardmaster his junior was used. Carrier's officer denied Yardmaster Wright's claim, stating:

"As stated to you in conference, our records indicate that Mr. Wright did not make a request to fill vacancy on yardmaster position No. 21 as required by Article 9, Section (b), Yardmasters' Agreement; therefore, the claim presented is not a valid claim and is denied." (Emphasis ours.)

On November 30, 1949, the Yardmasters' General Chairman withdrew the claim.

Moreover, the General Chairman of the Yardmaster's Organization presently representing the Carrier's Yardmaster, in a mimeographed communication addressed to Yardmasters on the Carrier's property, dated July, 1956, purportedly advised the Carrier's Yardmasters and members of Railroad Yardmasters of North America, Inc., on the Carrier's Pacific Lines property, that Yardmasters would not stand to be used for extra yardmaster work unless they requested it. Attached as the Organization's Exhibit "Q" is a photostatic copy of the mimeographed communication.

Reference is made in Exhibit "Q" to an "Interpretation Agreement" between the Southern Pacific Company (Pacific Lines) and its Yardmasters represented by the Railroad Yardmaster's of North America, Inc. So that the Board will have knowledge of this Interpretation Agreement made the subject matter of the mimeographed letter, we attach it as Exhibit "R." It will be noted that the Interpretation Agreement recognizes that for one to be eligible for temporary Yardmaster work thereunder, application for such vacancies must come about due to an exercise of seniority under Article 9, Section (b) of the Yardmaster's Agreement.

It is further to be noted, and this is important, that the mimeographed information to the Carrier's Yardmasters (Exhibit "Q") carries certain vital admissions. Note the admission that without the Interpretation Agreement, Yardmasters would not have been used and the company would have used "Yardmen" for the extra yardmaster's work. It is clearly advised therein, that unless Yardmasters request the extra yardmaster work, as per the Interpretation Agreement, they will not be used. And it should be kept in mind that when reference is made to the "Interpretation Agreement" such reference is to an agreement to which "petitioners" herein are parties. And while the General Chairman in the mimeographed message has urged his members to handle time claims when Switchmen are used for the temporary yardmaster work, it will surely be recognized that the mere handling of time claims cannot have the effect of negating the rules of the yard and yardmasters' agreements.

THIRD

THE CARRIER'S MANIFESTATIONS, POSITIONS, AND ARGUMENTS AND EVIDENCE IN OTHER CLAIMS BEFORE THE FIRST AND FOURTH DIVISIONS, NATIONAL RAILROAD ADJUSTMENT BOARD, SHOW A BASIS FOR THE AGREEMENTS REACHED IN THE INTERPRETIVE SETTLEMENTS HEREIN SHOWN.

On this property there is a close tie-in between the Yard and Yardmasters' Agreements and agreement provisions of long standing nature have provided that yardmasters will be promoted from the ranks of switchmen(yardmen). When the promoted man can no longer work as yardmaster,

or no longer desired to work as yardmaster, the way is open for him to return and again exercise his seniority as switchman.

For a long number of years the ebb and flow from switchmen to yardmaster, and yardmaster to switchman, has been a thing of daily occurrence in the numerous yards on the carrier's property. This ebb and flow has not been limited to conditions where a switchman becomes regularly assigned to a yardmaster job and then returns to switching service account not able, or not desiring to work as yardmaster. **To the contrary, most all of it is caused by the use of switchmen for temporary yardmaster work of 30 days or less duration under conditions where a yardmaster did not request to be used for the temporary yardmaster vacancies.** (See all interpretive settlements evidenced by the organization as exhibits.)

Numerous reasons of merit, underlying the action of the parties when agreeing to adopt the interpretive settlements, present a logical and practical basis for the use of switchmen to do temporary yardmaster work of 30 days or less duration when yardmasters do not request such work. One compelling reason finds its inception in the close tie-in of the two agreements.

The Yard Agreement forms a basis or pool of men to be promoted to yardmasters, and at the same time provides for one newly promoted to yardmaster to return and work as switchman, thus insuring steady employment if exercise of seniority rights will so provide. **One the other hand, if there is temporary yardmaster work of 30 days or less duration, for which one holding seniority as yardmaster has not requested, the use of a regular assigned switchman for the temporary work permits another switchman in most cases to work in the yard vacancy thus created.** In this respect a reciprocating feature in the application of the two agreements comes about and a distribution of work ensues.

Other underlying reasons for the use and right of switchmen to do temporary yardmaster work are explained by this same carrier in their position of the claim considered by the Fourth Division in that Division's Award No. 790.

In the claim of Fourth Division Award No. 790 a temporary yardmaster vacancy existed for which a request was not made by anyone holding seniority as yardmaster. The yardmaster claimant alleged he should have been used for the service instead of the switchman who had been called and used. Under their position in the case of Fourth Division Award 790 this carrier held as follows:

I

"RULES OF THE YARDMASTERS' AGREEMENT DISTINCTLY INDICATE THAT CLAIMANT WAS NOT ENTITLED TO THE SERVICES PERFORMED BY YARDMAN BRUNO ON POSITION NO. 9.

B—Rule Applicable to Filling of Temporary Vacancies Requires Yardmaster Having Sufficient Seniority and Desiring to Fill Such Temporary Vacancies to Make Specific Request. Claimant Admittedly made no Such Request to Fill Vacancy on Job No. 9 on the date of this Claim:

Article 9, Section (b) of the Yardmasters' Agreement briefly sets forth the procedure to be followed in filling temporary vacancies

(i.e., vacancies or new positions of 30 days' duration or less). That rule reads as follows:

'Article 9
Vacancies and New Positions

'(b) New positions and vacancies of thirty (30) days' or less duration shall be filled whenever possible by the senior qualified yardmaster making request for same.' (emphasis ours)

Except for the provisions appearing in Article 6, Section (d), with reference to providing reliefs for yardmasters on days off, the foregoing rule is the only rule in the Yardmasters' Agreement prescribing the mode to be followed in distributing temporary yardmaster work. It is therefore significant that the whole tenor of the foregoing rule is that assigned yardmasters have no right to be called to fill temporary vacancies, and their right to such temporary work is entirely dependent upon their making a specific request for same. (emphasis ours)

C—Carrier is Undeclared No Duty to Call Assigned Yardmasters to Fill Temporary Vacancies or to Advertise Such Vacancies:

The statement in the rule appearing in Section (b) of Article 9, Yardmasters' Agreement, that yardmasters 'making request' for new positions or vacancies of thirty days' or less duration shall be used to fill such vacancies necessarily precludes any thought that carrier is under a duty of any kind to call assigned yardmasters to fill such vacancies in the absence of a specific request having been made. No other rule of the Yardmasters' Agreement imposes upon carrier, either expressly or impliedly, a duty to call assigned yardmasters for temporary work off their assignment.

II

THE PROPRIETY OF USING SENIOR QUALIFIED YARD-
MEN TO FILL YARDMASTER POSITIONS IS EXPRESSLY REC-
OGNIZED BY YARDMASTERS' AGREEMENT AND BY SUBSE-
QUENT WRITTEN AGREEMENTS AND SETTLEMENTS SUB-
SCRIBED TO BY THE PETITIONER.

A—Unassigned Yardmasters are Very Seldom Available Due to Highly Restrictive Seniority Rule Adopted at the Insistence of the Petitioner:

The first action taken by the petitioner after becoming the authorized agent of carrier's yardmasters above the grade of assistant yardmaster was to demand a seniority rule which would restrict yardmaster seniority rights to individuals holding regular assignments as yardmasters. Thus, persons filling vacancies or performing temporary yardmaster work were precluded from acquiring a yardmaster seniority date.

Attached as carrier's Exhibit 'D' is the first letter addressed to carrier by petitioner's general officers after petitioner had won the right to represent yardmasters above the grade of assistant yard-

masters. The second paragraph of this letter contains the following significant statements:

'We wish to accept this schedule in its entirety with the clause included giving the yardmasters seniority from the last regular assignment, also yardmasters reduced on account of reduction in force will be allowed to use their seniority in filling all vacancies, including relief work.'

In 1937 petitioner won an election conducted by the Mediation Board, and thereby became the statutory representative of all carrier's yardmasters, including assistant yardmasters. Thereafter, petitioner and carrier subscribed to a Yardmasters' Agreement which became effective February 1, 1938, and which, pursuant to the demands of petitioner, contained a seniority rule which embraced the features mentioned in the excerpt quoted above.

B—All Yardmasters are Permitted to Make Specific Request for Temporary Work or Vacancies under Article 9(b), Yardmasters' Agreement, but, in the Absence of Such Specific Request, the Only Rule Placing a Duty Upon Carrier to Call Particular Employes for Temporary Yardmaster Work Specifically States that Yardmen May Be Used:

It has been indicated in subdivision I-C above that carrier is under no duty whatever to call assigned yardmasters for temporary yardmaster work or to advertise temporary work or vacancies in any way. Except for the rule in Article 9, Section (b), Yardmasters' Agreement, which confers upon senior yardmasters a right to ask for temporary positions, there is only one provision in Yardmasters' Agreement indicating whom carrier should use to perform any kind of temporary yardmaster vacancy, and that is the last sentence of Article 6, Section (d):

'If an unassigned yardmaster is not available, such relief may be made by the senior available qualified yardman.'

The tremendous significance of this express provision for the use of a yardman to perform temporary yardmaster work lies in the fact that such a yardman performing such work does not thereby acquire yardmaster seniority as a result of the restrictive rule which has hereinbefore been discussed. Thus, the only rule in the Yardmasters' Agreement, which purports to indicate whom carrier should call to fill temporary vacancies, indicates that yardmen who could not possibly hold yardmaster seniority should be used.

C—The Recognition in the Yardmasters' Agreement of the Right in Carrier to Use Qualified Yardmen to Fill All Temporary Vacancies in the Absence of a Specific Request for the Same by Senior Yardmasters, together with the Complete Absence of Anything in the Yardmasters' Agreement Restricting That Right of Carrier is Consistent with Specific Tripartite Agreements Between the Petitioner, Carrier and Representatives of Carrier's Yardmen Whereby the Yardmen and the Yardmasters Both Acquired Reciprocal Rights Which They Otherwise Would Not Enjoy: As Recently as 1950 Petitioner's General Chairman has Expressly and In Writing Admitted the Existence of These Tripartite Agreements and that Pursuant to the Same

and Pursuant to the Yardmasters' Agreement it is Entirely Proper for Carrier to Use Yardmen to Fill Temporary Yardmaster Vacancies in the Circumstances Involved In This Docket:

a. Tripartite Agreement—

The attention of Division members is respectfully directed to Section (e) of Article 8 Yardmasters' Agreement which reads as follows:

'ARTICLE 8

Seniority

'(e) Yardmasters shall retain their seniority as yardmen, and in the event of reduction in force, and there are no junior yardmasters for them to displace, shall be privileged within five (5) days (or if on leave of absence account of sickness or other reasons, for five (5) days from date of return) to displace a junior yardman. Yardmasters temporarily reduced shall retain their seniority date as yardmaster.'

Division members will readily recognize that this rule conforms with one of the demands originally made by the petitioner when it first became the authorized agent of carrier's yardmasters (see Exhibit 'D', partially quoted and discussed above). Division members will also readily recognize that this particular provision is one which the petitioning organization, as statutory agent of yardmasters, had no inherent right to demand because it deals with a subject, that is, yardmen seniority, which is exclusively within the province of the yardmen and their statutory representative. The provision was inserted in the Yardmasters' Agreement which became effective February 1, 1938, pursuant to the express and insistent demands of petitioner. Immediately after the said agreement was published, the statutory agent of carrier's yardmen protested that this rule impinged upon the prerogative of yardmen. The contention of the yardmen was obviously correct in view of the decision handed down by this Division in Award No. 391, wherein it was held that a member of one craft automatically forfeited his seniority rights in that craft when he commenced voluntarily to perform service on a regular assignment in another craft.

Attached as carrier's Exhibit 'E' is a copy of the letter addressed to carrier by the general officers of the statutory representative of carrier's yardmen under date of January 21, 1938, which contains the following protest against the rule quoted above from the Yardmasters' Agreement:

'It is the position of our Committee that inasmuch as the Yardmasters included in the agreement to become effective February 1, 1938 are not officials, yardmen promoted to and accepting such positions cannot, under Article 25, Section (b), Yardmen's Agreement hold their seniority as yardmen without agreement with our Committee, nor can they transfer from one yard to another as yardmasters, as provided for in Article 6 of the agreement negotiated between the Management and Railroad Yardmasters of America without

relinquishing their seniority as yardmen. It is not our understanding that the carrier would be privileged to enter into any agreement with the Railroad Yardmasters of America that would make it possible for yardmasters to transfer from one yard to another and exercise their seniority as yardmasters in the yard to which they transfer because to do so would set aside Section (c) of Interpretation of July 9th, 1936 which provides that, the senior qualified yardman at point of service will be used when the seniority list of yardmasters at that point becomes depleted or in case no applications are received from those whose names appear on the protected list for vacancies or new positions created.'

In further prosecution of the foregoing protest, the statutory agent of yardmen invoked the aid of the National Mediation Board and, for a long period of time there were extensive negotiations carried in in an effort to bring the organizations representing yardmen and yardmasters together on a reasonable basis of mutual cooperation. The outgrowth of those negotiations were numerous settlements and understandings, which are now reflected in the agreements covering these two classes of employees. The provisions in the Yardmasters' Agreement, such as Article 6, Section (d), recognizing that yardmen may be used to perform temporary yardmaster work; the provision in Section (e) of Article 8, permitting yardmasters to retain their seniority as yardmen; and the provisions in Article 9, Section (c), last sentence, indicating that qualified yardmen will be assigned to permanent vacancies where no request is received from a senior yardmaster, all reflect, in a general way, the understanding reached by the parties as a result of the extensive negotiations following the adoption of the 1938 Yardmasters' Agreement.

b. Petitioner's General Chairman has Admitted the Nature of the Tripartite Agreement in Writing as Recently as March, 1950—

The petitioner's present General Chairman has expressly acknowledged the existence of these tripartite agreements, and that pursuant thereto and under the Yardmasters' Agreement it is carrier's prerogative to use a qualified yardman in the circumstances involved in this case.

Attached as carrier's Exhibit 'F' is a letter which petitioner's General Chairman addressed to carrier's assistant manager of personnel on March 15, 1950. The 'Statement of Committee' in said letter contains the following extremely significant statement:

'In view of correspondence, and our recent withdrawal of two claims for Yardmaster Wehrsted, of Stockton Yard, said correspondence referred to signed by Mr. E. D. Moody, at that time Superintendent of the Western Division, Mr. Moody, states and we accepted fact, as yardmen were to fill position, yardmaster Wehrsted claimed time on, claim was withdrawn, per conference in your office, Fred Jones present, as per our tri-party agreement, it is my understanding, that it is proper to use qualified yardmen, to fill vacancies of yardmasters, when there are no extra or unassigned yardmasters available. (emphasis ours).'

"III

PAST PRACTICE, TOGETHER WITH SPECIFIC AGREEMENTS AND SETTLEMENTS, HAVE CONCLUSIVELY IMPRESSED UPON THE APPLICABLE RULES THE CONSTRUCTION WHICH CARRIER HAS GIVEN THEM IN THIS CASE.

A—Settlement directly in Point Subscribed to by Petitioner's Former General Committee Establishes that the Instant Claim is Invalid:

Carrier's files contain the following written settlement which admits the invalidity of an identical claim which was submitted to carrier in 1948, as a result of a mistaken belief of the petitioner's general officers that the yardmaster involved had made a specific request that he be used on a particular temporary vacancy. The letter of the General Chairman submitting that claim to carrier read as follows:

‘RAILROAD YARDMASTERS OF AMERICA
General Grievance Committee
March 19, 1948

Frank C. Milne,
General Chairman

Mr. M. E. Somerlott,
Assistant Manager of Personnel,
Southern Pacific Company,
65 Market Street,
San Francisco, California

Dear Sir,

Herewith please find appeal of Yardmaster C. L. Miller, Oakland Yard.

STATEMENT OF CLAIM

Claim is made for one day at Yardmaster's rate for October 19, 1947.

STATEMENT OF FACTS

Yardmaster Miller, a regularly assigned yardmaster, made request to work on his rest day on the date in question, but he was not used on position 28, Oakland Yard, and an engine foreman was used instead.

Mr. Miller has made claim for eight hours at straight time for not being used as requested but this claim has been denied.

STATEMENT OF COMMITTEE

This committee is of the opinion that the claim of Mr. Miller is in order and bases its contention on the fact that

Mr. Miller expressed his desire to the crew dispatcher to work on his rest day, but the company's representative did not see fit to call him, but did call an employe outside the scope of the yardmaster's agreement, to-wit Engine Foreman Littlehales, and in doing so failed to permit Mr. Miller to exercise his seniority as laid down in Article 9, Sec. (b) of the current yardmasters agreement.

This committee therefore respectfully requests that you review this claim and render an affirmative decision.

Yours truly,

(signed) F. C. Milne'

The facts were that Yardmaster Miller had not made a specific request that he be used to fill the vacancy and, therefore, on April 13, 1948, carrier's assistant manager of personnel addressed to the General Chairman the letter attached as carrier's Exhibit 'I', advising that the claim was denied. In a conference held June 21, 1948 the representatives of petitioner and carrier discussed the foregoing claim of Yardmaster Miller, and when petitioner's representatives were confronted with the fact that Yardmaster Miller had not made specific requests that he be used to fill the vacancy of the assigned relief yardmaster, they promptly agreed that the claim was invalid and withdrew the same. The following memorandum was subscribed to by petitioner's General Chairman and General Secretary:

'YDM 125-969
YDM 148-1417
YDM 148-1418
YDM 148-1419

MEMORANDUM

The claims identified by the above files were discussed today with Mr. F. C. Milne, General Chairman, RYA, accompanied by Mr. R. L. Reiserer, Secretary-treasurer, General Committee, RYA, and in this discussion this Committee withdrew the four claims thus identified, thereby permitting the Company's files to be closed on these subjects.

/s/ M. E. Somerlott

CORRECT:

/s/ F. C. Milne
General Chairman, RYA

/s/ R. L. Reiserer
Secretary-treasurer
General Committee, RYA

June 21, 1948'

C—In the Circumstances of This Case the Practical Interpretation Which the Parties Themselves Have Placed Upon the Yardmas-

ters' Agreement During the Past Ten Years is Conclusive Upon the Parties:

a. Awards of This Division—

This Division has repeatedly recognized that, as a general rule, a practice of long standing acquiesced in by both parties to a collective agreement has the effect of placing a binding interpretation on the applicable rules of the agreement. The following portion of the Board's Opinion, made in connection with award No. 419, is illustrative:" (emphasis ours)

'It seems to us that negotiation is the proper solution in this case. The Organization has pointed out no new provision in the Agreement of November 1, 1945, which would require that the carrier change its practice and place an employe in the Yardmaster class on the first trick at the Yard office. Since the General Yardmaster has admittedly been supervising yard crews adjacent to the yard for over 25 years and since Yardmasters' agreements have been in effect for almost the same length of time, it is our opinion that the result of upholding the Organization's contention in this case would be to write a new rule into the Agreement. This we cannot do.'

It is an admitted fact that since the adoption of the Yardmasters' Agreement in August 1941, the procedure followed in filling temporary vacancies in yardmaster positions has been identical with the procedure followed by carrier in this case; and, furthermore, the petitioner's general officers have repeatedly and expressly in writing recognized that procedure as being entirely appropriate and consonant with all applicable provision of the Yardmasters' Agreement. In these circumstances the past practice is obviously conclusive on the parties.

b. Pertinent Court Decision—

In view of the fact that the Yardmasters' Agreement was negotiated and subscribed to in the State of California, and also, the fact that these claims arose in that State, we respectfully direct the attention of Division members to the following expression of the California Court of Appeals, indicating the legal effect of a practical construction which parties may place upon their contract in that State:

"* * * When a contract requires construction the parties thereto have a right to place such an interpretation upon its terms as they see fit, even when such an interpretation is apparently contrary to the ordinary meaning of its provision. *Mitau v. Roddan*, 149 Cal. 1, 84 P. 145, 6 LRA (N.S.) 275 * * *" (*Herrlein et al v. Tocchini et al.* 178 Cal. App. 628, hearing denied by Supreme Court March 13, 1933.)"

The claim of the yardmaster being considered in Fourth Division Award 790 was denied and the use of a yardman for the temporary service was held to be proper.

In another claim of one of the carrier's yardmasters decided by the Fourth Division, National Railroad Adjustment Board, in its Award 1038,

with Referee G. Allan Dash, Jr., presiding, the Division considered the claim of an unassigned yardmaster for one day's pay at yardmaster rate October 4, 1952, and one day's pay at yardmaster's overtime rate of pay October 21, 1952.

This carrier had called and used a yardman (switchman) on a temporary yardmaster vacancy that existed on Yardmaster Position No. 3 each date, at the Carrier's Dunsmuir Yard.

Yardmaster Job No. 3 at the carrier's Dunsmuir Yard, on dates of claim, was a regular yardmaster position and the vacancy on Position No. 3 occurred each date of claim on one of the assigned work days of Position No. 3 due to the incumbent laying off for personal reasons.

A part of this carrier's facts in the claim of Fourth Division Award 1038 was as follows:

"3. A. L. Newman (hereinafter referred to as the claimant) an unassigned yardmaster holding regular assignment as yard helper on Job 701, Dunsmuir Yard, hours of assignment 7:59 A. M. to 3:59 P. M., was used on October 4, 1952 to fill vacancy on General Yardmaster Job No. 1, working thereon from 7:30 A. M. to 3:30 P. M.

The claimant was again used on October 20, 1952, on Yardmaster Job No. 3 (the day off of incumbent of that assignment) working thereon from 11:30 P. M. to 7:30 A. M.

On October 21, 1952, the claimant was next used on Yardmaster Job No. 2 (the day off of incumbent of that assignment) working thereon from 3:30 P. M. to 11:30 P. M.

4. Yardmaster regularly assigned to Yardmaster Job No. 3 (hours 11:30 P. M. to 7:30 A. M.) day off Monday, laid off for personal reasons on Saturday October 4, 1952, and Tuesday, October 21, 1952. In the absence of a request from a yardmaster (either assigned or unassigned) to fill those vacancies, a regularly assigned engine foreman, who was qualified as yardmaster, was used to fill vacancy on Yardmaster Job No. 3, each date, October 4 and 21, 1952." (emphasis ours)

The carrier's position in the case clearly and correctly sets forth that a yardmaster must have made a specific request for the work, else he would not stand for the work. The carrier's position held as follows:

"POSITION OF CARRIER: The carrier asserts that there is neither merit to nor basis for the claim presented in view of the clear provisions of Article 9, Section (b) of Yardmasters' Agreement which is as follows:

'ARTICLE 9
Vacancies and New Positions

'Section (b)—New positions and vacancies of thirty (30) days' or less duration shall be filled whenever possible by the senior qualified yardmaster making request for same. (Emphasis ours.)'

The uncontroverted fact in this case is that the claimant did not make request to fill the vacancies in question on dates involved; therefore, his failure to do so establishes the invalidity of the claim.

As evidence supporting carrier's position in the premises, attached as carrier's Exhibit 'A' is a settlement made with general chairman, Railroad Yardmasters of America, (the designated representative of carrier's yardmasters at the time said claim was progressed) involving the identical issue here involved. It will be observed that in that claim (Exhibit 'A') the claimant did not comply with the provisions contained in Section (b) of Article 9, Yardmasters' Agreement to the extent that he had not made request for a yardmaster vacancy, and as a consequence, was not used on an existing vacancy. The claim was denied by the carrier on the basis that the claimant did not make a request to fill the vacancy, and said decision and basis therefor, was accepted by the organization and the claim was withdrawn."

(Where reference is made next above to "Carrier's Exhibit 'A'" in the claim of Fourth Division Award No. 1038, such settlement referred to is covered by the carrier's file YDM 148-1861 now reproduced by this organization as Exhibit "O".)

The claim of the yardmaster in Award 1038 was denied. The opinion of the Board specifically and correctly pointed out certain pertinent applications to the Yard and Yardmasters' Agreements on the carrier's property. Note the last paragraph as follows:

"Since there was no obligation upon Yardman Newman to fill the two temporary Yardmaster vacancies on October 4, 1952 and October 21, 1952 to protect his Yardmaster's seniority, there was likewise no obligation upon the Carrier to notify him specifically of such vacancies to give him an opportunity to fill them. The past practices of the parties recognize no such obligation on the part of the Carrier, and the Board will not bring such an obligation into being in this instance. Rather, the past practices of the parties in this type of situation placed the claimant in exactly the same position as all other Yardmasters (assigned and unassigned) and required that he make known his request to fill these two specific temporary vacancies in order to have the right to be placed on them. If he had made a request to fill either or both of these temporary vacancies, and if the other facts of the case had been exactly as they are here, he would have had the right under Article 9(b) to have filled them. But since he had no obligation to fill them under Article 8(1) of the Agreement, and did not make his request known to fill them under Article 9(b) of the Agreement, there is no basis upon which his claim in this case can be supported." (Emphasis ours).

Note particularly the underlined portion of "Opinion of Board" dealing with past practice, and past application, and that yardmasters "(assigned and unassigned)" must request the temporary yardmaster work "in order to have the right to be placed on them."

Similarly, in still another claim of one of this carrier's yardmasters, decided by the Fourth Division, National Railroad Adjustment Board in its Award No. 802, with Referee Robert O. Boyd assisting, the Division considered the question if the yardmaster claimant had entered a request for a temporary vacancy existing on a regular yardmaster position at the carrier's Oakland Yard.

In the claim of Fourth Division Award No. 802 the temporary yardmaster vacancy arose on one of the assigned work days of regular yardmaster position No. 48 working in the Richmond portion of the carrier's Oakland Yard. The claimant, Yardmaster C. Miller, alleged he had made request for the particular vacancy involved and his claim for the work was premised on the basis that a request had been entered by him. Under those conditions he contended it was not proper to use a yardman.

The employees' facts in the claim of Fourth Division Award 802 included the following:

"Carrier assigned a yardman, an employe without yardmaster seniority, therefore outside the scope of the controlling Yardmaster Agreement, to the position notwithstanding the fact that Yardmaster Miller had advised the crew dispatchers on several occasions that he was available to double." (Emphasis ours).

Yardmaster Miller's local chairman when making formal handling of the claim with the Division Superintendent stated the following as facts:

"Yardmaster Miller and Unassigned Yardmaster Atkinson were both working on January 6, and Yardmaster Miller knowing that Mr. Carter would be off the 7th, made request of Crew Clerk Lutz for the position next night, which was Mr. Miller's layover day, but was denied the position by crew clerk, and instead on the 7th Mr. Atkinson working afternoon shift was contacted by the crew clerk and requested to double straight through on the next shift on Position No. 48, notwithstanding the fact Yardmaster Miller had served better than twenty-four (24) hours notice requesting to be marked up for the vacancy." (Emphasis ours).

Yardmaster Miller's General Chairman handled the claim on appeal with the Company officers, again holding that Yardmaster Miller had requested the temporary yardmaster work arising on regular yardmaster position No. 48.

This carrier's defense against the claim of Yardmaster Miller was that Mr. Miller did not enter a request for the temporary work under Article 9, Section (b) of the Yardmasters' Agreement. Under subtitle I, in their submission of the case, the carrier flatly stated the basis of the case was as follows:

"THE SOLE BASIS OF THIS CLAIM CONSISTS OF CLAIMANT'S ERRONEOUS AND UNSUPPORTED ASSERTIONS THAT HE MADE AN APPROPRIATE REQUEST FOR THE SERVICE INVOLVED AND THE CONTROLLING ISSUE IN THE CLAIM IS THUS AN ISSUE OF FACT WHICH THIS DIVISION IS IN NO POSITION TO DECIDE — MOTION TO DISMISS."

The claim of Fourth Division Award 802 revealed that:

1. A vacancy existed on regular yardmaster position No. 48 at the carrier's Oakland Yard January 1, 1951.
2. A yardman (switchman) was used to fill the vacancy.
3. Claimant (Yardmaster Miller) alleged that he had made a request for the temporary work on Yardmaster Position No. 48.

4. This carrier held that Yardmaster Miller had not made request for the vacancy on Yardmaster Job No. 48.

And so, the case and claim of Yardmaster Miller was clearly and concisely presented to the Fourth Division of the National Railroad Adjustment Board with but one question for the Board to decide —

Did Yardmaster Miller have a right to be used on temporary yardmaster vacancy existing on Regular Yardmaster Job No. 48 by virtue of his request for that work?

The Division, with Referee Robert O. Boyd assisting, under "Opinion of Board" stated in part as follows:

"OPINION OF BOARD: The issue presented by the submission in this docket is whether the Claimant made a request within the meaning and intent of Article 9(b) for the temporary vacancy created by the Yardmaster on Position No. 48 laying off.

It appears uncontroverted that the Claimant had from time to time made known his desire for extra work; that on previous occasions he had filled in on temporary vacancies; and that he was available for the work on the vacancy on Position No. 48 because that was to be on Monday, the lay-over day of Claimant. The Organization stated in its letter of February 14, 1951, to the Superintendent, that Claimant Miller knew in advance of the prospective vacancy and that he made request of the Crew Dispatcher Clerk for the position. This is not specifically denied by the Carrier although for such purpose it submits a communication dated March 9, 1951, from the crew dispatcher. This letter contains no denial that Claimant had requested the temporary position, and admits that the clerk knew that Claimant wanted extra work. The Carrier further contends that there was no record of Claimant's request. But the rule does not require the request to be made in writing. The Carrier admits that the Trainmaster's office knew of Claimant's desire for extra work, but asserts that he, the Claimant, did not want to work the particular position handling the Standard Oil Company work. But Claimant denies this and says that he told the Trainmaster he would not bid on the Richmond transfer. The Carrier knew that on one day of his regular assignment Claimant performed the Standard Oil Company work.

From an examination of the entire record, we have concluded that Claimant has sustained the burden of proof, and, therefore, find that he made a request for the work as claimed." (Emphasis ours).

The question if Yardmaster Miller had requested the work under Article 9, Section (b) of the Yardmasters' Agreement, having been decided in his favor, the claim was sustained.

Further evidence of the use of switchmen to do yardmaster work on the carrier's property is found in the claim of First Division Award No. 18686 wherein Referee Mortimer Stone assisted the Division to decide the proper claimant for yardmaster work at the carrier's San Jose Yard as between two switchmen. In that case there was no question but that a switchman was properly used on the vacancies existing on regular yardmaster positions (Job #7, 10:30 P. M., November 17, 1953, and Job #10, 10:30 P. M., November 20, 1953). The only question for the First Division to decide was whether the

proper switchman was used for the temporary yardmaster work involved under a correct application of the agreement in effect. When presenting the case to the Board this carrier stated the structure of the case to be as follows:

"On November 17, 1953, incumbent of Yardmaster Position No. 7 (hours 10:30 P. M. to 6:30 A. M.), San Jose Yard, laid off.

On November 20, 1953, incumbent of Yardmaster Position No. 19 (hours 10:30 P. M. to 6:30 A. M.) San Jose Yard, laid off.

On each date, November 17 and 20, 1953, there were no unassigned yardmasters, yardmasters who had made request to fill the vacancies, or yardmen who had served the prerequisite of 306 days' service as engine foreman in San Jose Yard available to fill the above mentioned yardmaster vacancies. It was, therefore, necessary to fill the vacant yardmaster positions with a yardman who had served less than 306 days as engine foreman, as provided for in letter of Understanding quoted in Paragraph No. 4."

Similarly, in still another claim of one of the carrier's switchmen for yardmaster work, decided by the First Division, National Railroad Adjustment Board, with Referee Wm. H. Spencer assisting (Award 12218), this carrier stated:

"For the Division's information, on this carrier's property, in those yards where zones have not been created, it is the established and recognized practice, in the absence of any extra yardmasters, to use the senior qualified yardman working on the shift upon which a yardmaster temporary vacancy exists, to fill said vacancy; however, in the event there is no qualified yardman working on the shift on which the vacancy exists, then the senior available qualified yardman (such as the claimant here) is used without regard to the shift on which he may be working as yardman.

Stockton Yard, the location here involved is not zoned; therefore, it was incumbent upon the carrier, in the circumstances here involved, to call the claimant, who was the senior available qualified yardman in that yard, to fill the yardmaster vacancy in question; however, as evidenced by the claimant's letter, (Exhibit A) he declined to accept that vacancy, clearly therefore, because of the provisions of the third and fourth paragraphs, Section (a), Article 12, yardman's current agreement, the carrier had no alternative but to recognize the fact that he had by that declination, forfeited his rights to yardmaster work for a period of six months. (See again Exhibit N.)"

See also claim from this carrier's property considered by the First Division, National Railroad Adjustment Board, in the Division's Award No. 17121. It is notable in that case that a switchman was properly used for the temporary yardmaster work arising on regular yardmaster position No. 3 on dates of claim.

The organization asserts that it has been conclusively shown that the carrier had an agreement obligation to use the senior switchman standing for the service forming the basis of this claim, and that their failure to use a switchman obligates them to pay the senior switchman standing for the service an amount commensurate with that contained in the statement of claim.

The organization further asserts it has been conclusively shown that the yardmaster work involved in the claims of First Division Awards 12218, 17121 and 18686, for which switchmen from this property were properly used, arose on temporary vacancies existing on regular yardmaster positions; that the yardmaster vacancies involved in the claim of Fourth Division Awards 802 and 1038 arose on regular yardmaster positions; that the yardmaster vacancies involved in the binding yard settlements shown as organization's Exhibits "B", "C", "D", "E", "F", "G", "H", "I", "J", "K" and "L" were temporary yardmaster vacancies arising on regular yardmaster positions; that the temporary yardmaster vacancies involved in the yardmaster settlements shown as organization's Exhibit "O" and "P" were vacancies on regular yardmaster jobs.

In the instant case a switchman was not used for the temporary yardmaster vacancy that arose on a regular yardmaster position under conditions where a request for the temporary vacancy was not made by anyone holding seniority as yardmaster.

All data and argument herein has been presented to the carrier and handled in conference as required by the Railway Labor Act, as amended. Oral hearing is desired.

We, therefore, respectfully request that this claim be sustained. (Exhibits not reproduced).

OPINION OF BOARD: The Organization, defendant here, contends that this Division should not assume jurisdiction over this dispute, alleging:

1st, that the claim has not been handled in accordance with Circular No. 1 of the National Railroad Adjustment Board and the Railway Labor Act.

2nd, that Circular No. 1 does not permit a carrier and an organization to jointly submit disputes involving another railway labor organization.

3rd, that the dispute comes within the jurisdiction of the First Division National Railroad Adjustment Board.

We find the record discloses that the dispute has been handled in accordance with the provisions of Circular No. 1 and the Railway Labor Act.

The record establishes that this is a "yardmaster dispute" and, as such, falls exclusively within the jurisdiction of this Division.

The subject matter of the dispute is the right to claim and perform service as yardmaster on a temporary yardmaster vacancy and involves the question of whether such vacancy is properly allocated to yardmasters and governed by the terms of the Yardmasters' Agreement, or whether such vacancy is allocated to switchmen and must be filled by switchmen under the terms of the Switchmen's Agreement. In other words, it involves the performance of yardmasters work.

It is, therefore, clear to the Division that the dispute presents a "yardmaster dispute" falling exclusively within the jurisdiction of the Fourth Division. See First Division Awards 11299 to 11338 inclusive, all of which dismissed claims of like nature in the following language:

"By the decision of the Supreme Court of the United States (January 13, 1947) rendered in the case of the Order of Railway Conductors of America, H. W. Fraser, President, et al, vs. O. E. Swan, et al, this Division does not have jurisdiction of this dispute."

The use of switchmen to fill vacancies of yardmaster as in the instant case was challenged by the organization representing those yardmasters and their position was upheld by this Division's Award No. 1178.

The practice of using switchmen to fill vacancies of yardmaster under circumstances as in the instant case, which prevailed prior to rendition of Award No. 1178, can no longer be construed as anything other than an understanding between the carrier and the switchmen's organization that, as between those two parties, the use of switchmen to fill yardmaster vacancies is not objectionable. That understanding between those parties does not, however, operate to require or permit the use of switchmen to fill vacancies of yardmasters in contravention of the yardmasters' agreement or when such use of switchmen does not have the concurrence of the yardmasters' organization.

It is well established that the carrier could not lawfully deal with the Switchmen's Union of North America in connection with matters regulating the class or craft of yardmasters unless that organization was the certified collective bargaining agent for the yardmaster craft: that organization is not, however, the representative of that craft. Consequently, the manner of filling vacancies of yardmasters, being a matter addressing itself to the parties to the agreement covering yardmasters, the carrier could not lawfully enter into an agreement with an organization representing switchmen, that switchmen would be used to fill yardmaster vacancies unless such an agreement were concurred in by the designated representative of the craft of yardmaster.

The right to negotiate with the carrier rules governing the performance of the work of the yardmaster craft, including the filling of temporary vacancies, is vested solely in the organization legally authorized to represent the yardmaster craft. See Awards 430, 495 and 1360 by this Division. See also Switchmen's Union of North America v. Southern Pac. Co., C. A. Cal. 1958, 253 F. 2d 81, certiorari denied 79 S. Ct. 29, 358 U. S. 818, 3 L. Ed. 2d 60, rehearing denied 79 S. Ct. 152, 358 U. S. 896, 3 L. Ed. 2d 123., and Order of Railway Conductors and Brakemen v. Switchmen's Union of North America, C. A. Ga. 1959, 269 F. 2d 726, certiorari denied 80 S. Ct. 206, 361 U. S. 899, 4 L. Ed. 2d 155.

This Board, therefore, finds that the contentions of the petitioners are borne out by what is said above and by the facts and the claim made by the Switchmen's Union of North America must be denied.

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

The carrier and the employe involved in this dispute are respectively carrier and employe 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.

The parties to said dispute were given due notice of hearing thereon.

AWARD

Contentions of petitioners sustained and claim denied in accordance with Opinion.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of FOURTH DIVISION

ATTEST: Patrick V. Pope
Secretary

Dated at Chicago, Illinois, this 17th day of March 1961.