

**Award No. 1711**

**Docket No. 1653**

**NATIONAL RAILROAD ADJUSTMENT BOARD**

**FOURTH DIVISION**

The Fourth Division consisted of the regular members and in addition Referee Harold M. Weston when award was rendered.

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**PARTIES TO DISPUTE:**

**RAILROAD YARDMASTERS OF AMERICA**

**THE PENNSYLVANIA RAILROAD COMPANY**

**STATEMENT OF CLAIM:** Claim and request of the Railroad Yardmasters of America that—

Yardmaster R. P. Sturgis be allowed one day's pay at time and one-half yardmaster's rate for second trick yardmaster's position, Delmare, Delaware, 2:30 P. M., to 10:30 P. M., Friday, November 27, 1959, account extra yardmaster used when not available,—due to being assigned to clerk's position 8 A. M., to 5 P. M., same date.

**EMPLOYEES' STATEMENT OF FACTS:** Yardmaster R. P. Sturgis was regularly assigned as relief yardmaster at Delmar, Delaware, with rest days Thursday and Friday, and was available to work as yardmaster on the 2:30 P. M., to 10:30 P. M., vacancy which existed on Friday, November 27, 1959.

R. C. Gibbs, on the date involved, November 27, 1959, was working as a clerk on an assignment scheduled to work 8 A. M., to 5 P. M., and theoretically was not available to work the yardmaster assignment commencing 2:30 P. M., on that date.

Nevertheless, the Carrier used Clerk Gibbs on the yardmaster vacancy commencing 2:30 P. M., November 27, 1959, in preference to using Yardmaster Sturgis, who possessed more seniority as a yardmaster and was available to work.

**POSITION OF THE EMPLOYEES:** The record of the handling of this dispute and the position of the employes is evidenced by the following exchange of correspondence on the property, commencing with Joint Submission executed at the Regional level:

**"THE PENNSYLVANIA RAILROAD  
CHESAPEAKE REGION**

**SUBJECT:** Docket No. 47—Claiming one day's pay at time and one-half yardmasters rate for Mr. R. P. Sturgis for second trick yardmaster's position Delmar, Del., 2:30 P. M. to 10:30 P. M. Friday, November 27, 1959—account extra yardmaster used when not available—due to being assigned to clerks position 8:00 A. M. to 5:00 P. M., same date. Denial No. YM-6.

**JOINT STATEMENT OF AGREED UPON FACTS:** R. P. Sturgis was regularly assigned as relief yardmaster at Delmar, Del., tour of duty — various — rest days Thursday and Friday.

R. H. Nabb was regularly assigned as second trick yardmaster at Delmar, Del., tour of duty 2:30 P. M. to 10:30 P. M., rest days Sunday and Monday.

G. M. Dashiell was regularly assigned as clerk to the Trainmaster-Road Foreman of Engines at Delmar, Del., tour of duty 8:00 A. M. to 5:00 P. M., rest days Saturday and Sunday.

R. C. Gibbs was regularly assigned as relief crew dispatcher at Delmar, Del., tour of duty — various — rest days Sunday and Monday. During the week November 23rd to 29th, 1959, Gibbs was relieved from his regular position and assigned to position of clerk to the Trainmaster-Road Foreman of Engines at Delmar, due to the regular incumbent being on vacation and no other clerical employe qualified to fill the position. One of the duties of this position is to make assignments covering vacancies occurring in the yardmaster's craft at Delmar. Gibbs is an unassigned yardmaster with a seniority date of February 4, 1957 in such craft.

On Friday, November 27, 1959, Gibbs reported for duty at 8:00 A. M., to work position of clerk to the Trainmaster-Road Foreman of Engines. At 2:30 P. M., same date, (assigned rest day of claimant R. P. Sturgis) Gibbs commenced service on the second trick yardmaster's known vacancy at Delmar Yard, due to the regular incumbent being on vacation. Gibbs was shown on payroll and allowed eight (8) hours straight time pay on each of the two positions in question.

The location of the Yard Office and Office of the Trainmaster-Road Foreman's clerk on November 27, 1959, was in the Consolidated Office at Delmar, Del., and were of adjoining rooms. The distance between the Yardmaster's desk and that of the Trainmaster-Road Foreman's Clerk was approximately ten to twelve feet.

**POSITION OF EMPLOYEES:** The extra Yardmaster in question, R. C. Gibbs, on the date mentioned, held a regular clerical position and was scheduled to work from 8:00 A. M. to 5:00 P. M. Mr. Gibbs had a demand right to work the clerical position or assignment during these hours, and by the same token, both the carrier and the yardmasters should expect him to fulfill his obligations for his time on this day.

Mr. Gibbs is an unassigned extra yardmaster with roster standing. As such and under the current Schedule of Agreements, he has certain rights to perform yardmaster service. The first prerequisite for his use as an extra yardmaster is availability. Certainly as shown in the Agreed Upon Facts of the case, he was not available. In fact he was in the middle of a tour of duty in another craft.

It should also be noted at this time, that in a previous Joint Submission from the same Region as covered by System Docket #39, that the Carrier has taken just the opposite opinion as the one expressed in this case. An examination of the time involved quite clearly

shows that in that particular case, the Management goes into quite a lengthy discussion as to why it is improper to use an extra yardmaster as such, at anytime that his use conflicts with his regular class of service.

The Yardmasters, as employes, realize that we have no demand right upon Management to set policy; but we do think, that whatever policy is adopted should be uniform.

Our opinions are expressed quite clearly in Joint Submission to cover System Docket #39, which was a controversy arising on this same Region. To say simply that Mr. Gibbs fulfilled his obligations because he was paid 8 hours pay for performing 5 hours and 30 minutes service, we think adds to the "featherbedding" issue which at present is receiving so much publicity; but if Management condones and encourages this type of service at one point then we fail to see what prohibits the employes from expecting the same rules and policies to hold true at all points.

We therefore think that if the practice is held to be basically good, then we expect all extra or unassigned Yardmasters to be treated in the same fashion and shall expect all extra or unassigned Yardmasters, to be relieved in the middle of any tour of duty and change over to a Yardmaster vacancy.

It does not take a very close examination to see that such a policy as this would lead to utter chaos, and it is far from desirable by both parties involved. With a little closer examination it shows a practice which at best should be termed "sharp". So it follows that Yardmaster R. P. Sturgis was aggrieved and should be properly compensated for the penalty as claimed.

**POSITION OF COMPANY:** R. C. Gibbs is an unassigned yardmaster, in fact, the only unassigned yardmaster in working zone 1 of the former Delmarva Division. He has a demand right to be used for extra yardmaster service in accordance with Rule 5-A-2. The first prerequisite for such extra service is availability. As pointed out in the facts above, Mr. Gibbs was relieved of his responsibilities on clerical position, Symbol B-20 at 2:00 P. M., Friday, November 27, 1959, by the management. This is the prerogative of the management. He was then available for the yardmaster vacancy at 2:30 P. M., this same date. The fact that Gibbs was compensated for a full eight (8) hours while working but five (5) hours has no bearing on his availability as an unassigned yardmaster. He was so paid through the requirements of the Schedule Agreement covering clerical employes on this carrier.

The Organization makes much ado about the position taken by the undersigned in Chesapeake Region Yardmasters' Docket No. 54, which became System Docket No. 39. We can see little similarity in these two cases, for the following reasons: In the case covered by System Docket 39, the claimant, a regular yard clerk with yardmaster seniority, could not be used in a yardmaster capacity on the particular dates involved without incurring additional expense to the Company in filling his regular clerical assignment. His clerical position, being that of a yard clerk, could not be blanked — it was required for the proper and efficient operation of the yard. The clerical

position held by R. C. Gibbs in the instant dispute is that of clerk to the Trainmaster-Road Foreman of Engines of the Delmarva District. It is a higher salaried position carrying greater responsibilities than that of a yard clerk. However, such a position could be blanked for a few hours, a day, or possibly longer, without affecting the actual operation of trains. This is not true however, of the yard clerk position held by J. R. McCabe in the case covered by System Docket No. 39. In other words, the clerical position held by Gibbs does not have the sense of immediacy about it that prevails in a position of yard clerk.

Contrary to the contentions of the Organization, R. C. Gibbs was an available unassigned yardmaster on Friday, November 27, 1959, and was properly used in accordance with Rule 5-A-2 of the Yardmasters' Schedule Agreement to cover the vacancy existing at 2:30 P. M., that date. As such, Claimant Sturgis was not aggrieved and the claim herein should be denied.

/s/ Harry E. Killmon  
Local Chairman R. Y. of A.

/s/ N. P. Patterson  
Superintendent, Personnel

Baltimore, Md.  
July 29, 1960"

Letterhead of  
RAILROAD YARDMASTERS OF AMERICA  
PENNSYLVANIA LOCAL LODGE No. 83

H. E. Killmon, President  
P.O. Box 264  
Onley, Virginia

A. T. Otto, Jr., Gen. Chairman  
Pleasant Hills  
Wellsburg, West Virginia

W. W. Swartz, Secy.-Treas.  
720 Edgewood Avenue  
Trenton 8, New Jersey

"Wellsburg, W. Va.  
August 9, 1960

Mr. Herman Kendall, Manager Labor Relations  
The Pennsylvania Railroad  
Transportation Center — 6 Penn Center Plaza  
Philadelphia 4, Pa.

Dear Sir:

Please accept this as an appeal from the adverse decision rendered by Superintendent-Personnel Patterson concerning Chesapeake Region Docket #47.

The completed Joint Submission to cover this dispute has been forwarded to me for further handling.

Will you please advise as to when a meeting may be held to further discuss and progress this claim.

Yours truly,

/s/ A. T. Otto, Jr.  
General Chairman

ko

HEK

cc - N. P. Patterson — Please note and hereby be advised that your adverse decision is rejected and appealed.

A. T. Otto, Jr.  
General Chairman”

“Philadelphia, Pa., September 21, 1960.

Mr. A. T. Otto, Jr., General Chairman  
Railroad Yardmasters of America  
Pleasant Hills  
Wellsburg, W. Va.

Dear Sir:

This refers to your letters of August 9 and September 14, 1960, appealing from the decision of the Superintendent-Personnel, Chesapeake Region, with respect to the following subjects:

System Docket 43 — ‘Docket No. 47 — Claiming one day’s pay at time and one-half yardmasters rate for Mr. R. P. Sturgis for second trick yardmaster’s position Delmar, Del., 2:30 P. M. to 10:30 P. M. Friday, November 27, 1959 — account extra yardmaster used when not available — due to being assigned to clerks position 8:00 A. M. to 5:00 P. M., same date. Denial No. YM-6.’

We have arranged to meet with you in this office at 10:00 A. M., Wednesday, October 12, 1960, and the above subjects have been placed on the docket for discussion.

Very truly yours,

/s/ Herman Kendall  
Manager, Labor Relations”

“Philadelphia, Pa., October 28, 1960

Mr. A. T. Otto, Jr., General Chairman  
Railroad Yardmasters of America  
Pleasant Hills  
Wellsburg, West Virginia

Dear Sir:

This refers to the discussion at the meeting in Philadelphia, Pa., on October 18, 1960, in connection with the following:

System Docket 43 — Chesapeake Region Case 47

‘Claiming one day’s pay at time and one-half yardmasters rate for Mr. R. P. Sturgis for second trick yardmaster’s position Delmar, Del., 2:30 P. M. to 10:30 P. M. Friday, November

27, 1959 — account extra yardmaster used when not available — due to being assigned to clerks position 8:00 A. M. to 5:00 P. M., same date. Denial No. YM-6.'

R. P. Sturgis was regularly assigned as relief Yardmaster at Delmar, Delaware, with rest days of Thursday and Friday.

R. C. Gibbs was regularly assigned as relief Crew Dispatcher at Delmar, Delaware, with rest days of Sunday and Monday. Gibbs is also an unassigned Yardmaster. During the week of November 23rd to 29th, 1959, Mr. Gibbs was taken from his regular clerical assignment and used to fill the vacation vacancy of the clerk to the Trainmaster-Road Foreman of Engines at Delmar. The tour of duty on this clerical job was 8:00 A. M. to 5:00 P. M. with rest days of Saturday and Sunday.

On Friday, November 27, 1959, Mr. Gibbs reported for duty at 8:00 A. M. on the clerical position, and at 2:00 P. M. on that date was relieved from this position to work a Yardmaster's position at Delmar Yard from 2:30 P. M. to 10:30 P. M. due to the regular assigned Yardmaster being on vacation.

It was your contention that the unassigned Yardmaster was not available for Yardmaster's work because he was in the middle of a tour of duty in another craft.

Regulation 5-A-2 provides for the use of unassigned Yardmasters in seniority order except when such use would result in additional expense to the Company. In a situation involving added expense, Management has the prerogative of not using the unassigned Yardmaster. In this particular case, however, the use of Mr. Gibbs resulted in no additional expense; and it is a fact that he was available.

Thus, there is no question that the use of Gibbs was proper under Regulation 5-A-2 and did not cause claimant to be aggrieved. The claim is accordingly denied.

Very truly yours,

/s/ Herman Kendall  
Manager, Labor Relations"

"Wellsburg, W. Va.  
November 5, 1960

Mr. Herman Kendall, Manager Labor Relations  
The Pennsylvania Railroad  
Transportation Center — 6 Penn Center Plaza  
Philadelphia 4, Pa.

Dear Sir:

Re: System Docket #43

Does not the fact that Mr. Gibbs was paid a full 8 hours at clerical rate of pay, and a full 8 hours at Yardmaster rate of pay, constitute additional expense to the company?

Between the hours of 2:00 P. M. and 5:00 P. M., Mr. Gibbs was receiving pay both as a clerk and as a Yardmaster. Isn't this additional expense?

Wasn't Mr. Gibbs available only through a 'sharp practice' on the part of management?

Will all extra Yardmasters receive the same consideration as was shown to Mr. Gibbs?

Does the highest officer of the Pennsylvania Railroad, as designated by our rules, actually and honestly believe that this case was handled to the best interests of the Pennsylvania Railroad? What about Yardmaster morale if situations such as this are condoned and encouraged by decisions such as was made in this dispute?

I have constantly been reminded that Yardmasters provide the 'front line' supervisor and bear the first brunt of most attacks. Is this a fair way to treat your 'front line' supervision?

Will you please advise?

Yours truly,

/s/ A. T. Otto, Jr.  
General Chairman

KO

cc-HEK"

"Philadelphia, Pa., April 27, 1961

Mr. A. T. Otto, Jr., General Chairman  
Railroad Yardmasters of America  
Pleasant Hills  
Wellsburg, West Virginia

Dear Sir:

This refers to the discussion at the meeting held in this office April 25, 1961:

**System Docket 43 — Chesapeake Region Case 47**

'Claiming one day's pay at time and one-half yardmasters rate for Mr. R. P. Sturgis for second trick yardmaster's position Delmar, Del., 2:30 P. M. to 10:30 P. M. Friday, November 27, 1959 — account extra yardmaster used when not available — due to being assigned to clerks position 8:00 A. M. to 5:00 P. M., same date. Denial No. YM-6.'

During our discussion you requested that the time limits for further handling of this case be extended.

We are agreeable to extend the time limits in this case thirty days beyond the present expiration date of April 28, 1961. Such ex-

tension is granted under the provisions of Article V, paragraph (c) of the August 12, 1954 Agreement.

Very truly yours,

/s/ Herman Kendall  
Manager, Labor Relations"

The facts and arguments pertinent to this dispute have been extensively set forth in Joint Submission prepared at a Regional level, and already reproduced hereinbefore.

Rule 5-A-2 of the controlling Agreement specifically provides that — "Unassigned Yardmasters with roster standing, when available, will be used in the order of their seniority for extra work." Conversely, this means that Yardmasters not available will not be so used. It is admitted by the Carrier that Gibbs, who was used on this vacancy instead of the claimant, was working on a position scheduled to work 8 A. M. to 5 P. M., for which he was paid the full 8 hours, or for work in contemplation of services to 5 P. M., therefore, he was not available to work as a Yardmaster on a position schedule to commence work at 2:30 P. M.

His use by the Carrier, as was done in this instance, constituted a discrimination against other yardmasters seniority as such who were available.

Claimant R. P. Sturgis established seniority as a yardmaster in accordance with the provisions of Rule 2-B-1 (c), was available on the day in question and was entitled to exercise those rights, even to the extent of protecting Yardmaster work on overtime basis, as is contemplated by Rule 4-A-3 (a) and 4-D-1.

Many previous awards of the various Divisions have held that employees covered by the scope of an Agreement are entitled to the work of that craft, even to the extent that it may be necessary to perform such work on an overtime basis. Attention is directed to Fourth Division Awards 1495 and 1496, wherein claims were sustained on behalf of regularly assigned yardmasters for compensation on their relief days.

Claim should be sustained. All data submitted in support of Employees' position have been presented to the Carrier and made a part of the particular question in dispute.

**CARRIER'S STATEMENT OF FACTS:** This dispute arose at Delmar, Delaware, on Carrier's Chesapeake Region, where Claimant R. P. Sturgis was regularly assigned as a relief Yardmaster with rest days Thursday and Friday.

On Friday, November 27, 1959, R. C. Gibbs, regularly assigned relief Crew Dispatcher at Delmar, was filling an 8:00 A. M. to 5:00 P. M. vacancy in the position of Clerk to the Trainmaster-Road Foreman of Engines. Gibbs was also an unassigned Yardmaster with a seniority date of February 4, 1957.

On this same date, a vacancy existed in a regular Yardmaster position on second trick, 2:30 P. M. to 10:30 P. M. Gibbs was relieved of his clerical assignment at 2:00 P. M. and used to fill the second trick Yardmaster vacancy. The Claimant was off duty observing his second rest day.

On January 18, 1960, the Local Chairman, Railroad Yardmasters of America, presented a claim on behalf of the Claimant for a day's pay at punitive rate



for November 27, 1959, to the Superintendent, Personnel, Chesapeake Region, who denied it under date of January 19, 1960. The claim was rediscussed at meeting on February 4, 1960, and again denied on February 8, 1960. Subsequently, at the request of the Local Chairman, a Joint Submission covering this matter was prepared, a copy of which is attached as Exhibit "A".

At meeting on October 18, 1960, the General Chairman presented this claim to the Manager, Labor Relations, the highest officer of the Carrier designated to handle such disputes on the property. The Manager, Labor Relations denied the claim by letter of October 28, 1960.

Therefore, so far as Carrier is able to anticipate the basis of claim, questions to be decided by your Honorable Board are whether, under any of the provisions of the Yardmaster Rules Agreement, Claimant had a demand right to fill the second trick Yardmaster vacancy at Delmar on November 27, 1959, and whether he is entitled to the compensation claimed.

**CARRIER'S POSITION:** The Carrier will show that:

I. There is an Agreement between the parties to this dispute governing the rates of pay and working conditions of Yard Masters and Assistant Yard Masters;

II. The Agreement has not been violated and Claimant is not entitled to the compensation claimed;

III. Under the Railway Labor Act, the National Railroad Adjustment Board, Fourth Division, is required to give effect to the said Agreement and to decide the present dispute in accordance therewith.

Each of the points of the Carrier's Position will be discussed in the order set forth above.

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**I. There Is An Agreement Between The Parties To This Dispute  
Governing The Rates Of Pay And Working Conditions Of Yard  
Masters And Assistant Yard Masters.**

The Pennsylvania Railroad Company has entered into an Agreement with its Yard Masters and Assistant Yard Masters through their duly designated and authorized representatives, which covers the rates of pay and working conditions of the said class of employes. This Agreement is known as "Agreement Governing Rates of Pay and Working Conditions of Yard Masters and Assistant Yard Masters of The Pennsylvania Railroad Company and of The Long Island Rail Road Company, Represented by Railroad Yardmasters of America," rules effective June 1, 1947, rates of pay effective May 22, 1946. It has been amended from time to time, but not in any way relevant to this dispute. Copies of this Agreement are on file with the National Railroad Adjustment Board, Fourth Division.

Consequently, in order to sustain the claim in this dispute, the Employes must show that the Agreement, on its face or as interpreted by the parties thereto, has been violated and that Claimant is entitled to the compensation claimed.

**II. The Agreement Has Not Been Violated And Claimant Is Not Entitled To The Compensation Claimed.**

The Carrier asserts and will show that there is no provision in the applicable Rules Agreement giving the Claimant a demand right to fill the Yardmaster vacancy involved on November 27, 1959, and that the Carrier's action in filling the position was entirely consistent with the Agreement.

The vacancy in the second trick Yardmaster position was filled by R. C. Gibbs, an unassigned Yardmaster, whose work performance as such is governed by Rule 5-A-2 reading:

"5-A-2. Unassigned Yard Masters with roster standing, when available, will be used in the order of their seniority for extra work, except when this would result in additional expense to the Company."

At the time in question, Gibbs was the only unassigned Yardmaster working in that seniority district.

In their Position in the Joint Submission covering this matter (see Exhibit "A"), the Employes have failed to allege a violation of Rule 5-A-2, or any other rule of the Agreement; however, the second and third paragraphs of their Position read:

" Mr. Gibbs is an unassigned extra Yardmaster with roster standing. As such and under the current Schedule of Agreements, he has certain rights to perform Yardmaster service. The first prerequisite for his use as an extra Yardmaster is availability. Certainly as shown in the Agreed Upon Facts of the case, he was not available. In fact he was in the middle of a tour of duty in another craft.

It should also be noted at this time, that in a previous Joint Submission from the same Region as covered by System Docket #39, that the Carrier has taken just the opposite opinion as the one expressed in this case. An examination of the time involved quite clearly shows that in that particular case, the Management goes into quite a lengthy discussion as to why it is improper to use an extra Yardmaster as such, at anytime that this use conflicts with his regular class of service."

The Employes admit Gibbs had certain rights to perform Yardmaster service under the Rules Agreement, they only question his availability.

In this regard, the Carrier wishes to make it abundantly clear that R. C. Gibbs was available to fill the Yardmaster vacancy, and that the Employes' contentions to the contrary must be considered invalid.

There is no dispute that the Carrier relieved Gibbs of his clerical assignment at 2:00 P. M. on November 27, 1959; therefore, there can be no dispute that he was available to fill the Yardmaster vacancy at 2:30 P. M. It is the Carrier's position that its action in so relieving Gibbs was a proper exercise of a managerial prerogative in no way prohibited or restricted by any provision of the Yardmaster Rules Agreement. Under such circumstances, the Carrier submits it is obvious that no violation of said Agreement could possibly have occurred. Your Honorable Board has consistently upheld this position, as evidenced by the following excerpts quoted from the Opinion of Board in several awards of the Fourth Division touching on this matter:

**Award 677—Referee Smith**

“It is well established that all of the prerogatives of management not specifically relinquished by contract are retained by an employer.”

**Award 688—Referee Douglass**

“The Carrier retains all the inherent rights of management of the property not specifically abrogated by contract or practice.”

**Award 733—Referee Carter**

“\* \* \* it must be borne in mind that it is the prerogative of management to direct the work of its employes and, except as it may have limited itself by agreement, this prerogative remains complete and all-inclusive. Consequently, in all matters that have not been limited by agreement, the Carrier’s authority remains unrestricted. **This simply means that if no agreement has been made which restricts the action of the Carrier, then no basis for a complaint exists as to the manner of its handling.**” (Emphasis ours)

**Award 740—Referee Carter**

“The Carrier is free to impose any reasonable rule or condition except where it has limited itself by agreement. **There is no rule cited indicating that this has been done.**” (Emphasis ours)

In accordance with the principle set forth in the above cited awards, it is clear that in order to sustain their claim, the Employes would have to show that some specific provision of the Rules Agreement prohibited the Carrier from using Gibbs, or that a specific provision required the Carrier to call the Claimant, a regular relief Yardmaster off duty on one of his rest days. Failing to make such a showing, the Employes’ claim herein must fall.

However, as indicated by the above quoted paragraphs from the Position of Employes in the Joint Submission, no such showing has been, or can be, made. The Employes cannot cite any provision of the Agreement requiring the Carrier to fill a vacancy with a regular Yardmaster who is off duty on a rest day in lieu of an available unassigned Yardmaster. To the contrary, Rule 5-A-2, which governs the work performance of unassigned Yardmasters, specifically provides that such employes, when available, will be used. Under such circumstances, it is difficult to conceive how it may be made more clear that the use of Gibbs was entirely proper and that such use in no way aggrieved the Claimant.

Further, in this regard, as the Carrier has indicated, the Employes have failed to cite any Rules Agreement provision to support their contention that the Claimant should have been used because Gibbs was in the middle of a clerical assignment and was, therefore, unavailable. Their arguments in this respect are limited simply to the allegation that in a previous case, the Carrier “goes into quite a lengthy discussion as to why it is improper to use an extra Yardmaster as such, at any time that his use conflicts with his regular class of service.”

This previous case cited by the Employes is identified as System Docket 39, and is currently before your Honorable Board as Docket 1618, having

been listed by the Employes under date of September 23, 1960. In the instant case, the Employes refer to the Joint Submission covering Docket 1618, a copy of which is attached as Exhibit "B".

Briefly, the issue in Docket 1618 is whether, under Rule 5-A-2, the carrier was required to use the claimant, an unassigned yardmaster working as a clerk, to fill a yardmaster vacancy, when such use would have necessitated filling his clerical assignment at the punitive rate of pay. The Employes state that their opinions are expressed quite clearly in the Joint Submission in Docket 1618, their Position therein reading as follows:

"Among the Rules of the present Schedule of Agreements pertinent to the dispute is 5-A-2, 'Unassigned Yardmaster with roster standing, when available, will be used in the order of their seniority for extra work, except when this would result in additional expense to the Company.'

It is well established that Yardmaster regulations govern only employes in Yardmaster positions. The Yardmasters Organization does not provide or even attempt to provide legislation for employes working in another craft. It follows to state that just the opposite of the above-mentioned statement is also true. Thus, no other Craft's rules or regulations should have any bearing upon the use of an extra Yardmaster in the performance of his duties as a Yardmaster.

Mr. McCabe's use as an extra Yardmaster in the mentioned dates of this Joint Submission would not in any way have entailed additional expense to the Company under the Yardmaster Regulations. We therefore feel that Yardmaster McCabe was dealt with unjustly and ask that payment be made as requested."

First, in this regard, the Carrier fails to understand in what way the opinions expressed by the Employes in their above-quoted Position in Docket 1618, lend any support to their claim in the instant case. In Docket 1618, the Employes argued that rules or regulations of other crafts have no bearing on the issue of availability of an unassigned Yardmaster. In the case at hand, the Employes are apparently relying on another agreement to hold that Gibbs was not available.

The Carrier submits that these two situations are entirely different and that the Employes' contentions with respect thereto are both fallacious and contradictory.

For example, the issue in Docket 1618 is concerned with the question of additional expense, whereas the issue in the instant dispute is the availability of the unassigned Yardmaster who was used to fill the vacancy in question. Moreover, the Employes argue in Docket 1618, in effect, that the carrier should have used the claimant and filled his clerical assignment at overtime, and in this dispute they argue that the unassigned Yardmaster should have completed his clerical assignment on the date involved. Also, in Docket 1618, the Employes argue that the claimant should have been used because his use would not have involved the payment of overtime to anyone as a Yardmaster, but in the instant case the Claimant was off duty on a rest day and his use would obviously have resulted in the payment of overtime to him as a Yardmaster. Yet, in addition to the foregoing inconsistencies, the Employes in their Position in Docket 1618, on which they rely in this dispute, state that, "The Yardmasters Organization does not provide or even attempt to provide

legislation for employes working in another craft." Under such circumstances, the Carrier respectfully suggests your Honorable Board need take no cognizance of, nor give weight to, any such illogical and contradictory arguments as the Employes have here presented in an attempt to support their claim.

The Carrier also wishes to comment further upon the question of the availability of R. C. Gibbs, the unassigned Yardmaster who filled the vacancy in question, and to point out that the Employes' arguments with respect thereto clearly illustrate the fatal flaw in their Position in this dispute.

First, as the Carrier has indicated, it is an indisputable fact that Gibbs was available to fill the vacancy, and the Employes have not even inferred that this dispute is dependent on any other factor. To put it bluntly, Gibbs was available because the Carrier made him available through the exercise of an act of managerial discretion not prohibited nor restricted by any provision of the Yardmaster Rules Agreement (see Awards 667, 688, 733, 740, previously cited). The facts are, plainly and simply, that in the instant dispute, R. C. Gibbs was assigned to a clerical position which, by the nature of its duties and responsibilities, could be suspended or blanked from 2:00 to 5:00 P. M. at the discretion of the Carrier, thereby making Gibbs available to fill the Yardmaster vacancy at 2:30 P. M. On the other hand, the clerical assignment held by the claimant in Docket 1618, was that of yard clerk, which could not be blanked because of the carrier's operational requirements. Under such circumstances, he was properly considered unavailable. Therefore, there is clearly no inconsistency in the positions taken by the carrier in Docket 1618 and in the instant dispute, as the Employes would apparently have your Honorable Board believe. The Carrier again wishes to emphasize most emphatically, that there can be no question of Gibb's availability, for as the Carrier has shown, the Employes can cite no provision of their Rules Agreement prohibiting the Carrier's action in releasing Gibbs from his clerical assignment at 2:00 P. M. on November 27, 1959.

In view of the foregoing, the Carrier asserts that under the circumstances here present, there is nothing at issue for your Honorable Board to decide. The Employes have cited no rule to support their contentions and have not even implied, much less proven, that their Rules Agreement was violated. In light of the fact that the Railway Labor Act requires your Honorable Board to decide this dispute in accordance with the said Rules Agreement, the Carrier submits that a denial or dismissal award is here clearly indicated.

To put it another way, it is obvious that, as indicated by their Position in the Joint Submission, the Employes are asking your Honorable Board not to interpret a provision of the Rules Agreement, but to legislate for them on a question which the provisions of said Agreement does not cover. In this respect, particular attention is directed to the following statement appearing in the Employes' Position:

"The Yardmasters, as employes, realize that we have no demand right upon management to set policy; but we do think, that whatever policy is adopted should be uniform."

Clearly, a matter of managerial policy is not a valid question for a decision by your Honorable Board, and the Carrier submits that an affirmative award herein would amount to writing into the Agreement something that is not now there, which is beyond the power of your Honorable Board. See Fourth Division Awards 938, 989, 1051, 1288. As the applicable Agreement cannot be revised or expanded by the unilateral action of one of the parties,

or by an award of your Honorable Board, it is clear that a denial or dismissal award should be entered in this case.

Turning now to the claim as presented to your Honorable Board, it will be noted that the Employes are requesting the Claimant be compensated at the rate of time and one-half for November 27, 1959. The Carrier asserts that should it be held, contrary to all evidence presented in the foregoing, that the Rules Agreement was violated, the Claimant would be entitled to no more than the straight time rate for the date claimed. This is in accordance with the firmly established principle that the penalty for work not performed is the pro rata rate. In awards too numerous to require citation, your Honorable Board has consistently upheld this principle.

**III. Under The Railway Labor Act, The National Railroad Adjustment Board, Fourth Division, Is Required To Give Effect To The Said Agreement And To Decide The Present Dispute In Accordance Therewith.**

It is respectfully submitted that the National Railroad Adjustment Board, Fourth Division, is required by the Railway Labor Act to give effect to the said Agreement, which constitutes the applicable Agreement between the parties, and to decide the present dispute in accordance therewith.

The Railway Labor Act, in Section 3, First, subsection (i), confers upon the National Railroad Adjustment Board the power to hear and determine disputes growing out of "grievances or out of the interpretation or application of agreements concerning rates of pay, rules or working conditions." The National Railroad Adjustment Board is empowered only to decide the said dispute in accordance with the Agreement between the parties to it. To grant the claim of the Employes in this case would require the Board to disregard the Agreement between the parties hereto and impose upon the Carrier conditions of employment and obligations with reference thereto not agreed upon by the parties to this dispute. The Board has no jurisdiction or authority to take any such action.

The Carrier has shown that its action here complained of is in no way prohibited nor restricted by any provision of the applicable Rules Agreement and that the Employes have, in effect, admitted that no Rules Agreement violation occurred. Therefore, your Honorable Board is respectfully requested to deny or dismiss the claim of the Employes in this matter.

The Carrier demands strict proof by competent evidence of all facts relied upon by the Employes, with the right to test the same by cross-examination, the right to produce competent evidence in its own behalf at a proper trial of this matter, and the establishment of a proper record of all of the same.

All data contained herein have been presented to the employe involved or to his duly authorized representative.

**OPINION OF BOARD:** This claim rests on the contention that Carrier breached the applicable Agreement when it used R. C. Gibbs, an unassigned yardmaster, instead of the Claimant to fill a vacancy in a second trick yardmaster's position with hours from 2:30 to 10:30 P. M.

It is undisputed that Claimant, a relief yardmaster with Thursday and Friday as rest days, was senior to Gibbs in yardmaster service and available to perform the extra work under consideration since the vacancy occurred

on his second rest day. On the date in question, Gibbs was filling an 8 A. M. to 5 P. M. vacancy in a clerical position but was relieved by Carrier at 2 P. M. so that he could be used in the second trick yardmaster vacancy that began at 2:30 P. M.

Petitioner maintains that Gibbs was not available to perform this yardmaster work under these circumstances. It is Carrier's position that its action in relieving Gibbs made him available for the 2:30 P. M. assignment and is a managerial prerogative in no way prohibited by any provision of the Agreement.

The discussions on the property were sufficiently broad to include Rule 5-A-2 which is controlling in this case and reads as follows:

"Unassigned Yard Masters with roster standing, when available, will be used in the order of their seniority for extra work, except when this would result in additional expense to the Company."

The critical question is whether or not Gibbs was available for the second trick yardmaster vacancy. In our view, this issue must be resolved in the negative. The clerical position he filled the day in question had regularly assigned hours from 8:00 A. M. to 5:00 P. M. and there is no showing that when he first reported for that work he was informed that those hours would be curtailed. We do not consider an employe "available", within the meaning of Rule 5-A-2, for extra Yardmaster work when the assigned hours of such work conflict with those of a position he already occupies. An employe in that situation does not become "available" by the device of abandoning the position he has begun to fill before its assigned hours have run their course (see Third Division Award 3875) or by Carrier's act of relieving him from that work before the expiration of its regular hours. We are of the opinion that this is a sound and fair interpretation of Rule 5-A-2. In arriving at our conclusions, we have only considered the narrow question of an employe's availability for extra yardmaster work under the applicable Agreement and are not passing upon Carrier's power to blank a portion of a position's work day.

Claimant was entitled to be used for the disputed extra work on one of his rest days and no valid justification is perceived for limiting his monetary claim.

The claim will be sustained.

**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.

The Agreement was violated.

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AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD  
By Order of FOURTH DIVISION

ATTEST: Patrick V. Pope  
Secretary

Dated at Chicago, Illinois, this 3rd day of December 1962.