Award No. 2217
Docket No. 2188

NATIONAL RAILROAD ADJUSTMENT BOARD

FOURTH DIVISION

Referee William H. Coburn

PARTIES TO DISPUTE:

RAILROAD YARDMASTERS OF AMERICA

UNION PACIFIC RAILROAD COMPANY

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

> Yardmaster Glenn M. Franke be allowed one day's pay at time and one-half rate of Tower Yardmaster, Cheyenne, Wyoming for July 9, 10, 11 and 12, 1965, account held off his regular assignment by Carrier and required to work the 11 P. M. Tower Yardmaster assignment. This in addition to the four days paid at straight time on July payroll.

EMPLOYES' STATEMENT OF FACTS: On claim dates Yardmaster Franke was required by the Carrier to fill a vacancy as Tower Yardmaster due to the illness of incumbent and was relieved from his regular assignment. Time and one-half rate was claimed and paid but was later adjusted to straight time rate when Carrier alleged punitive time payment was not supported by schedule rules.

CARRIER'S STATEMENT OF FACTS: This dispute involves a claim for payment at the penalty rate of time and one-half in addition to pro rata compensation already allowed for service performed on another Yardmaster position within the hours of Claimant's regular assignment, which is allegedly due under Rule 4(a) of the Schedule Agreement. It is the Carrier's position in this dispute that there is nothing in Rule 4 or any other provision of the applicable agreement that requires the resultant payment advocated by the Organization.

The Claimant Yardmaster G. M. Franke was assigned as Assistant Yardmaster at Cheyenne, Wyoming, 11:00 P. M. to 7:00 A. M.

The regular Tower Yardmaster, E. L. Gardner, 11:00 P. M. to 7:00 A. M., was taken ill four hours prior to commencing his assignment on July 9, 1965. Since there were no qualified Tower Yardmasters available, Claimant Franke was requested to protect this assignment on July 9, 10, 11 and 12, 1965, for which he received the higher pro rata rate of the Tower Yardmaster position.

Claim was progressed on this property by the Organization on behalf of Mr. Franke for July 9, 10, 11 and 12, 1965 respectively, under the contention that such service performed within his regular hours required payment at the

punitive rate of time and one-half. Claim was then appealed to this Board for adjudication demanding punitive payment **in addition** to compensation already received.

This claim has been progressed on the erroneous contention that Rule 4(a) of the Schedule Agreement provides for payment at the time and one-half rate when a Yardmaster is worked on another Yardmaster position within the hours of his regular assignment.

The handling of this dispute on the property is set forth in the following letters between representatives of the Organization and representatives of the Carrier:

CARRIER'S EXHIBIT A – Letter dated October 22, 1965 from General Chairman Baker to Carrier's Asst. to Vice President N. T. DeLong

CARRIER'S EXHIBIT B – Letter dated December 10, 1965 from General Chairman Baker to Asst. to Vice President N. T. DeLong

CARRIER'S EXHIBIT C – Letter dated December 17, 1965 from Asst. to Vice President DeLong to General Chairman Baker

CARRIER'S EXHIBIT D – Letter dated January 28, 1966 from General Chairman Baker to Asst. to Vice President DeLong

CARRIER'S EXHIBIT E – Letter dated February 9, 1966 from Asst. to Vice President DeLong to General Chairman Baker

CARRIER'S EXHIBIT F – Letter dated February 18, 1966 from General Chairman Baker to Asst. to Vice President DeLong

CARRIER'S EXHIBIT G – Letter dated March 7, 1966 from Asst. to Vice President DeLong to General Chairman Baker

CARRIER'S EXHIBIT H – Letter dated March 29, 1966 from General Chairman Baker to Asst. to Vice President DeLong.

(Exhibits not reproduced.)

OPINION OF BOARD: Claimant was regularly assigned as Assistant Yardmaster with hours from 11:00 P. M. to 7:00 A. M. On July 9, 1965, the regularly assigned Tower Yardmaster working the same shift, became ill prior to beginning work on his assignment. Claimant then was assigned to and worked the Tower Yardmaster job on July 9, 10, 11, and 12, 1965.

The claim is for time and one-half at the Tower Yardmaster rate in addition to four days' pay at the pro rata Tower Yardmaster rate heretofore paid Claimant.

Petitioner relies upon Rule 4(a) of the Agreement. It reads as follows:

"RULE 4. ASSIGNMENT

(a) Eight consecutive hours shall constitute a day's work unless relieved at the yardmaster's request, in which event actual time

worked will be paid for. Time worked in excess of eight hours will be paid for as overtime at rate of time and one-half on the minute basis. **A regularly assigned yardmaster called to fill a shift or a portion of a shift after he has been relieved from his regular assignment, will be paid a minimum day at rate of time and one-half.** An extra yardmaster called to fill a shift or a portion of a shift will be paid a minimum day at pro rata rate. Time consumed in making transfer will not be counted as overtime."

(Emphasis ours.)

The Carrier's defense appears to rest upon two grounds: first that established practice on this property was to pay straight time at the appropriate rate of the position where a regularly assigned yardmaster temporarily worked a shift other than his own, provided he had not worked any part of his own assignment on that day; second, that the parties had agreed under a "question and answer" series that a regularly assigned yardmaster who had not started work on his own assignment was not entitled to the overtime rate under Rule 4(a) (Supra) when required to work a different assignment. Carrier also cites Rule 10(a) as applicable here because Claimant was temporarily assigned to a higher rated position (Tower Yardmaster) and was paid the higher rate for working it.

Petitioner's objections to the Board's consideration of the "questions and answers" agreement and Rule 10(a) as matters not raised during the progress of the claim on the property are without merit. Agreements of the parties and agreed-to interpretations thereof are proper subjects of appellate review whether or not they were cited or relied upon by the parties prior to the appeal of a claim to this Board. That is so because both parties are chargeable with full knowledge of the agreements and interpretations they have entered into. Accordingly, such agreements and interpretations are deemed to be in evidence at all stages of the progress of a claim and cannot be barred as "surprise evidence" when cited at this level of appeal. (Cf. Third Division Awards 11644 and 12075). Accordingly, the Board will give due consideration to the agreement and the rule to which Petitioner objects.

In our opinion, the Carrier's reliance upon Rule 10(a) is misplaced. The rule is entitled "Preservation of Rates" and on its face is clearly meant to afford protection and maintenance of established yadmaster rates of pay. As a pay rate rule Rule 10(a) manifestly can have no application to the substantive merits of this claim because here it is not in dispute that Claimant was entitled to the higher rate of the position worked, that is the Tower Yardmaster rate. The issue is whether or not he was entitled to time and one-half pay at that rate in addition to the pro rata Tower Yardmaster rate already paid. Accordingly, we find that Rule 10(a) has no application here.

Nor do we find any support for the Carrier's position under the aforesaid "questions and answers" agreement. That series of agreed-to interpretations is dated February 1, 1946, and was applicable to a then-effective agreement between these parties. The current agreement became effective as of June 1, 1958. The Board has been furnished no evidence showing an agreed-upon interpretation of Rule 4(a) as now contained in the controlling agreement. The most that can be said of the "question and answer" series is that it reflected the parties' understanding and interpretation of the provisions of the basic agreement then in effect and certain "new" rules to be incorporated therein. Therefore, we cannot accept such interpretations as controlling here.

The facts establish that Claimant was relieved from his regular assignment and that thereafter he was ". . . called to fill a shift . . ." other than his own. The language of Rule 4(a) contains no provision limiting or qualifying the express right of a yardmaster under these facts to be paid "a minimum day at the rate of time and one-half," and none may properly be implied.

The claim is supported by the rule relied upon and will, therefore be sustained to the extent only that Claimant will be paid compensation representing the difference between the amount he received at the pro rata Tower Yardmaster rate and that computed at the time and one-half Tower Yardmaster rate.

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 parties to said dispute waived right of appearance at hearing, but were granted privilege of appearing before the Division, with the Referee sitting as a member thereof, to present oral argument.

AWARD

Claim sustained to extent set out in Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of FOURTH DIVISION

ATTEST: Muriel L. Humfreville
Secretary

Dated at Chicago, Illinois, this 13th day of July, 1967.