

Referee Harold M. Weston

PARTIES Railroad Yardmasters of America  
TO  
DISPUTE: Chicago, Milwaukee, St. Paul and Pacific Railroad Company  
(Lines East)

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

Yardmaster L. A. Castle be allowed one day's pay each day at the appropriate yardmaster time and one-half rate for February 11, 1969 and March 30, 1969 account junior, unavailable extra yardmaster used to fill vacancy when he was available.

OPINION OF BOARD: The present claim rests on the contention that Carrier used unavailable extra yardmasters instead of Claimant, a yardmaster assigned regularly to the 6:30 a.m. to 2:30 p.m. trick, to fill yardmaster vacancies on February 11 and March 30, 1969.

On the first occasion, Carrier had Extra Yardmaster Evans fill a yardmaster vacancy at 10:30 p.m. although Evans was working a 3 to 11 p.m. switching assignment and had to be excused thirty minutes early to handle the vacancy. Evans was unavailable for the vacancy since its scheduled hours were in conflict with those of the position he already occupied. He did not become available by abandoning his switching position before its assigned hours had run their course or by Carrier's act of relieving him from that work before the expiration of its regular hours. See Award 1711.

In the second instance, Carrier used an extra yardmaster, O. Ferguson, who had worked as switchman from 7 a.m. to 3 p.m. on March 30, 1969, to fill a yardmaster vacancy from 10:30 p.m. on the same day to 6:30 a.m. He therefore did not have eight hours off duty between assignments, although Rule 6(e) provides that "A yardmaster will be considered available if he has had eight (8) hours off duty."

The extra yardmasters used on both occasions were clearly unavailable. The rules and principles regarding this point are unambiguous and there accordingly is no need or occasion to consider past practice in order to interpret them. The fact that Petitioner withdrew a similar claim on the day it was to be heard by this Division may have been due to any one of a variety of reasons and does not reflect adversely upon the validity of the present claim or establish

that Petitioner has endorsed Carrier's position.

In the brief submitted by Carrier's representative to this Board after the parties' submissions had been filed, it was argued that Claimant was unavailable to fill the vacancy since if called he would have been unable to work his regular assignment starting at 6:30 a.m. The issue was not raised on the property and cannot be considered in view of its untimeliness. In any event, it is clear that it was improper for Carrier to use Evans and Ferguson in this situation. There is no evidence that these employes were called upon to fill the disputed vacancies because of any real emergency.

Carrier maintains that even if their use was improper, no basis exists for the punitive rate claimed by Petitioner. Award 1099 and many other awards support Carrier's contention that unless an employe actually works the time in question, his recovery is limited to a pro rata rate for not being called as the regulations provide. While that principle may be sound when applied to some factual situations, the better view, in our opinion, is that a Claimant is entitled to the time and one-half rate where, as here, he would have received that rate if his employer had observed the conditions of the applicable agreement. See Award 2533.

#### FINDINGS:

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

The carrier and the employes 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 thereon.

#### A W A R D

Claim sustained in its entirety.

NATIONAL RAILROAD ADJUSTMENT BOARD  
By Order of Fourth Division

ATTEST: *Muriel L. Humphreville*  
Muriel L. Humphreville  
Secretary

Dated at Chicago, Illinois, this 15th day of December, 1970.