

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 23856
Docket Number CL-23863

T. Page Sharp, Referee

PARTIES TO DISPUTE: (Brotherhood of Railway, Airline and Steamship Clerks,
(Freight Handlers, Express and Station Employees
(The Baltimore and Ohio Railroad Company

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood
(GL-9335) that:

(1) Carrier violated the Agreement between the Parties at Willard, Ohio, when it "stepped-up" Mr. Paul E. Winans, incumbent Stock Clerk position C-197 at the Main Store Room, rated \$54.41 per day, to a vacation-vacancy arising on General Foreman Motive Power Store Room position C-182, rated \$56.90 per day, per his request, for fifteen (15) work-dates - October 10 through October 28, 1977 - and required Mr. Winans to work both General Foreman Motive Power Store Room position to which stepped-up, and the Main Store Room Stock Clerk position vacated, failing and refusing to fill Stock Clerk position C-197 vacancy with Mr. M. E. King, the senior regularly-assigned employee who was on record as desiring to fill short vacancy on Stock Clerk position C-197, and

(2) Because of such impropriety, Carrier shall now be required to compensate Mr. Paul E. Winans an additional eight (8) hours' pay (\$54.41) for each date: October 10, 11, 12, 13, 14, 17, 18, 19, 20, 21, 24, 25, 26, 27 and 28, 1977, and

(3) Carrier shall compensate Mr. M. E. King eight (8) hours' pay at the rate of time and one-half (\$81.61): October 10, 11, 12, 13, 14, 17, 18, 19, 20, 21, 24, 25, 26, 27 and 28, 1977.

OPINION OF BOARD: Claimant (Winans), a Stock Clerk, was assigned the position of General Foreman Motive Power for a short vacancy when the incumbent of that position went on a three week vacation. Claimant voluntarily sought the position of General Foreman by filing a written request with the designated officer pursuant to Rule 24 of the Agreement. After he was working the Foreman position there is much disagreement about what happened.

It is undisputed that while Claimant (Winans) held the position of Foreman he performed some of the duties that are also performed by his Stockman position. The Organization contends that Claimant (Winans) was working the two positions and refutes the Carrier's position the Stockman position was "blanked". The Organization also contends that Claimant (Winans) was removed from this position (Foreman) and required to work the Stockman position. This, it is submitted, is in violation of Rule 24(b) which provides, in pertinent part, "An employee held off or removed from his regular position and required to fill a vacancy...is entitled to a minimum of eight (8) hours' pay at pro rata rate for each position." Therefore, the

Organization claims that Claimant (Winans) is not only entitled to the Foreman's rate which he had been paid but additionally for eight hours' pay for the fifteen days on the Stockman's position. Additionally the Organization contends that the Stockman's position was hewer blanked and that another Claimant (King), a yard clerical, who had sought the short vacancy on the Stockman position pursuant to Rule 24 should have been given that position. Fifteen days pay at the rate of the and one half are sought for this Claimant (King).

The Carrier states that the Stockman Claimant (Winans) was moved to the position of Foreman and was paid the foremen's rate for the entire period and was never removed from that position. The stockman functions that were performed by this Claimant are alleged to be part of the normal duties of the Foreman and are not intermingled with the duties of the Stockman. The Carrier states that the position of Stockman was blanked as it had a right to do so and consequently there was no stockman vacancy. Furthermore, the Carrier contends that if the Claimant (Winans) in his position of Foreman was required to do work exclusively to his old position of Stockman, such conduct would be permissible because of Rule 5 and Rule 16 of the Agreement. The Carrier states that since there was no position open, the Stockman's position having been blanked, there was no position for the yard clerk Claimant to move to and consequently no violation of the Agreement.

The proof that the Agreement had been violated submitted by the Organization were affidavits by seven storeroom employees, including the regular incumbent of the Foreman position, which stated that the duties of Foreman and Stockman are not intermingled. The Carrier states that its investigation revealed that both the Stockman and Foreman positions include duties of ordering and issuing material, taking stock and handling of related paper work.

This Board will not consider the position that Rules 5 and 16 would insulate the Carrier from claims even if the position of the Organization is as stated. No mention of these rules was raised on property and procedurally cannot now be raised at this time.

Nowhere in the Agreement is there a provision which prohibits the "blanking" of positions. Absent such prohibition this Board considers it a right of the Carrier to leave positions unfilled or blanked. As the Carrier stated in its submission it could have blanked the Foreman's position, and under the terms of the National Vacation Agreement could have had other employees perform 25% of the work of that unfilled position. This the Carrier did not do. It further states that if the Organization's position be taken literally, the Claimant would have been moved back to his Stockman position and the Foreman position would have been blanked and the only variance from the Agreement would have merely been an overpayment to Claimant.

The Board reads Rule 24(b) as stating that if Claimant had been moved back (held off or removed from his Foreman position) and required to work the Stockman position he would be entitled to eight hours' pay at a pro rata rate for each position. It is clear from the correspondence of the Carrier that the Carrier always considered the Stockman Claimant (Winans) as filling the position of

Foreman. The **Carrier** claims that he was working some duties of that position which are not **intermingled** with the duties of the **Stockman** position, but which are the same as some of the duties of the **Stockman** position. The Claimant (**Winans**) was, for the three weeks in question, **filling the** Foreman position.

The issue for this **Board** was to decidewhetherboth the Foremen position and the **Stockman** position have similar **stockman** duties. Initial correspondence of the **Carrier** stated that each position had **similar** but not intermingled duties. **The Organization** submitted proof through the affidavits that the duties were not **intermingled**. The matter was **clarified** by the letter of September 18, 1979 from the Carrier's Director of Labor Relations to the General **Chairman** of the **Organization**. This letter stated:

We have again investigated the **circumstances** surrounding this claim in light of the allegations contained in your letter of July 31, 1979. The local officers absolutely **insist that** despite the affidavits attached to your letter, the **Foreman-Stockman** position at **Willard** is required from time to time to assist the **Stockmen** in the **performance** of their duties and the work required on those latter assignments **is**, therefore, also a part of the **Foreman-Stockman** position."

It does not follow that because a **Foreman** is required to assist a **stockman** in his duties such assistance becomes **part** of the Foreman's duties **independant** of a **stockman** to assist. In this case there was uo **occupant** of the **Stockman** position, therefore no one to assist. The **Foreman** during this time **performed some** of the duties of the **Stockman** position. The next issue for the **Board** to discuss is the **quantum of work allowed to be performed on a** 'blanked' position.

The **Organization's** contention that Claimant (**Winans**) was **removed from** the Foreman position and placed back on his **Stockman** position is not only **refuted** by the denial of the **Carrier**, but is further refutedby the fact that he was paid the **Foreman** rate for the entire period. If **such a claim were to be sustained** the **Organization** would have to prove that the **primary** duties of Claimant (**Winans**) during the time at issue were **stockman** duties and that any **performance of Foreman** duties occupied a **small portion** of Claimant's work shift. Nowhere in the **record** is there any proof of the **amount of time** the Claimant (Wi-) spent performing duties of the **Stockman** position. It is only established that Claimant (**Winans**) worked **part** of the time doing the **duties** of the blanked position. The **Board** holds that he was not held off or removed **from** his regular position, which for the three-weekperiodwas the **Foreman** position, therefore **Rule 24(b)** was not violated.

Because the **Stockman** position was **worked in part** and was not the -- blanked, it should **have** been awarded to the Yard Clerk (King). We agree with the rationale of **the Board in Award 15459** which stated:

"This Board can find nothing in the Vacation Agreement or the Clerks' Agreement which could permit it to apply the same regime to vacant positions created by a regular employe's moving from his job to occupy a vacationing employe's position. The Referee regrets this, believing that the "burden test" of Article 6 and the "25 percent of the workload test" of Article 10(b) contribute to the economical utilization of a Carrier's forces at no disadvantage to its employes. Nevertheless, the tests of Articles 6 and 10(b) can be extended to the present situation not by this Board but only by agreement between the parties."

In determining the damages to the two Claimants, this Board can find and has been submitted no pertinent provisions in the Agreement to determine how compensation should be made to the Claimants, therefore we will be governed by the "make-whole" concept of damages. The Stockman Claimant (Winans) has suffered no loss. As would be the case if he had been the regular occupant of the Foreman position temporarily assigned to a lower rated position, he has been paid the rate of the Foreman position. The Yard Clerical Claimant (King) is awarded the difference between what he would have earned for the time in question in position No. 6038 and his regular assigned position.

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

That the parties waived oral hearing;

That the Carrier and the Employes involved in this dispute are respectively Carrier and Employes within the meaning of the Railway Labor Act, as approved June 21, 1934;

That this Division of the Adjustment Board has jurisdiction over the dispute involved herein; and

That the Agreement was violated.

A W A R D

Claim sustained in accordance with the Opinion.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: Acting Executive Secretary
National Railroad Adjustment Board

By Rosemarie Brasch
Rosemarie Brasch - Administrative Assistant

Dated at Chicago, Illinois, this 28th day of April 1982.

