

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 20425
Docket Number MW-20539

Irwin M. Lieberman, Referee

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way **Employes**
(**Louisville** and **Nashville** Railroad Company

STATEMENT OF CLAIM: Claim of the System Committee of the **Brotherhood**
that:

(1) The Agreement was violated **when Foreman S.A. Brooks** performed track repairman's (track laborer) **work** on August **21, 22, 23, 24, 28, 29, 30, 31, September 6, 7, 8, and 12, 1972** instead of **recalling** cut-off track repairman (track laborer) **Vernon R. Slack** to perform such service. (System File **1-1/E-304-2 E-304**)

(2) **Track Repairman (Track Laborer) Vernon R. Black** now be allowed 120 hours of straight-time pay and 25 hours of time and one-half pay because of the aforesaid **violation**.

OPINION OF BOARD: Claimant, holding seniority as a laborer (**Rank No. 6**) within the **Track** Subdepartment, was furloughed during the **claim** period from Extra **Gang No. 53. During August and September 1972** the Foreman of the Gang performed some work **in** connection with laying panel track in addition to his supervisory responsibilities. Petitioner claims that this was inappropriate and that Claimant should have been recalled to perform the work. **There** is a dispute as to the amount of **time** that the Foreman worked with the gang with Petitioner **alleging full** days and the **Carrier** contending that he did not work even half a day on each day involved. Petitioner's documentation was presented with its submission and not on the property; it **may** not be considered by the **Board in** conformity with long established **doctrine**.

Essentially **Petitioner argues** that the Carrier has no right to permit an **employee** with Seniority Rank **No. 1** to perform the work of Seniority Rank **No. 6**; the physical work of **laying** panel track accrues to **employees having** Seniority Rank **No. 6**. Petitioner concludes that Claimant should have been recalled to perform the work in question. It should be noted that there **is** no information whatever as to the date Claimant was furloughed. The Organization relies heavily on Award **19816** in support of its position, which involved the same parties and Agreement. While we concur in the **finding** in that Award with respect to the Composite Service Rule, we believe that **Award** to be in error insofar **as** it holds that Rule 5 dealing with Seniority Ranks constitutes a reservation of work rule. We have held in many prior Awards (for example **19922, 18876 and 18471**) that rules listing positions per **se** do not reserve work exclusively to

employees of a given **class and** certainly a Seniority Rank Rule such as in the instant **Agreement** vests no exclusive **right** to specific work in the absence of system-wide custom and **practice**.

Carrier states that its **Operating** Rules in Rule 141 provide that foremen must **"....as far as possible engage in** the work when the forces are **small"**. Carrier claims that the **gang** in question constituted four **men** and a foreman and there was no vacancy in the **gang** for which Claimant could have **been** recalled. Carrier also contends that the work performed by the **foreman** on the days Involved was of his own volition and without instruction from any **supervisory** personnel. Carrier concludes that the claim is not supported by the Agreement and should be denied.

There **is** no indication in the **record** that there was in fact a vacancy in **Extra Gang** No. 53. Further in Award 17360 involving the **same** parties and Agreement we said: "We do not believe the Agreement **contem-** plates that two men **gangs** are improper or that where such are authorized the foreman **is** to be confined to supervisory duties only." We find no Agreement support restricting the foreman's work in this instance.

With respect to the voluntary aspect of the foreman's actions,, despite contrary **Awards(18003)** we find that the position that voluntary service cannot support a claim is correct (Awards **12907, 17172, 19839** and others).

It is well established that **Claimant must** bear the burden of **proving** exclusive jurisdiction **over** work to the exclusion of others. This Board has also found that when there is a jurisdictional question between employees of the same **craft** in different classes, represented by the same Organization, the burden of establishing exclusivity **is** even **more** heavily upon Petitioner (Awards **13083** and **13198**).

Petitioner's General Chairman, in his letter to Carrier dated **December 14, 1972** while acknowledging the existence of Operating Rule 141 but denying any conforming Agreement **language**, said: **"....and I believe you will** have to agree that no **foreman** has a right to work the **amount** of hours **which** I have claimed **above** with cut-off laborers...." The inference may be drawn from that statement that the foreman is not prohibited **from doing any** physical work with the **gang**; if this is true, then the length of time he does such work is not **significant(Award 13083)** and Petitioner's position is seriously weakened.

Based on the entire record of this dispute and the reason-
above, we find that Petitioner has not sustained its burden **of** proof
and the Claim is not supported by the Agreement: it **must** be denied.

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 **Employees involved** in this dispute
are respectively **Carrier and Employees** *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 not violated.**

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST:

A. W. Pauls
Executive Secretary

Dated at Chicago, Illinois, this **27th** day of September **1974.**