

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 31670
Docket No. MW-31224
96-3-93-3-229**

The Third Division consisted of the regular members and in addition Referee Robert Richter when award was rendered.

**(Brotherhood of Maintenance of Way Employees
PARTIES TO DISPUTE: (
(Burlington Northern Railroad Company
((former St. Louis-San Francisco Railway
(Company)**

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

- (1) The Agreement was violated when the Carrier assigned Track Gang 445 employees to perform track patrol work between Nichols Mile Post 242 and Monett Mile Post 283 on June 1, July 6, 7, 20 and 21, 1991, instead of assigning District Gang 442 (Track Foreman R. D. Long and Trackman Driver G. D. Jackson) (System File B-1495/8MWC 91-09-04A SLF).**
- (2) As a consequence of the violation referred to in Part (1) above, Track Foreman R. D. Long and Trackman Driver G. D. Jackson shall each be allowed sixteen (16) hours' pay at their respective time and one-half rates."**

FINDINGS:

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

The carrier or carriers and the employee or employees involved in this dispute are respectively carrier and employee 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.

Parties to said dispute waived right of appearance at hearing thereon.

The Organization filed this claim alleging that Track Gang 445 performed track patrol work on the territory of Track Gang 442 on the rest days of the gang. It argues that the Carrier violated Rule 62(m) of the Schedule Agreement. The Rule reads as follows:

"(m) Work on Unassigned Days -- Where work is required by the Carrier to be performed on a day which is not a part of any assignment, it may be performed by an available extra or unassigned employee who will otherwise not have 40 hours of work that week; in all other cases by the regular employee."

The Organization cites numerous awards which it avers supports its position in this case.

The Carrier takes the position that it has been working the track gangs involved in this claim in the same manner for over ten years. Therefore, the claim should be barred under the Time Limit Rule of the Agreement. While the position of the Carrier is well taken, the fact that a practice has been on-going for many years does not make it a rule when there is a rule that clearly prohibits the practice.

However, it is the Organization's burden to prove that such a rule exists.

The Carrier argues that the track gangs are seven day assignments with different off days.

The Rule cited by the Organization does not prohibit the Carrier from establishing the assignments as it has done for the past ten years. The rule does not limit the territory of another gang.

After careful review of the Organization's Submission and the correspondence of record we find that it has failed to meet its burden by proving that the actions of the Carrier are prohibited by the Agreement.

AWARD

Claim denied.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) not be made.

**NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division**

Dated at Chicago, Illinois, this 29th day of August 1996.