

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 25406
Docket Number NW-25134

George S. Roukis, Referee

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way **Employees**
(The Atchison, Topeka and Santa Fe Railway Company

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

(1) The Carrier violated the Agreement when it assigned junior **Trackman** T. L. Shipley to fill a temporary vacancy as welder helper at Fort Madison, Iowa beginning November 28, 1981 instead of calling and using **Trackman** G. W. Grosekemper who was senior, available, **willing** and qualified to fill that vacancy (System File 20-40010-821/11-2340-40-11).

(2) Because of the aforesaid violation, **Trackman** G. W. Grosekemper shall be compensated for all wage loss suffered including eight (8) hours of pay at the welder helper's time and one-half rate for November 28, 1981.

OPINION OF BOARD: Organization contends that Carrier violated the Letter of Understanding dated November 9, 1977, also entitled Appendix No. 14 when it assigned a junior **trackman** to fill a temporary Welder Helper's vacancy at Fort Madison, Iowa on November 28, 1981. It is Organization's position that Carrier was required to permit the senior **trackman** on the gang nearest the location of the temporary vacancy to fill the Welder Helper's vacancy on November 28, 1981, consistent with the Fourth Paragraph of Appendix No. 14, when the regular incumbent of the position was unable to perform welder helper services. Organization argues that notwithstanding that said work was required on an overtime basis and November 26, 1981 was not a regular work day of the incumbent, it was nevertheless a vacancy assignment necessitating the application of Appendix No. 14. Claimant acknowledges that he relinquished Group 6 Welder and Helper seniority on March 10, 1983, and acknowledges that he **had** not filed a request indicating his desire to protect a Group 6, Class 3 temporary vacancy; but asserts that paragraph 4 of Appendix No. 14 does not require an employee to hold seniority in Group 6, Class 3 as a prerequisite condition for filling temporary vacancies in this category. Moreover, Organization maintains that paragraph 3 of Appendix No. 14 requires Carrier to canvass the **trackmen** in the **gang** nearest the location of the temporary vacancy to ascertain if any of the **trackmen** desire to establish seniority in Group 6, Class 3 and absent positive responses, Carrier is required, pursuant to paragraph 4, to permit the senior **trackman** on the **gang** nearest the temporary vacancy to fill the vacancy. For purposes of clarification, we are referencing verbatim Appendix No. 14.

'Letter of Understanding Dated November 9, 1977

This will confirm our discussion in conference at Chicago on November 3, 1977, concerning the protection of temporary **vacancies** of thirty (30) calendar **days or less occurring in Group 6, Class 3 (Welder Helpers)**, when there is no **employee** with Group 6, Class 3 seniority available to protect the temporary service.

"During the aforementioned discussion, it was agreed that in such cases, said temporary vacancies that are to be filled may be filled by promoting the senior qualified **trackman** on the Grand Division with an application for seniority in Group 6, Class 3, on file with the **Assistant General Manager-Engineering**.

In the event there are no such applications on file, said temporary vacancies that are to be filled, may be filled by canvassing, in seniority order, qualified **trackmen** on the **gang** nearest the location on the Division where the temporary vacancy exists to determine if any of said **trackmen** desire to establish seniority in Group 6, Class 3.

In the event there are no qualified **trackmen** on said gang who desire to establish seniority in Group 6, Class 3, the senior **trackman** nearest the location on the Division where the temporary service is required, who desires to protect the temporary service without establishing seniority in Group 6, Class 3, will be permitted to protect such temporary service, pending availability of an **employee** who holds seniority in Group 6, Class 3 or promotion of a **trackman** pursuant to the provisions of the second or third paragraph hereof. A **trackman** who performs temporary service as a welder helper under these conditions will be paid the Welder Helper's rate while performing such service, but will not establish seniority in Group 6, Class 3."

Carrier disputes there was a vacancy on the Welder Helper's position since the assignment did not occur on one of the regular work days of the incumbent. It asserts that the declination of overtime service by the incumbent did not create a vacancy as that term is commonly understood, and, as such, Appendix No. 14 is not controlling. It asserts that under Rule 33(f) of the Rules Agreement it had the option to assign the work here involved to senior qualified and available welder employees off in force reduction or working in a lower class who otherwise did not have 40 hours of work that week. It argues that even assuming arguendo that a vacancy was present, Claimant would not have been entitled to the overtime vacancy since he had not made an application for seniority in Group 6, Class 3 and was not the senior **trackman** on the Fort Madison Track Section. It notes that Claimant and the junior **trackman** both indicated that they did not want to establish seniority in the Group 6, Class 3 classification, but unlike Claimant who did not express a desire to protect temporary vacancies without establishing seniority, the junior **trackman** expressed such a desire. In fact, it observes that the junior **trackman** was used on prior occasions to fill the welder helper's position herein without complaint. It is Carrier's position that its actions were proper and in accordance with Appendix No. 14 and the Schedule Rules agreement.

In our review of this case, we concur with the Organization's position that Carrier failed to develop on the property its arguments that the overtime service herein was not a temporary vacancy. The argument was not fully developed until Carrier transmitted its **Ex Parte** Submission to the Division. We do note, however, that Carrier previously utilized the junior **trackman** in accordance with Paragraph 4 of Appendix No. 14, and his assignment herein was predicated upon the November 9, 1977 **Letter** of Understanding. It was not based upon Rule 33(f) of the Schedule Rules Agreement. Accordingly, while there is no evidence that senior qualified **trackmen** had filed applications for seniority in Group 6, Class 3 with the Assistant General Manager - Engineering and no evidence that there were more senior qualified **trackmen** on Claimant's gang, who if canvassed would have expressed a desire to establish seniority in the aforesaid classification, it would be contrary to Claimant's previously expressed decision to relinquish such seniority to conclude that he desired to establish seniority in Group 6, Class 3. In fact, his disinclination to challenge the junior **trackman's** past assignments reinforces his intention. Since Paragraph 4 of Appendix No. 14 is thus applicable herein, we must conclude that the junior **trackman** was properly assigned to the temporary Welder Helper vacancy on November 28, 1981. Similar to Claimant he did not wish to establish seniority to Group 6, Class 3. but unlike Claimant he expressed a desire to protect a temporary vacancy without securing such seniority. Under these circumstances we find no violation of Appendix No. 14.

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 Second Division

Attest:


Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 15th day of April 1985.