

**NATIONAL RAILROAD ADJUSTMENT BOARD  
THIRD DIVISION**

**Award No. 44615  
Docket No. MW-45075  
22-3-NRAB-00003-210249**

**The Third Division consisted of the regular members and in addition Referee Edwin H. Benn when award was rendered.**

**(Brotherhood of Maintenance of Way Employees Division -  
(IBT Rail Conference**

**PARTIES TO DISPUTE: (**

**(The Kansas City Southern Railway Company  
(former Gateway Western Railway Company)**

**STATEMENT OF CLAIM:**

**“Claim of the System Committee of the Brotherhood that:**

- (1) The Carrier violated the Agreement when it failed to award Claimant J. Wallis a tamper operator position on Mobile Gang 625 which was advertised by Bulletin No. 05-16 on November 10, 2016 and listed as ‘no qualified bids’ by Bulletin No. 06-16 on November 28, 2016 [System File C 16 11 28 (078)/K0417-7071 GAT].**
- (2) As a consequence of the violation referred to in Part (1) above, Claimant J. Wallis shall ‘... be allowed the HMO Tamper position, with his HMO seniority date starting on November 28, 2016 pending he meets the qualifying portion of the Agreement, also compensated the difference in pay between a Bridge Tender and a Machine Operator (HMO) which equals \$2.62 for all hours worked including overtime paid per the Agreement until this matter is resolved or is awarded a position with equal pay plus late payment penalties based on a daily periodic rate of .0271% (Annual Percentage Rate of 9.9%) calculated by multiplying the balance of the claim by the daily periodic rate and then by the corresponding number of days over sixty (60) that this claim remains unpaid.”**

**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 were given due notice of hearing thereon.

On November 10, 2016, the Carrier's Bulletin No. 05-16 posted a bid for a Tamper Operator position on Mobile Gang 625 with the following requirement:

**"Persons wishing to bid on the Tamper Operator position, must have a CDL License [commercial driver's license] and present a copy of license with bid to be considered for the position."**

At the time of the posting, the Claimant was a Bridge Operator on Gang 625 headquartered at Pearl, Illinois. The Claimant bid on the Tamper Operator position.

On November 28, 2016, the Carrier issued Bulletin No. 06-16 stating, "No qualified bids received will assign later."

The State of Illinois issued the Claimant a CDL on August 31, 2016. The Carrier's position that the Claimant was nevertheless not qualified for the Tamper Operator position was because he had not completed a Carrier Driver Training Class. The Carrier notes in its March 28, 2017 letter that for qualification requirements "... under the Federal Motor Safety Administration (FMCSA) rules there are requirements beyond the presentation of a Commercial Driver's License (CDL) which includes an entry-level driver training requirement ... to name a few." Further, in that letter, the Carrier states that it "... has taken steps to contact JJ Keller to set up the entry-level training on line ... [and] the Claimant was enrolled in the online training near or around December 16, 2016."

The problem from the Carrier's perspective in this case is found in an email dated October 4, 2016 concerning the Claimant's effort to become qualified as a CDL driver with the Carrier. In that email and with respect to the Claimant's need to have Entry Level Driver Training, the Carrier states that the Claimant needed to complete:

**"... [T]he Entry Level Driver Training. Now that Ricky Briggs is gone, I'm not sure exactly who is conducting the class, but will need to get him scheduled as soon as we have a replacement. ..."**

The Carrier therefore argues that even though the Claimant possessed a CDL, the Claimant was not qualified for the Tamper Operator position because he had not taken the Carrier's Entry Level Driver Training class. However, the Carrier was not making that class available because it was not known who was conducting the class as the individual who did so "... is gone ..." and there was no replacement for that individual as of the time that the Claimant needed the training class. The Claimant pointed out in his May 18, 2017 email that he was told by a Carrier representative that:

**"... [T]he ONLY reason that I wasn't awarded the position was because I didn't have the new driver training classes. ... I am not the reason that the classes were not completed. Had I been given access to them in a timely manner they would have been completed and I would have been qualified by the company thus not giving them a reason to not award me the position."**

The Carrier is correct that it has the managerial prerogative to determine whether employees are qualified for positions. See Third Division Award 35808:

**"Qualification, fitness and ability to perform a job are determinations to be made by the Carrier, subject only to limited review by the Board as to whether the Carrier was arbitrary in its determination. ..."**

Moreover, "[a] disqualification decision made by the Carrier is not arbitrary if there is a rational basis for the decision." First Division Award 28138.

Finding that the Claimant who had a CDL was not qualified for a CDL position because he had not taken the Carrier's Entry Level Driver Training class

when the Carrier was not offering the Entry Level Driver Training class because the person who previously conducted the class was "... is gone ..." and there was no replacement at the time is a decision that was without "... a rational basis ..." and therefore "arbitrary". First Division Award 28138; Third Division Award 35808, supra. The claim therefore has merit.

As a remedy, we cannot place the Claimant into the Tamper Operator Position as of the date the Carrier determined that there were no qualified bidders. To do so might run afoul of FMCSA requirements. However, we can compensate the Claimant for wages lost, if any, commencing with the date the Carrier determined that there were no qualified bidders because but for the Carrier's failure to offer the Entry Level Driver Training class which prevented the Claimant from being awarded the position, the Claimant would have been awarded the position. With respect to placement into the position, that shall be effective as of the date the Claimant completed the Entry Level Driver Training requirements.

In sum, as a remedy, the Claimant shall be awarded the Tamper Operator position as of the date he completed the Entry Level Driver Training requirement, but the Claimant shall be made whole for lost compensation back to the date the Carrier determined there were no qualified bidders for the Tamper Operator position (November 28, 2016).

**AWARD**

Claim sustained.

**ORDER**

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) be made. The Carrier is ordered to make the Award effective on or before 30 days following the postmark date the Award is transmitted to the parties.

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

Dated at Chicago, Illinois, this 15<sup>th</sup> day of December 2021.