

NATIONAL MEDIATION BOARD

PUBLIC LAW BOARD NO. 6402

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

and

UNION PACIFIC RAILROAD COMPANY

)
) Case No. 49
)
) Award No. 46
)

Martin H. Malin, Chairman & Neutral Member
D. D. Bartholomay, Employee Member
D. A. Ring, Carrier Member

Hearing Date: May 23, 2005

STATEMENT OF CLAIM:

1. The Carrier violated the Agreement when it failed and refused to assign Mr. A. Stokes to the machine operator position advertised by Bulletin No. ILL1463 on March 8, 2002 to be effective March 22, 2002 and instead assigned junior employee A. Varela (System File CE100302R/1325047).
2. As a consequence of the violations referred to in Part (1) above, Claimant A. Stokes shall now be compensated for all wage loss suffered, including overtime, beginning March 23, 2002 and continuing until he is assigned to the aforesaid machine operator position and he shall be assigned a machine operator date of March 22, 2002 senior to Mr. A. Varela.

FINDINGS:

Public Law Board No. 6402, upon the whole record and all the evidence, finds and holds that Employee and Carrier are employee and carrier within the meaning of the Railway Labor Act, as amended; and, that the Board has jurisdiction over the dispute herein; and, that the parties to the dispute were given due notice of the hearing thereon and did participate therein.

Carrier posted Bulletin No. ILL 1463 advertising a vacancy for a machine operator position, operating a tamper. The bulletin specified that the employee be tamper qualified. No employees with machine operator seniority bid on the position. Carrier awarded the position to A. Vaerla who was junior to Claimant.

This dispute is governed by Agreement Rule 19(a) which provides:

Promotions will be based on ability, merit and seniority. Ability and merit being sufficient, seniority will prevail, the management to be the judge subject to appeal.

Rule 19(a) requires that the senior bidder be awarded the position, provided that the bidder has sufficient qualification for the position. Rule 19(a) further provides that management is the judge of the bidders' qualifications, subject to appeal. Thus, management does not have unreviewable discretion in judging qualifications; if management's judgment is unreasonable, the Board need not defer to it.

During handling on the property, Carrier submitted a statement from the Manager Special Projects that he had approached all of the employees about signing up for training schools and that Mr. Varela and another employee who was junior to Varela signed up for tamper school. The Manager Special Projects further averred that he advised Claimant that training school opportunities do not just pop up but must be planned for and Claimant stated that he was not interested in attending tamper school or in getting a CDL. Consequently, according to the Manager Special Projects, after he posted the bid announcement, he awarded the position to Varela as the senior qualified bidder, as Varela was registered for tamper school. In light of Claimant's failure to register for tamper school, the Manager Special Projects deemed him unqualified. The Organization submitted a statement from Claimant averring that the Manager Special Projects never offered him an opportunity to sign up for tamper school and never asked him directly if he was interested.


Certainly, a requirement of registration for tamper school is a reasonable qualification for management to impose in evaluating bidders for a machine/tamper operator position. If the Manager Special Projects's statement is credited, then he selected the senior qualified bidder in accordance with Rule 19(a). If Claimant's statement is credited, then he was never offered the opportunity to sign up for tamper school and the claim should be sustained.

The record thus contains irreconcilable conflicting statements of fact. As an appellate body we are unable to resolve such conflicts in factual assertions. In such circumstances, the Board is compelled to deny the claim because the Organization is unable to sustain its burden of proof. *See, e.g.*, NRAB Third Division Awards Nos. 30798 and 35855.

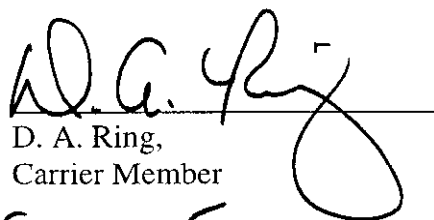
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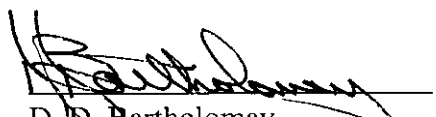
Claim denied.



Martin H. Malin, Chairman



D. A. Ring,
Carrier Member



D. D. Bartholomay,
Employee Member 8-8-05

8-8-05

Dated at Chicago, Illinois, July 29, 2005