

Special Board of Adjustment No. 956

PARTIES
TO
DISPUTE:

Brotherhood of Maintenance of Way Employees
and
New Jersey Transit Rail Corporations, Inc.

STATEMENT
OF
CLAIM:

(a) The Carrier has violated the collective bargaining agreement when awarding the position of B&B Inspector to a junior employee with B&B Inspector seniority instead of awarding such position to B&B Foreman J. Aronis.

(b) Claimant Aronis shall be awarded the position of B&B Inspector, as provided in Rule 3, Section 1, of the Agreement, and shall be compensated for the regular straight-time rate of pay and overtime time rate of pay of the Inspector in excess of the total compensation received since May 25, 1987, for all hours worked.

FINDINGS:

Claimant is a Bridge and Building (B&B) foreman with a July 8, 1985 seniority date in that position as well as in the position of B&B assistant foreman. His seniority date as B&B mechanic is April 3, 1978.

On April 10, 1987, Carrier advertised for bid the position of B&B inspector. Claimant as well as several other employees applied for the position. It was awarded "pending qualifications" to V. Frega, who was junior to claimant, effective May 25, 1987.

Frega has a B&B mechanic's seniority date of July 14, 1984; his seniority date for foreman and assistant foreman is September 8, 1986. It appears that both men have B&B inspector seniority dates -- claimant a July 8, 1985 date and Frega a September 8, 1986 date.

The issue before this Board is whether Carrier violated the applicable agreement, specifically Rule 3, by awarding the position of B&B inspector to Frega rather than to claimant.

Rule 3 Section 1 reads as follows:

RULE 3 - SELECTION OF POSITIONS

"Section 1. Assignment of position.

In the assignment of employees to positions under this Agreement, qualification being sufficient, seniority shall govern.

The word "seniority" as used in this Rule means, first, seniority in the class in which the assignment is to be made, and therefore, in the lower classes, respectively, in the same group in the order in which they appear on the seniority roster.

Section 2. Qualifications for positions.

In making application for an advertised position or vacancy, or in the exercise of seniority, an employee will be permitted, on written request, or may be required, to give a reasonable, practical demonstration of his qualifications to perform the duties of the position."

Rule 3 makes clear that seniority is not the sole criterion in assigning employees to positions. Seniority only governs when the employee's qualification is "sufficient".

Where more than one applicant has "sufficient" qualifications for the position in question, seniority is controlling and the position must be awarded to the senior applicant with "sufficient" qualifications. The selection may not be based on the relative ability of applicants.

That Carrier has the sole right to make determinations with respect to qualifications is well settled. It is equally clear that such determinations will not be set aside by Boards such as our's in the absence of clear proof that the determination was arbitrarily made. See, e.g., Fourth Division Awards 3960 and 4093.

Carrier describes the responsibilities of a B&B inspector as follows:

His primary responsibility is to act as interface between Building contractors and Carrier's Construction Management Department. He must be able to read blue prints, shop drawings and other specifications to communicate with the Contractor and management personnel regarding construction questions and to submit written reports.

There is nothing in the record to indicate that that description is erroneous or improper.

After each applicant for the inspector position was interviewed by Carrier, it was determined that claimant lacked sufficient qualifications for the position. It awarded the position to Frega "pending qualifications" on the basis of its determination that Frega had previous work experience as a construction inspector.

Frega's qualifications have not been effectively challenged by Petitioner and the record is barren of convincing evidence that claimant in fact possessed satisfactory qualifications for the inspector position. The fact that claimant had completed a B&B Foreman/Inspector course in 1977 while in Conrail's employ does not establish that he was qualified for the position. Nor do statements that he had experience as a foreman on a number of construction jobs (Shark River, Ocean and Branchport Rehabilitation projects and

was scheduled to serve as foreman on the very bridge now in question) provide the necessary proof.

This Board is not in a valid position to substitute its judgment for that of Carrier in the matter of determining qualifications. In Award 26903, cited by Petitioner, the Third Division did not follow a contrary course; it sustained a claim on the basis of seniority where there was no contention by the Southern Pacific that the senior employee was not qualified; it distinguished Award 20724 on that basis.

We can appreciate claimant's irritation at having progressed through the ranks due to his own ability to foreman, the highest B&B supervisory position in the bargaining unit, and then finding that an employee with much less seniority is awarded a position for which he applies and considers himself well qualified. All of these factors must have been taken into consideration by Carrier. Under Rule 3 as interpreted by a long line of awards, we cannot validly set aside Carrier's assessment, at least in the absence of additional facts that clearly show that he is sufficiently qualified to serve as a B&B inspector. The burden of proof with respect to that essential element rests with Petitioner.

Contrary to Petitioner's contention, it was not error for Carrier to interview each applicant before arriving at its decision. In the absence of an express agreement to the contrary, it is a fundamental right of an employer to interview applicants for a position, particularly at the level of inspector.

There is no evidence that any applicant was not given the benefit of a meaningful interview or that any part of the interview was unlawful or improper. It does not appear that any applicant

was deprived of the opportunity to give a practical demonstration of his qualifications to perform the duties of inspector. The fact that the award in this case was made "pending qualifications" has not been shown to have been unreasonable.

AWARD: Claim denied.

Adopted at Newark, N.J. **July 10, 1980**



Harold M. Weston, Chairman

Will B. Murphy
Carrier Member

Employee Member

Labor Member's Dissent

to

Awards No. 44 and 45

Special Board of Adjustment 956

Brotherhood of Maintenance of Way Employees

vs

New Jersey Transit Rail Operation

(Referee Mr. Harold Weston Arbitrator)

The majority has erred and has allowed impriorities at the hearing which has permitted new information not found in the record to be used in the decision.

The Agreement, Rule 25(f) establishes the provisions by which this Board must operate, and in pertinent part, Paragraphs 8 and 9 state the following:

8. "At Board hearings the parties may be heard in person, by counsel, or by other auorized representatives. The Board shall rule on the facts stated in the authorized record. The Board shall have the authority to request the production of additional evidence by either party. The Board shall not conduct a trail de novo where hearings have already been held at a prior level in the grievance or discipline procedure."
9. "The Board shall not have the authority to add to, subtract from or modify any of the provisions of this Agreement, and all decision shall be confined to the interpretation and application of this Agreement. The Board shall render a decision solely on the dispute submitted to it. Such decision shall be in writing and furnished to the parties. The decision shall be final and binding on both parties."

At the hearing, this Board allowed testimony to be given by the Carrier's Engineering Department, which placed the Organization at an unfair disadvantage. Not only was the Organization not given advance notice that this testimony was to be taken so that a prepared rebuttal could be made, but also there was no opportunity given the Organization to properly address the statements made during this testimony. The clear and precise language of the Agree-

ment provides that "the Board shall rule on facts stated in the authorized record". However, in this testimony, facts were brought out that were not included in the record, such as Mr. Frega's alleged previous employment, which this Board considered when formulating its decision in these awards. Consequently, the awards were not based on facts found in the authorized record but on new information, and therefore, they must be considered improper.

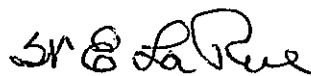
The Board has further exceeded its authority when giving a new meaning to the term "practical demonstration". The Board has concluded that such term would afford the Carrier the unilateral right to determine an employee's qualifications without an actual demonstration of his abilities and without reviewing the factual record of the employee's knowledge and experience. This is not the meaning agreed to by the parties in Rule 3, Section 2 of the Agreement, and the Carrier is well aware that contractually it did not have the right to make such decisions. This unauthorized modification of the Agreement by the Board would put the employees at the mercy of favoritism by Carrier supervision and would deem seniority as meaningless.

The Board's decision to grant a junior employee, who had no seniority in the class, the right to be trained for the position on the basis that the senior employee was not qualified to assume such position, even though a practical demonstration of his abilities was not allowed, is a clear violation of Rule 41 of the Agreement, which states:

- (a) "The parties to this Agreement pledge to comply with Federal and State Laws dealing with non-discrimination toward any employee. This obligation not to discriminate in employment includes, but is not limited to, placement, transfer, demotion, rates of pay or other forms of compensation, selection for training, lay-off and termination."

While the Carrier has twice before proposed this procedure of determining qualification in both cases the organization has rejected such proposal.

By this award this Board has given the Carrier what they have not been able to negotiate.



W. E. LaRue
Member