Award No. 45
Case No. 45

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 on October 6, 1986, when awarding the position of B&B Inspector to a junior employee without B&B Inspector seniority, by Award Bulletin 41, Position 154, instead of awarding such position to B&B Foreman J. Rybczynski.

(b) Claimant Rybczynski 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 October 6, 1986, for all hours worked.

FINDINGS: Claimant, a B&B Foreman, applied for the position of Bridge and Building Inspector pursuant to Bulletin 36. The position was awarded to B&B Mechanic Russel, who is junior to claimant.

Prior to Russel's selection, all applicants were

interviewed and Carrier determined that claimant, unlike Russel, lacked sufficient qualifications for Inspector.

There is no indication that anything said in the interviews was illegal or improper and the record does not contain clear proof that claimant was sufficiently qualified to fill the Inspector position.

The present case involves substantially the same basic issue and situation and the same agreement as were before this Board in Case No. 44. No additional factor has been presented here.

What we had to say in Case 44 is equally applicable to the present case.

AWARD: Claim denied.

Adopted at Newark, N.J. January 10 1990

Harold M. Weston, Chairman

Carrier Member

Employee Member

956-45

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 errored 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 discrimate 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