Award No. 12119
Docket No. DC-11576

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

David Dolnick, Referee

PARTIES TO DISPUTE:

JOINT COUNCIL DINING CAR EMPLOYEES, LOCAL 495

SEABOARD AIR LINE RAILROAD COMPANY

STATEMENT OF CLAIM: Claim of Joint Council Dining Car Employees, Local 495 on the property of the Seaboard Airline Railroad Company for and on behalf of Third Cook C. A. Baker that he be paid the difference between what he earns and what he would have earned since May 20, 1958, *had Carrier awarded Claimant Third Cook assignment on Trains 38 and 39* instead of awarding said assignment, in violation of the current agreement, to an employe who had not established seniority in the classification of Third Cook.

EMPLOYES' STATEMENT OF FACTS: Carrier posted for bid assignment as Third Cook on Trains 38 and 39. Under date of May 20, 1958, Carrier *awarded this position to Chef L. W. Grady. On June 18, 1958, Employes filed* time claim on behalf of claimant, who, like Chef Grady, had made application for the assignment in question. (Employes' Exhibit A.) It was, and is, the position of Employes that Chef Grady should not have been awarded the assignment in question because he, unlike claimant, had not established seniority in the classification of Third Cook.

Carrier's Superintendent Dining Cars denied the claim under date of June 23, 1958. (Employes' Exhibit B.) Carrier based its denial on an alleged **verbal understanding** it had with a former General Chairman of Employes, supposingly reached in conjunction with a written agreement dated October 29, 1943. (Employes' Exhibits C and D.) In particular, Carrier asserted that by virtue of this verbal understanding, an employe hired as chef automatically acquired seniority in all lower classification in the general class of cooks. Conference, appeal and re-appeal ended with Carrier sustaining the original denial. (Employes' Exhibits E, F, G, H and I.)

POSITION OF EMPLOYES: There is in existence and on file with this Board an Agreement between the parties to this dispute, Rule 5 of which provides as follows:

RULE V.

Seniority Qualifications.

(a). The principle of seniority is recognized, but it will not be applied *in such a way as to result in impairing the efficiency of dining*

its duly authorized representative to live up to its agreements. Agreements between Carriers and Organizations are made to continue in full force and effect until changed or modified in accordance with the provisions of the Railway Labor Act and are not to be effective only until some employe takes exception thereto and wants it set aside so he may have a particular assignment belonging to a senior employe. The Organization cannot justify its improper action in repudiating a bona fide agreement made by its duly authorized representative on the grounds that some employe might sue the Organization. Nor can the Organization excuse and justify its improper action because it was instructed to do so by some outside attorney. It is difficult to understand how an informed attorney could seriously contend that the oral agreement in question had no application and effect in 1958 and could be repudiated by the Organization. An oral agreement is just as binding as a written agreement when, as in the instant case, there is conclusive proof of its existence, complete acknowledgment and understanding thereof and fifteen years of uncontested application thereof.

The Carrier went to great lengths in correspondence and conference discussions with General Chairman Lindsey of the Organization endeavoring to have him take a realistic and responsible position in the matter and not be influenced by misapprehensions and opinions of irresponsible persons whose evaluation of an agreement was that it was something to disregard and wriggle out of whenever deemed expedient. We tried to impress him with the seriousness of the matter and that to follow his theory would mean that any agreement that might be reached with him in conference discussion or negotiations would not be final and binding, but would be subject to repudiation and cancellation and even claim for penalty payment, which would certainly be contrary to the provisions of the Railway Labor Act that all disputes shall be considered and if possible decided in conference between the duly authorized representatives of Carriers and Employes and would destroy the whole foundation of proper relationship between management and labor. It was to say the least disappointing to learn from the Organization's notice to Third Division of September 18, 1959 that our efforts had failed.

As pointed out, it is certainly unusual for an Organization to go to such lengths to secure preferential rights for a junior employe over a senior employe in controvention of the fundamental principle of seniority that the senior employe has preferential rights to work over a junior employe. The agreement referred to followed this principle. It was not unusual or unprecedented for General Chairman McConnell to make such agreement in October 1943 that cooks establishing seniority in a higher classification would automatically establish seniority in the lower classifications, as the same seniority provisions had been agreed to by the Organization on some other lines. For instance, agreement between the Organization and the Chicago & Eastern Illinois Railroad of March 1, 1943 contained provision that: "Seniority will be restricted to each classification of employes except an employe entering the service in a classification higher than third cook shall at the same time acquire and accumulate seniority in all lower classifications." Agreement between Organization and Union Pacific Railroad of 1942 also contains similar provisions that employe establishing seniority date in a higher class will also have such seniority date in all lower classes.

There can be no merit to this claim and it should accordingly be denied.

OPINION OF BOARD: Rule V(b) of the Agreement provides as follows:

> "Classification (b). For the purpose of applying seniority, the employes covered by this agreement shall be divided into classes as follows:

General Classes	Seniority Classes
Cooks	(1) Chefs
	(2) Buffet Chefs
	(3) Second Cooks
	(4) Buffet Second Cooks
	(5) Third Cooks
	(6) Buffet Third Cooks
	(7) Fourth Cooks
Waiters	(1) Waiters-in-Charge
	(2) Waiters and Tavern Car Waiters
	(3) Tavern Car Attendants
Chair Car Attendants	(4) Chair Car Attendants"

In October, 1943, the parties reached the following agreement with respect to the application of said Rule V(b):

> "It is understood that when compiling seniority roster, the general classes of cooks, four rosters will be prepared
>
> one showing chef cooks
>
> one showing second cooks
>
> one showing third cooks
>
> one showing fourth cooks
>
> "The above understanding was reached as of today, October 29, 1943, at a meeting held between the Superintendent Dining Cars, Seaboard Railway, and Representatives of the Employes Union."

At the same time the parties agreed "that a cook holding or establishing seniority in a class higher than fourth cook would automatically hold seniority in all lower classifications as of the date his seniority was established. In other words, a cook listed on the chef's roster only would hold seniority in the lower three clases of the date of his seniority as chef." This agreement is confirmed by the former General Chairman who was signatory to the October 29, 1943 understanding with respect to Rule V(b).

Petitioner does not deny that such an understanding was agreed to. They argue only that a verbal understanding may not alter the basic agreement.

Cook L. W. Grady entered service with the Carrier on December 17, 1939 as Second Cook. He was promoted to Chef on September 9, 1942. Claimant entered the service on August 2, 1940 as Third Cook. He was promoted to Second Cook on December 21, 1941 and to Chef on February 2, 1943.

On May 2, 1958 a position of Third Cook on trains 39-38 was bulletined. Both Claimant and Grady applied for the position. On May 20, 1958 the Third

Cook position was awarded to L. W. Grady. Petitioner contends that Claimant should have been assigned to that position because only he had Third Cook seniority; Grady had none.

The oral agreement entered into by the parties on October 29, 1943 did not alter or modify the written agreement. It provided the manner in which Rule V(b) is to be applied. It recognized and provided the most equitable application of seniority to the four cook rosters.

Furthermore, the parties, by their action, gave meaning and intent to the oral understanding. The seniority principle contained in the oral understanding was applied for fifteen years prior to the filing of this claim without protest. No claim for alleged violation of the cook seniority provision as so applied had been previously filed.

It is a well settled rule of contracts that "the conduct of the parties in recognizing the written contract as modified by oral agreement constitutes a mutual interpretation given it by the parties as evidence by their actions with reference thereto, and affords a safe guide in determining what the parties had in mind when the written contract was made and modified by the oral agreement." Award 6008.

On the basis of the entire record, Grady was properly awarded the position of Third Cook.

FINDINGS: The Third Division of the Adjustment Board, after giving the parties to this dispute due notice of hearing thereon, and upon the whole record and all the evidence, finds and holds:

That the Carrier and the Employes involved in this dispute are respectively Carrier and Employes 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 Carrier did not violate the Agreement.

AWARD

Claim is denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 24th day of January 1964.