

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

(Supplemental)

Francis M. Reagan, Referee

PARTIES TO DISPUTE:

JOINT COUNCIL DINING CAR EMPLOYEES, LOCAL 495
NORFOLK AND WESTERN RAILWAY COMPANY

STATEMENT OF CLAIM: Claim of the Joint Council Dining Car Employees Local 495 on the property of the Norfolk & Western Railway Company, for and on behalf of Cook Ashby Langhorn, that:

1. Carrier be ordered to grant Claimant a seniority date as chef cook of March 3, 1961, the date Claimant made application for chef cook's position awarded to an employee junior to Claimant.

2. Claimant be paid the difference between Second Cook's rate of pay and chef's rate of pay from March 21, 1961, to the date Claimant is allowed to exercise seniority in the class of chef cook, account of Carrier on that date awarding assignment of chef cook to an employee junior to Claimant in violation of the Agreement.

EMPLOYEES' STATEMENT OF FACTS: Under date of March 28, 1961, Organization filed the following time claim on behalf of Claimant:

"Mr. W. C. Molyfield
Superintendent Dining Cars
Norfolk and Western Railroad
Roanoke, Virginia

Dear Sir:

This claim is for and on behalf of Mr. Ashby Langhorn, Second Cook, and other employees similarly situated, for a chef cook's position and rate of pay that was awarded Mr. Archie Mayo, Junior Third Cook, March 21, 1961, instead of Mr. Langhorn, senior employee who made application for chef cook's position under Article 7 of our working agreement.

This claim is from March 21 until the Carrier awards assignment to the senior employee who made application for same.

Statement of Facts: The Carrier bulletined chef cook's position for cooks on the seniority roster. Mr. Ashby Langhorn, senior em-

In the instant case, the Employes have failed to prove that the Claimant had fitness and ability to fill the position here involved, or that the Carrier acted in a biased, arbitrary, capricious, unreasonable, or prejudicial manner in denying the position to the Claimant.

From a review of the record, and for the reasons given herein, the claim is denied."

The Carrier asserts that the record in this case shows clearly and conclusively that its position is based upon competent evidence that the Claimant lacked the proper fitness and ability to merit assignment to the position contended for herein. The record certainly shows beyond any doubt that the Employes have not at any time met, nor even attempted to meet, the positive burden resting upon them of proving by substantial and competent proof that the Claimant had "sufficient" fitness and ability. The claim is, therefore, left devoid of merit, and should be declined in its entirety.

(Exhibits not reproduced.)

OPINION OF BOARD: Contention in this matter arose out of the assignment of Third Cook Archer Mayo to Chef in place of Claimant Second Cook, Ashby Langhorn.

Claim was made Carrier violated the agreement of August 1, 1945, between the Carrier, Norfolk and Western Railway Company and the Cooks, Pantrymen-Waiters and Waiters in Dining Car Department in that Claimant was not assigned Chef as of March 3, 1961. Further, upon assignment, that he be entitled to Cook's pay from March 3, 1961.

Facts of the file reveal that Claimant is a Second Cook with a date of seniority as of November 24, 1943, while the person assigned to Chef was a Third Cook as of June 6, 1942.

The assignment was made March 3, 1961. Notice of Intention to file an Ex Parte Submission in behalf of the Claimant by the Joint Council of Dining Car Employees was filed with this Board April 9, 1963, two years, one month, and six days later.

A very careful review of this matter has been made. All evidence in favor of the Claimant has been weighed, his seniority, the preeminence of his qualifications, his faithful untarnished service to the Carrier, but within reason the Carrier must be left here to choose that person able and best fitted for the job.

Further, Claimant, if he felt himself aggrieved, should have acted promptly to redress the alleged wrong. He should have acted within weeks, perhaps a few months, of his denial. He has been guilty of laches. His lack of action has caused the Carrier to invest over two years of its time and training in a person the Claimant at this late date now says was not able and best fitted.

It is persuasive with the Board that nine months would have been a maximum time to file claim herein, for this is the period limited in Section 8 (g) of the standard agreement of this Organization with other Carriers.

Further, there was no rebuttal placed in the record by the Organization to the affirmative material contained in the Carrier's Ex Parte Submission touching on the lack of general qualifications for the Chef's position on the part of Claimant.

Regretfully, the claim of this faithful employe for promotion cannot be recognized.

FINDINGS: The Third Division of the Adjustment Board, upon the whole record and all the evidence, finds and holds:

That the parties waived oral hearing;

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 the Agreement has not been violated.

AWARD

Claim denied.

**NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION**

**ATTEST: S. H. Schulty
Executive Secretary**

Dated at Chicago, Illinois, this 13th day of July 1964.