

**NATIONAL RAILROAD ADJUSTMENT BOARD**

**THIRD DIVISION**

**Arthur Stark, Referee**

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**PARTIES TO DISPUTE:**

**BROTHERHOOD OF SLEEPING CAR PORTERS**

**CHICAGO, BURLINGTON AND QUINCY RAILROAD COMPANY**

**STATEMENT OF CLAIM:** \* \* \* for and in behalf of L. S. Wagner, who is now, and for a number of years past has been, employed by the Chicago, Burlington & Quincy Railroad Company as a chef cook.

Because the Chicago, Burlington & Quincy Railroad Company did, through Crew Supervisor H. G. Mott and Superintendent P. M. Scott, under dates of July 26 and August 8, 1961 respectively, deny the claim filed for and in behalf of L. S. Wagner, wherein it is contended that Mr. Wagner was denied the seniority rights he acquired under the Agreement presently in effect governing the class of employes of which Mr. Wagner is a part, in that the Company denied him the right to occupy a certain assignment as chef cook on Trains 1 and 10 after he had bid on the run under the provisions of the Agreement and same had been awarded to him.

Further, because in denying Mr. Wagner his right to exercise his seniority as provided for under the rules of the above-mentioned Agreement, he was deprived of a valuable property right and suffered a loss in income because he was not allowed to occupy the assignment, which it is contended he was entitled to occupy according to his seniority.

And further, for Mr. Wagner to be assigned to the particular assignment on Trains 1 and 10 as chef cook and for him to be paid any loss of salary suffered by him by reason of the denial of the seniority rights that he possessed under the rules of the Agreement.

**EMPLOYEES' STATEMENT OF FACTS:** Your petitioner, the Brotherhood of Sleeping Car Porters respectfully submits that it is duly authorized to represent employes of the Chicago, Burlington and Quincy Railroad Company classified as Dining Car Employes. And in such capacity, it is duly authorized to represent L. S. Wagner who is now, and for some years past, has been employed by the Chicago, Burlington and Quincy Railroad Company as a dining car employe in the capacity of a chef cook.

Your petitioner further represents that on or about July 1, 1961, a vacancy for a chef cook assignment was posted for bid as provided for under the current Agreement governing dining car employes on the Chicago, Burlington and Quincy Railroad, on Trains One and Ten; and Mr. Wagner exercising his rights

traits are not up to standard for this type of work. These things provided a sound basis for the judgment of management that he was not qualified for this job.

6. Similar cases on this property have been dropped by a predecessor Organization, and the subject is a closed issue under the grievance rule.
7. The Board cannot set aside management's judgment in this case, according to numerous precedents cited herein.

The claim must be denied.

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All data herein and herewith have been previously submitted to the Organization.

\* \* \* \* \*

(Exhibits not reproduced.)

**OPINION OF BOARD:** Claimant Louis S. Wagner was hired as a 4th Cook on September 16, 1937. The following month he was promoted to 3rd Cook and, in July 1941, to 2nd Cook. On August 1, 1945 Wagner was made Chef, while continuing to retain seniority in all lower classes pursuant to the Agreement. Between September 12, 1948 and June 30, 1949, Claimant was disqualified as a Chef. In 1951 he was disqualified again from chef work for 90 days, but permitted to continue in a 2nd Cook capacity.

In early July 1961 Wagner submitted a bid on a posted vacancy of Chef Cook, Trains 1 and 10 (The Denver Zephyrs). On July 18, 1961, according to Wagner, he was advised that he had been awarded the run and should report July 20 for the new assignment. Management, however, asserts that Mr. Wilhelmi, the man to whom Wagner talked, held a clerical position in the office of the Supervisor of Crew Personnel and was without authority to make assignments. Normally, the Carrier points out, the Supervisor makes cook assignments after bids are approved by Traveling Chef Louis Gordon.

On July 20, Wagner was interviewed by Gordon, following which his bid was rejected. In a written report to P. M. Scott, Manager of Dining Car Service, after briefly reviewing Wagner's record, Gordon stated in relevant part:

" . . . I requested the opportunity to interview Chef Wagner prior to making my decision. Prior to the interview I made the statement and it is my opinion that Chef Louis Wagner could do the work as a chef cook but there was a question in my mind as to whether or not he would . . . (H)is attention was called to the numerous reports concerning his past service. He was asked what we could expect and his reply was more or less defensive and antagonistic.

Throughout the entire interview Chef Wagner at no time indicated to me by his conduct or statements made that I could possibly approve him to work as chef on heavy trains such as the Denver Zephyr and The California Zephyr . . . Throughout the entire interview he displayed an arrogance that one might say that he was always right and the other fellow was always wrong as though he were being persecuted . . .

I believe Chef Wagner should work as a chef on the lighter trains where he will not be put under pressure such as he would on these two heavy trains."

At the conclusion of the interview Gordon advised Wagner that his decision to reject the employe's bid was based on Wagner's "fitness, conduct and . . . past record".

On July 26, 1961 Wagner submitted a grievance alleging that his seniority rights had been violated. Rule 16(a) of the Agreement provides:

"It is recognized that the character of service required of employes coming within the scope of this agreement demands fitness and ability. The principle of seniority shall be adhered to, but nothing in this agreement shall be construed to require that seniority be so as to impair the efficiency of service to be rendered to the company or to the public."

On July 29, 1961 H. G. Mott, Supervisor, Crew Personnel, denied the grievance, stating in part:

"Your past record as regards to fitness and ability . . . precluded me as Crew Supervisor to accept the responsibility for your assignment on this very important train and I therefore referred the matter to Mr. L. E. Gordon. Mr. L. E. Gordon in his capacity holds full responsibility for promotion of all grades of cooks and chefs . . ."

Upon subsequent appeal, Management again denied the claim, stating in its August 16, 1961 letter:

" . . . After due consideration of Mr. Wagner's past record, it is the opinion of the management that he is not capable of carrying out the high-level of cookery and supervisory duties required of a chef on the Denver-Zephyr—which is the Burlington's foremost passenger train."

Thereafter the case was submitted to this Board.

Carrier's position may be summarized as follows:

- "1. The position for which claimant bid was never 'awarded' to him. He never began a tour of duty on this assignment.
2. Under Rule 16(a) of the schedule an applicant must first possess the necessary fitness and ability for the position, and the matter of seniority is relegated to consideration only when it will not impair the efficiency of service.
3. The management must be the judge of an employe's fitness and ability.
4. The position claimant bid for, Chef on the Denver Zephyrs, is the most exacting Chef's position on the Burlington.
5. The personal employment record of Mr. Wagner is far from exemplary, his experience has been very limited, and his personality traits are not up to standard for this type of work. These things

provided a sound basis for the judgment of management that he was not qualified for this job.

6. Similar cases on this property have been dropped by a predecessor Organization, and the subject is a closed issue under the grievance rule.
7. The Board cannot set aside management's judgment in this case, according to numerous precedents."

The Organization believes Wagner had sufficient fitness and ability, in July 1961, to operate as a chef on Trains 1 and 10. It argues in substance:

1. Wagner has been a qualified Chef Cook since 1945. He has served on almost all trains operated by this Carrier, including Trains 1 and 10.
2. Wagner has served often, and with no complaint, as Chef Cook on the Twin Zephyr, a train comparable in dining car service (menu) to the Denver Zephyr.
3. There is no evidence in the record to support Management's assertions regarding Wagner's past performance, reprimands, demotions and the like. In any event, there have been no entries on his personnel record since 1957.
4. While Management has the right, in the first instance, to determine an employee's fitness and ability under Rule 16(a), the employee has a right to challenge an adverse determination. When challenged, it is the Carrier's obligation to demonstrate the employee's lack of fitness. The only evidence on that score in the present case consists of ex parte statements of Carrier officials made under circumstances which precluded Wagner from the opportunity of analyzing them.

In light of the parties' contentions, it seems apparent that there is no basic disagreement here regarding Management's right to evaluate the fitness and ability of its employees. The first sentence of Rule 16(a) makes it clear that the character of service required of employees "demands fitness and ability". The Organization does not question Management's right or obligation to make judgments under this clause. (Emphasis ours.)

However, Rule 16(c) grants employees the right to exercise seniority in bidding on permanent vacancies, and the second sentence of Rule 16(a) requires that "the principle of seniority shall be adhered to . . ." There is only one proviso: seniority will not be applied "so as to impair the efficiency of service to be rendered to the company or to the public." It is Management's application of Rule 16(a) in a specific case which the Organization now challenges and which, without doubt, this Board has authority to review.

The issues before us, then, are: (1) Did Claimant Wagner have the necessary fitness and ability to perform the task of Chef Cook on Trains 1 and 10 in July 1961? (2) Would his appointment to that post have impaired the efficiency of service rendered the company or public?

There seems to be little doubt that Wagner had sufficient experience to qualify for the Denver Zephyrs Chef Cook assignment. He had maintained Chef Cook status for 16 years (except for two interruptions caused by temporary

demotions). And, while the record does not reveal the nature of his work from 1945 to 1957, it shows that from 1957 to 1961 (September) he served at least 20% of the time as a Chef Cook. Moreover, he was familiar with Denver Zephyr work, having spent about 47% of his time as 2nd Cook on that train during the 1957-61 period (9 months in 1958, 6 months in 1959, 8 months in 1960 and 4 months in 1961). He also served as Chef Cook on that train from February 1 to 5, 1960.

Although Carrier emphasizes the "elaborate" menu provided diners on the Denver Zephyrs, there is little reason to believe that Wagner would not have been able to cope with it. The record shows that menus on the Twin Zephyrs are just as extensive. Wagner had worked ten assignments as Class A Chef on this train (and two as 2nd Cook) during the 1957-61 period: January 3-6 and 21-24, 1957, July 23-25, 1957, February 26-27, 1957, November 24-26, 1957, September 11, 1959, January 25-30, 1960, July 22-23, 1960, July 7-11, 1961, and September 28-30, 1961.

As a matter of fact, Management acknowledges that "Claimant's experience was not the primary reason for disqualifying him from these trains" (R-44).

It then pinpoints the issue regarding Wagner in this way:

"His problem is, for the most part, of attitude and personality. A copy of the report made by Traveling Chef Louis Gordon under date of July 20, 1961, when his bid was rejected, is attached . . . This letter explains the reasons why that bid was not accepted."

Gordon's letter has been previously quoted. Significantly, he remarks, ". . . it is my opinion that . . . Wagner could do the work as a chef cook." His only question was whether Wagner would do it; i.e. the problem of "attitude" noted by the Carrier.

What, then, is the evidence on "attitude" which prompted Gordon's (and Management's) decision to disqualify the Claimant? First, Wagner was confronted with a record of numerous adverse reports concerning his past performance. His response, Gordon reports, was "more or less defensive and antagonistic." Second, Gordon felt that Wagner displayed "arrogance" during the interview. By this Gordon apparently meant that the employe would not admit to having committed errors ("he was always right and the other fellow was always wrong").

While Management certainly has the right to exercise reasonable discretion in evaluating fitness and ability, and while it has some latitude in disqualifying men under Rule 16(a)'s "impair the efficiency of the service" proviso, it has an important obligation to support its disqualification decisions with more than just generalized statements regarding an employe's attitude in an interview. Thus, the fact that a man becomes defensive — even antagonistic — when confronted with a record of past infractions, would seem to bear little relation to the question of whether that man is currently capable of fulfilling a particular job assignment. (This reaction might even be expected when the infractions spoken of date back four or more years.)

As for failure to admit errors, this may well be a significant factor if there is evidence showing the employe cannot recognize that his job requires him to work or act in a certain way. But the terse statement in Gordon's report reveals no details of the conversation and gives us no warrant to conclude

that other things being equal, Wagner would be unaware of his responsibilities as a Chef Cook on the Denver Zephyrs.

There is, of course, Wagner's past — and far from exemplary — record. This was mentioned in the opening paragraph of Traveling Chef Gordon's July 20, 1961 Statement and referred to throughout Carrier's letters and submissions. In brief this record, as compiled by Management, shows:

1. Eighteen wage assignments.
2. One AWOL.
3. Six adverse reports by a supervisor.
4. Eleven interviews, reprimands or disciplinary actions.

Chronologically (excluding wage assignments) the Carrier's Personnel Record Summary reveals that, since becoming a Chef on August 1, 1945, the following major events have occurred:

1. November 1945. Interview and reprimand concerning work.
2. April 1946. Interview about "a report of poor housekeeping".
3. January 1947. Interview and warning about work.
4. June 1947. Interview about work. "Retained in service as a chef on his plea to prove his capabilities."
5. February 1948. Interviewed about "report of inability to provide satisfactory service . . . Passed without discipline".
6. September 1948. Demoted to 2nd Cook following several incidents in June and August.
7. June 1949. Reinstated as chef "after being re-examined for work as chef, and following road trip to observe his work."
8. May 1951. Interviewed about a "report of unsatisfactory cookery".
9. September 1951. Disciplined by 90 day demotion from Chef to 2nd Cook.
10. March-April 1953. Interviewed (with Union representative present) and record reviewed of "lack of cooperation with employes in charge, attitude toward fellow employes, and failure to properly protect menus." Permitted to continue as Chef "upon assurance he would make every effort to cooperate . . . and . . . accept the responsibility of a chef to the fullest extent."
11. January 1954. Traveling Chef recommended demotion to 2nd Cook. No action.
12. March 1955. Reprimanded for "loud and profane talk in kitchen."
13. August 1957. Three "reports from supervisors" about failure to be ready on time, cookery, "weak kitchen", and unnecessary conversation with supervisor.

It is extremely difficult to assess an "interview about a report" of unsatisfactory service. The really important items in the above list, however, are the reprimands, warnings and disciplinary actions. These cannot be treated lightly. They illustrate Wagner's capacity for doing poor work and his sometimes erratic behavior. However, the problem in July 1961 was how to evaluate this record in light of subsequent behavior and demands of the Denver Zephyr Chef assignment for as already noted, Wagner did have the necessary ability to perform the work if he wanted.

Without in any way impugning Supervision's motives, it is our conclusion that Management acted arbitrarily and unreasonably in overlooking Wagner's post-1955 record. Traveling Chef Gordon, in his July 20, 1961 Statement, noted that Wagner had been "severely reprimanded and again upon his promise and assurance [to cooperate and accept responsibility] he was permitted to continue working as a chef cook." This, presumably, occurred in January 1954. The record shows, then, that except for a 1955 incident involving loud and profane language and three adverse "reports" in 1957, Wagner fulfilled his promise from January 1954 to July 1961, a period of 7½ years. There is no evidence whatsoever that Wagner was deficient in any way between August 1957 (the date of the last adverse "report") and July 1961, a four-year period.

These facts are decisive, in our estimation, when considered in conjunction with Wagner's 1957-61 work record which shows that at least 20% of his time was spent on Chef assignments.

Under the circumstances, and giving due consideration to the fact that the Denver Zephyrs are considered crack trains, handle more dining car guests than other trains, and require a larger kitchen crew, it is our finding that Management failed to accord proper weight to Wagner's seniority, under Rule 16(a), and that the evidence establishes his selection for the Chef assignment in July 1961 would not have impaired the efficiency of the service.

**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 Employee involved in this dispute are respectively Carrier and Employee 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 Carrier violated the Agreement by disqualifying Claimant Louis S. Wagner from the position of Chef Cook, Trains 1 and 10, in July 1961.

#### AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD  
By Order of THIRD DIVISION

ATTEST: S. H. Schulty  
Executive Secretary

Dated at Chicago, Illinois, this 26th day of April 1963.