

**NATIONAL RAILROAD ADJUSTMENT BOARD**

**THIRD DIVISION**

**Arthur Stark, Referee**

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**PARTIES TO DISPUTE:**

**BROTHERHOOD OF SLEEPING CAR PORTERS**

**THE COLORADO AND SOUTHERN RAILWAY COMPANY**

**STATEMENT OF CLAIM:** \* \* \* for and in behalf of James L. Wood, who was formerly employed in the dining car department of The Colorado and Southern Railway Company as a waiter and waiter-in-charge.

Because The Colorado and Southern Railway Company did finally, through a decision rendered by Mr. R. D. Wolfe, sustain a disciplinary action taken against Mr. Wood by Mr. H. E. Moyer, Superintendent, Wichita Falls, Texas, under date of August 19, 1964, wherein Mr. Wood was discharged from his position in the dining car department of The Colorado and Southern Railway Company allegedly because of charges that had been made against him previous thereto.

And further, because the charges against this employe were not proved and the action of The Colorado and Southern Railway Company in discharging Mr. Wood was unjust, unfair, arbitrary and in abuse of the Company's discretion.

And further, for Mr. James L. Wood to be returned to his former position as a waiter in the dining car department of The Colorado and Southern Railway Company with seniority rights, vacation rights and all other rights incidental to this position unimpaired, and with pay for whatever wages were lost by him as a result of the unjust and unreasonable action.

**OPINION OF BOARD:** Claimant James L. Wood, employed by Carrier for seven years, served as Waiter-in-Charge on Train No. 7 in July 1964. This train operated between Denver, Colorado and Dallas, Texas. The dining-lounge car, however, was cut out at Wichita Falls.

On July 14, 1964 Claimant refused service to a woman who, with four children, had entered the dining car after the train had left Vernon, Texas. About two weeks later, on July 27, Carrier's Vice President J. W. Terrill received a letter from a Louise Price stating:

"This letter is to inform you of a very unhappy experience on one of your trains.

July 14, Tuesday, I took my two children 9, 7, and my nephews 15, 13, to Dallas. One of the main attractions for the children was the train ride, (their very first) and eating in the diner.

We arrived in Vernon to catch the 12:13 train and to eat lunch in Vernon if we couldn't have lunch on the train.

We were told by the train agent in Vernon that while they took the diner off at Wichita Falls, we could eat by going straight to the diner after they took our tickets. This is what we did. Upon our arrival in the diner, the waiter-in-charge, who was named Jim Wood, descended on us bellowing a lot of nonsense about we couldn't eat, the diner was closed. All I said was they told us we could in Vernon, and he yelled back, with everyone in the diner staring, some more stuff about peoples rights.

Mr. Terrill, it's very hard to repeat when he did say. He was as near incoherent as anyone I've seen.

So I turned and walked away meeting a conductor, Ray Anderson, who was very nice, but couldn't help us.

Mr. Terrill, the disappointed looks on my children's faces, made me sick.

As a result, we didn't have a meal until we reached our destination at Dallas and let me tell you we were a hungry bunch.

The train number was 7, from Vernon-Dallas, July 14.

Sincerely,

Louise Price

Mr. Anderson heard the 'conversation.' May I add I'd never been talked to so rudely or been quite so perplexed and embarrassed. Frankly, I didn't know what to do.

Thank You"

On August 4, 1964 Carrier notified Wood:

"Attend investigation in the Veterans' Club Room, Passenger Station Building, Wichita Falls, Texas at 1:00 P.M. August 6, 1964 for the purpose of ascertaining the facts and determining your responsibility in connection with your alleged refusal to serve passengers who entered dining car on Train No. 7 shortly after that train departed Vernon, Texas at about 12:22 P.M. on July 14, 1964. Arrange for representative and/or witnesses if desired.

Please acknowledge receipt by affixing your signature in the space provided on copy of this letter.

You are being withheld from service pending decision on this investigation."

A hearing was conducted on August 6. On August 19 Carrier dismissed Wood from service.

“ . . . for your violation of special instructions contained in Paragraph 7, captioned ‘Meal Service’, of Notice No. 234, dated April 13, 1964, issued by the Burlington Lines Dining Car Department, and for your non-compliance with ‘General Rules and Standard of Service Manual For The Guidance Of All Employees Of The Dining Car Department,’ particularly Rules ‘I’ and ‘R,’ resulting from your failure to make the comfort and service to guests of first importance in the discharge of duty and for your further failure to maintain self-control and restraint, to be courteous, orderly and quiet and practice tact and diplomacy with patrons while employed as Waiter-in-Charge of Dining Car enroute Wichita Falls, Texas, on Train No. 7, July 17, 1964, thus constituting conduct which subjected the railroad to criticism and loss of good will, . . . ”

At the outset Petitioner contends that the claim should be sustained if for no other reason than Carrier failed to give Mr. Wood proper notice in accordance with Rule 29. Paragraph (c) of that rule provides:

“Such employe shall be apprised in writing prior to the investigation of the charges preferred against him and be present at such investigation and may be represented by two or less duly authorized representatives of the Organization . . . ”

Here, Petitioner argues, the Notice of Investigation contained no charge, but merely stated that the investigation was for the “purpose of ascertaining the facts and determining your responsibility in connection with your alleged refusal to serve passengers who entered dining car on Train No. 7 shortly after that train departed Vernon, Texas at about 12:22 P.M. on July 14, 1964.”

It is true that Carrier had in its possession the letter from Mrs. Price and failed to divulge its contents in the August 4 Notice. But the incident had occurred only three weeks before and it is not unreasonable to believe that Woods was aware of it. Moreover, particulars were given: The date, time and place of the occurrence and the alleged misconduct (refusal to serve passengers). Additionally, if he was unaware of or in doubt about the nature of the infraction he was being charged with, he or his representative had some obligation to raise such question either before or at the investigation. The record, however, reveals that no objection was made then about Carrier’s Notice nor, for that matter, was a protest voiced even during the handling of the dispute on the property or in the Claim itself.

Under these circumstances Petitioner’s contention with respect to Rule 29 (c) is rejected. It should be noted, nevertheless, that Carrier’s Notice made no specific allegation concerning rules violations. Certainly it would be improper, under the guise of a Rule 29 investigation, to engage in a “fishing expedition” or to elicit evidence of possible infractions not directly involved in the charges as set forth in the original Notice. If such procedure were permitted, the basic purpose of Rule 29’s due process provisions would be undermined.

In the present case, Carrier’s Notice set the framework for the ensuing investigation. The question to be determined, then, is whether there was a “refusal to serve passengers” on the specified occasion and, if so, whether in light of all the circumstances the penalty of dismissal was unreasonable or arbitrary. In this regard Rule “R” of the General Rules and Standard of Service Manual for the Guidance of All Employees of The Dining Car Department is relevant:

"Employees who . . . conduct themselves in such a manner . . . that will subject the railroad to criticism and loss of good will, will not be retained in the service."

The record of the investigation reveals these facts: (1) On July 14, 1964 Claimant Wood made the last call for lunch at Chillicothe, the station before Vernon (they are about 18 minutes traveling-time apart); (2) Mrs. Price and four children boarded the train at Vernon at 12:22 P.M. (the train was 9 minutes late that day); (3) Mrs. Price and the children entered the dining car between 5 and 10 minutes later; (4) ten or more persons were being served at the time and there were no tables for five available; (5) Wood had already started closing the diner in preparation for its being cut out at Wichita Falls; (6) Wood refused to serve the Price group and Conductor Anderson became involved in the incident; (7) Train No. 7 arrived at Wichita Falls at 1:10 P.M.

Mrs. Price's letter of complaint contains her version of the incident (she was not called as a witness). Mr. Wood testified, in substance, that a woman with four children asked if she could have lunch. He replied, "Madam, the diner is closed." He had a tray of dishes in his hand. She said she had been told the dining room was open. He repeated his statement. He then noticed Conductor Anderson standing behind her, and said, "Ray, you explain to her. Somebody should write this up." In response to questions at the investigation, Mr. Wood asserted that he had exercised courtesy, self-control, restraint, tact, and diplomacy, and did not have any argument with the patron. He was orderly and quiet and not rude. He did not raise his voice.

Conductor Ray Anderson testified that after taking tickets he entered the diner and head a very loud voice all through the hallway (a voice he later identified as that of Wood). Passenger Price turned to him and said, "that man is the most obnoxious person that I have ever encountered" and she was scared of that man. He tried, unsuccessfully, to console her. While they were talking, Wood yelled to him, "Why don't you tell her the diner is cut out at Wichita Falls and it is closed now." Anderson thereupon told the passenger that the diner was cut off at Wichita Falls.

This testimony raises two questions: one concerns the propriety of Wood's action in denying service to the Price group, the other relates to the manner in which Wood handled the situation. The essence of Price's complaint with respect to Wood's behavior was that he "bellowed," he "yelled back" and he talked "rudely." While she affirmed that Conductor Anderson heard the "conversation," Anderson did not testify as to anything Claimant may have said to Price or to any rudeness on Wood's part. He did confirm that Wood spoke very loudly to the passenger and yelled at him (Anderson). Despite Claimant's denial, Carrier was not unreasonable in crediting Anderson's testimony on the question of talking loudly.

What, then, of Wood's refusal to service the party? Notice No. 234 to Waiters-in-Charge on Trains No. 7-8, dated April 13, 1964, stated in relevant part:

#### "MEAL SERVICE

Early lunch must be called to complete service by arrival time at both Pueblo and Wichita Falls. Last call on No. 7 not to be made until after departure Vernon."

On July 14, Wood admits, he made the last call after departure Chilli-cothe instead of Vernon. This impropriety, however (assuming that it was one), did not prevent Mrs. Price from seeking service. The question still remains, therefore, whether Wood improperly denied her group that service. The record on this score provides convincing testimony that Wood did not act unreasonably:

1. The Waiter-in-Charge has responsibility for exercising judgment and making decisions with respect to the performance of his duties. One of the paramount considerations in serving passengers is that they not be rushed while eating or denied time in which to complete their meals.

2. The Waiter-in-Charge had a responsibility to insure that meal service was completed "by arrival time at . . . Wichita Falls." The critical importance of this requirement had been emphasized to Wood by his Superintendent on an earlier occasion when Train No. 7 was held for 35 minutes at Wichita Falls to complete lunch service.

3. On July 14, when the Price group entered the dining car, there were between 38 and 43 minutes left before arrival at Wichita Falls. According to Supervisor Cobel, it takes between 25 and 40 minutes to serve a passenger. Other things being equal, Wood might just have been able to serve the five new passengers before arrival time. But, when the Price group arrived, there were orders to be completed for passengers already in the diner, and there were other chores to be completed preparatory to arrival, in accordance with requirements specified in Notice No. 234.

Faced with a choice between refusing service or serving five more passengers, with the possible—if not probable—consequence that either the service could not be completed or the Train held up, Wood's decision cannot be deemed unreasonable. Certainly it did not constitute an act of defiance against authority or a deliberate flouting of rules. At the very most it represented poor judgment.

4. Conductor Anderson, who was in charge of the train and, presumably, aware of the schedule as well as concerned with passengers' welfare, made no effort whatsoever to persuade Wood that the Price group could or should have been served. To the contrary, he supported Wood's position.

It is true that Wood's refusal to serve the Price group subjected the railroad to "criticism" and possible "loss of good will" (Rule R). But actions which may lead to this potential result cannot be considered in a vacuum. Had the request for service on July 14 been made at one P.M., for example, there is no guarantee that the disappointed passenger would not have submitted a complaint. Yet Carrier, surely, would not have then criticized the Waiter-in-Charge for declining service at that hour. As it turned out, the request was made between 12:27 and 12:32 and, in light of all the circumstances, it cannot be found that a declination of service then was so unreasonable as to constitute an improper action under Rule "R."

For the reasons set forth above it must be concluded that Carrier's action in dismissing Wood was arbitrary and unjust and constituted an abuse of discretion. Some discipline, however, was warranted, and the award shall provide for a suspension, without pay, for thirty days.

**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 Employees involved in this dispute are respectively Carrier and Employees 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 was violated.

#### AWARD

Claim that James L. Wood was unjustly discharged is sustained. His dismissal is revoked and he shall be returned to service with all contractual rights unimpaired and be compensated for wage loss for the period since September 3, 1964 in accordance with provisions of Rule 29 (f). The period between August 4 and September 3, 1964 shall be considered as a disciplinary suspension.

NATIONAL RAILROAD ADJUSTMENT BOARD  
By Order of THIRD DIVISION

ATTEST: S. H. Schulty  
Executive Secretary

Dated at Chicago, Illinois, this 10th day of December 1965.