

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

(Supplemental)

Don Hamilton, Referee

PARTIES TO DISPUTE:

**BROTHERHOOD OF RAILWAY AND STEAMSHIP CLERKS,
FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYES**

WABASH RAILROAD COMPANY

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood (GL-5594) that:

(1) The Carrier's action was arbitrary, capricious, unfair and unjust, when on October 3, 1963, it ordered Mr. James Leo assigned to Check Clerk position at the Chicago, Illinois freight house to vacate his assignment and required him to cross seniority districts to stow freight, and when Mr. Leo informed his supervising foreman, Mr. R. Malmloff, that he was not feeling well enough to handle freight, he (Leo) was sent home for 15 days without pay.

(2) Mr. James Leo be paid for all time lost beginning with October 4 through October 18, 1963.

(3) Mr. James Leo's records be cleared of all charges.

EMPLOYEES' STATEMENT OF FACTS: Mr. James Leo entered service with the Wabash Railroad Company at the Chicago, Illinois freight house as a freight handler on October 31, 1933 and was promoted to the Clerks' roster on December 9, 1935.

Prior to the date the charges were brought against Mr. James Leo on October 4, 1963, we have no record of, nor is there any mention in this investigation held in the Superintendent's office on October 8, 1963, of any former charges of any kind, or any disciplinary action ever being assessed against him in the over thirty (30) years of faithful service with the carrier.

Mr. James Leo used his seniority, fitness and ability to bid in and was assigned to the check clerk position, with hours of assignment 7:00 A. M. to 3:30 P. M., one-half hour off for lunch, Monday through Friday, rest days Saturday and Sunday. This is in full compliance with the Schedule for Clerks and Freight Handlers Agreement, effective May 1, 1953.

There can be no doubt as between Mr. James Leo and both his foreman and supervisor as to the meaning and understanding of the conversations between them.

As he testified, James Leo was not sick; neither did he desire or request leave, but objected (beyond tolerable limits) to performing work as directed to the point of insubordination.

In the circumstances, the discipline assessed, fifteen (15) days' suspension, was quite lenient, and I must decline request that it be set aside.

Yours truly,

/s/ J. F. Nellis
Vice President and
General Manager"

(Exhibits not reproduced.)

OPINION OF BOARD: Claimant herein is seeking a reversal of Carrier's action whereby he was suspended for 15 days.

The first error cited by the Organization is that the Claimant was charged with leaving his place of duty without permission but was disciplined for insubordination, thereby assessing punishment for an offense which Claimant did not have an opportunity to defend against, all of which resulted in denial of due process of law to the Claimant.

The letter which notified Claimant of the investigation is as follows:

"WABASH RAILROAD COMPANY

525 West 47th Street

Chicago, Illinois

October 4, 1963

Mr. James Leo
7949 S. Talman Avenue
Chicago, Illinois

Dear Sir:

Please arrange to report at my office, 525 W. 47th Street, Chicago, Illinois, at 10:00 A.M. Central Daylight Time, October 8, 1963, for an investigation to determine the facts and fix responsibility, including yours, if any, in connection with your leaving your place of duty without permission approximately 7:45 A.M., Central Daylight Time, October 3.

If you desire to have a representative present at this investigation, please so arrange.

You are being held out of service pending the investigation of the matter described above.

Yours truly,

/s/ J. P. Landis
J. P. Landis
Supervisor,
47th Street Transfer"

The letter which advised Claimant of his suspension is as follows:

"WABASH RAILROAD COMPANY

2543 West Columbus Avenue

Chicago 29, Illinois

October 14, 1963
Appl. 706

Mr. James Leo
7949 S. Talman Avenue
Chicago, Illinois

Dear Sir:

Referring to investigation held in Superintendent's Office on October 8, 1963.

This investigation developed that you did not do as instructed by your foreman and as you were also instructed by Supervisor Landis.

For your failure to obey instructions of your supervisory officers, and leaving your place of duty without permission you are hereby suspended from the service of the Wabash Railroad Company for a period of fifteen (15) days, October 4th through October 18th, 1963, inclusive.

Yours truly,

/s/ J. T. Ormond
Superintendent"

We are of the opinion that the charge was sufficiently distinct to advise Claimant so that he could properly prepare his defense.

The transcript of the hearing clearly supports the finding of insubordination, which may well be considered a lesser included offense of the formal charge. Carrier may even rely upon the doctrine of aider by evidence to support the findings of the investigation.

In any event, the record does not present a denial of due process of law as far as this Claimant's rights are concerned.

The Organization further argues that Carrier's action was arbitrary, capricious, unfair and unjust. We believe that the transcript contains sufficient evidence to substantiate the findings made by the Carrier. Therefore, we will cite our own language of Award 13117 and deny the Organization's attempt to reverse the action of the Carrier herein.

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 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 not violated.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 22nd day of June 1966.