

Award No. 6056
Docket No. CL-6152

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Thomas C. Begley, Referee

PARTIES TO DISPUTE:

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

ATLANTIC COAST LINE RAILROAD COMPANY

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood that:

1. The Agreement governing hours of service and working conditions between the parties was violated by the Carrier at Wilmington, N. C., on December 15, 1951, in the treatment accorded Clerk S. T. Glover, Jr., in dismissing him from the service, and

2. That employe S. T. Glover, Jr., shall be restored to service with all rights unimpaired and compensated for wage loss from December 15, 1951, at the rate of pay of position he occupied at the time of his dismissal, or any position which might come open after that date to which his seniority would have entitled him had he not been removed from service and continue until Mr. Glover is restored to service and allowed to begin such service.

OPINION OF BOARD: This is a discipline case. The Claimant Clerk S. T. Glover, Jr., was employed by the Carrier in the Auditor of Freight Receipts Office, Wilmington, N. C.

By letter dated December 3, 1951, the Claimant was notified to appear for investigation at 3:30 P. M., Friday, December 7, 1951, at the office of the Auditor of Freight Receipts. The letter reads as follows:

"Mr. S. T. Glover, Jr.
Office

"Dear Sir:

"Please arrange to report to my office at 3:30 P. M. Friday, December 7, 1951, for investigation of the following:

"(1) Entering Atlantic Coast Line General Office Building 'A' after office hours on October 3, 1951, accompanied by outsiders, for purposes detrimental to this Company and not in connection with your employment.

"(2) Making false statements and concealing facts concerning matters under investigation, in that you reported to me, and to

my Assistants, Messrs. W. E. Jenkins and J. E. Davis, and later to Mr. Jenkins, individually, that you had not in any way participated or aided in the making of plaster casts of a portion of the circular stairway in General Office Building 'A' on the night of October 3, 1951.

Yours truly,

/s/ McC. B. Wilson
Auditor Freight Receipts."

On December 4, 1951, Claimant replied to Wilson, the Auditor of Freight Receipts as follows:

"Mr. McC. B. Wilson
Auditor of Freight Receipts
Atlantic Coast Line R.R. Co.

"Dear Sir:

"This will acknowledge receipt of copy of your letter dated December 3, 1951, file 94136 which was delivered to me by Mr. W. E. Jenkins, Asst. Auditor Freight Receipts, at 9:20 A. M., December 4, 1951, in his office.

"I wish to refer you to Rule 28 of the Clerks Agreement dated July 16, 1951, reading in part as follows:

'He shall upon request, have not to exceed five (5) calendar days advance notice of such investigation and be apprised in writing of the charges against him.'

"I respectfully request that you comply with Rule 28, allowing me the required five (5) days advanced notice from the time charges are preferred and that you clarify the statement made in copy of your letter in items 1 & 2, and specifically that portion of item one (1) reading as follows:

'for purposes detrimental to this company.'

"After carefully reading the copy of your letter of December 3, 1951, I fail to find therein where you have preferred any charges against me. Therefore, I cannot prepare myself for an investigation unless specific charges in detail are preferred as outlined in Rule 28 of the Clerks' agreement.

Yours truly,

/s/ S. T. Glover, Jr.

CC: Mr. L. L. Wooten

Mr. B. B. Phillips, Jr.

Mr. J. E. Hearn, Jr."

On December 5 Wilson wrote to Claimant as follows:

"Mr. S. T. Glover, Jr.
Office

"Dear Sir:

"Replying to your letter dated December 4 which was in answer to my letter of December 3 instructing that you report to my office at 3:30 P. M., Friday, December 7, 1951, for investigation of charges as outlined therein:

"Inasmuch as you request five days advance notice of such investigation, this is to advise you that the investigation will be held in my office at 2:30 P. M., Monday, December 10, 1951. Please arrange to be present.

"The charges which have been preferred against you are enumerated in my letter of December 3 and it is not felt the charges require explanation or clarification.

Yours truly,

/s/ McC. B. Wilson
Auditor Freight Receipts."

On December 6 the Claimant wrote to Wilson as follows:

"Mr. McC. B. Wilson
Auditor Freight Receipts
Atlantic Coast Line R.R. Co.
Wilmington, N. C.

"Dear Mr. Wilson:

"I have your letter of December 5, 1951, file 94136, which is in reply to my letter of December 4, 1951, and note that you have failed to comply with my request as stated therein.

"Will you kindly set out in detail, exactly what you mean, that portion of your statement in item one (1) your letter of December 3, 1951, which reads as follows:

'for purposes detrimental to this company.'

"This statement, neither defines the 'purposes' nor does it limit them in number, but merely states: 'for purposes detrimental to this company'.

"Unless this matter is clarified I will be unable to answer this statement.

"Your immediate reply is expected.

Yours truly,

/s/ S. T. Glover, Jr."

On December 7 Wilson wrote to Claimant as follows:

"Mr. S. T. Glover,
Office.

"Dear Sir:

"Replying further to your letter of December 4 and your letter of December 6, in which you request that I set out in detail exactly what is meant by that portion of Item 1 in my letter of December 3, 1951, which refers to 'purposes detrimental to this Company.'

"In order that you may understand the nature of the charges made against you, I now wish to advise you that there are in fact two separate charges contained in Item 1 of the letter to which you refer:

'One, you are charged with entering the Atlantic Coast Line General Office Building "A" after office hours on

October 3, 1951 accompanied by an outsider for purposes not in connection with your employment.

"Two, you are charged with making that entry not only for purposes not in connection with your employment, but for purposes in fact detrimental to this Company. It is alleged that you participated in arranging for or in the making of the plaster cast of one of the steps contained in the spiral staircase connecting the third and fourth floors of Building "A", and/or that you attempted to smooth out that portion of the cast showing the treads of the step in order that the case would represent the step to be smoother than it was in fact, with the further idea that this plaster cast would be introduced in evidence in a damage suit against the Company to show that the step was in an unsafe condition.'

"With this additional explanation it appears to me that there can be no question in your mind about the nature of the charges made against you. However, if there is any further question in your mind about the nature of the charges, I suggest that you appear at the investigation, listen to the evidence, and, if necessary, ask for recess in order to present your defense.

Yours truly,

/s/ McC. B. Wilson
Auditor Freight Receipts."

On December 10 the Claimant wrote to Wilson as follows:

"Mr. McC. B. Wilson
Auditor Freight Receipts
Atlantic Coast Line R.R. Co.
Office.

"Dear Sir:

"In reply to your letter of December 7, 1951 file 94136, this will advise that I will appear in your office at 2:30 P.M., December 10, 1951 as requested in your letter of December 5, 1951 for investigation of charges against me outlined in your letter of December 3, 1951.

"I will have as my representatives Mr. B. B. Phillips, Jr., and Mr. J. E. Hearn, Jr., also a public stenographer to record the proceedings of this investigation.

"Request a desk be placed in your office for the convenience of my stenographer and my representatives.

Yours truly,

/s/ S. T. Glover, Jr.

CC: Mr. L. L. Wooten

Mr. B. B. Phillips, Jr.

Mr. J. E. Hearn, Jr."

The investigation was held on December 10, 1951, at 2:30 P.M. Upon completion of the investigation the Claimant was notified by letter on December 15 by Wilson that he was dismissed from service as of December 15, 1951, at 5:30 P.M.

The Employes contend that the charge is not sustained by the evidence; that the Carrier acted in an arbitrary manner and abused its sound discretion in dismissing Claimant from service; that no rule had been violated.

The claim asks that the Claimant be restored to service with all rights unimpaired and compensated for wage loss from December 15, 1951, at the rate of pay of position he occupied at the time of dismissal.

The Carrier complied with the procedural requirements of the Agreement leading up to the hearing.

Claimant, as of October 2, 1951, was on leave of absence as he was under subpoena to appear in Court, said leave to run until released from subpoena by the Court.

After a careful reading of the record, the evidence shows that (1) a Dr. Ronner had told certain employes of the Carrier that the Claimant on October 3, 1951, helped him to make a plaster cast of the steps of a spiral stairway and that the Claimant attempted to smooth the plaster casts after they had been taken, (2) that Employee Phillips (who was acting as Claimant's representative at the investigation) had told a Mr. Johnson, Assistant General Chief Clerk, on October 22, 1951 but not reported to Wilson by Johnson until November 19, 1951, that Glover was the man that was at the office on the night of October 3, 1951.

Dr. Ronner was not present at the investigation; he had refused to give a statement to the Carrier or appear as a witness although he had promised the Carrier that if he did not appear he would give a statement.

Phillips would not answer any questions put to him by the Carrier at the investigation.

The Claimant did not offer any testimony at the investigation but had told his superiors at a meeting held at the property, that he did not have anything to do with the making of the casts, that he returned to the office for a ball point pen that he left on his desk, that on coming back from the office he was asked to help take the cast to the car which he refused to do, that he was a victim of circumstances.

Phillips on December 17, 1951, gave a statement which reads as follows:

"AFFIDAVIT

"B. B. PHILLIPS, JR., being duly sworn, deposes and says: That during the investigation held at 2:30 o'clock P. M., on December 10, 1951, in the office of Mr. MacC. B. Wilson, of charge brought against S. T. Glover, Jr., it was stated by N. M. Johnson that your affiant told Mr. Johnson that 'Glover was the man up here' during the making of the plastic cast on the night of October 3, 1951; that this affiant has not at any time made any such statement to Mr. N. M. Johnson, and furthermore, to the best of affiant's knowledge, information and belief Mr. S. T. Glover, Jr., was not present at that time.

/s/ B. B. Phillips, Jr.

"Subscribed and sworn to before me
this 17th day of December, 1951.

/s/ Davie G. Duffy
Notary Public.

My commission expires Sept. 3, 1952."

Dr. Ronner gave a statement on December 18 which reads as follows:

"I, Roger Talmadge Ronner, have read the stenographic transcript of the charges against S. T. Glover, Jr., which investigation took place at 2:30 P. M., December 10th, 1951, in the office of Mr. MacC. B. Wilson, and have noted that M. M. DesChamps and W. E. Jenkins stated at said investigation that I hold them that on the night of October 3rd, 1951, when I made a plaster cast of the stair-step in question, S. T. Glover, Jr. and B. B. Phillips, Jr., accompanied me inside the building and pointed out the step in question, and that Glover visited me at various times while the cast was being made, and that after the cast had been completed, Glover attempted to smooth it out with his hand.

"I did make such statements to Messrs. DesChamps and Jenkins, but on further consideration I am convinced that the statements I made to DesChamps and Jenkins are not correct, and that as a matter of fact I was not accompanied inside the building by either Glover or Phillips, nor did Glover visit me at various times during the making of the cast, nor did Glover at any time attempt to smooth out the cast.

"I testified at the trial, and now solemnly reiterate and reaffirm that the plaster cast made by me and introduced into evidence at the trial of Mintz v. A. C. L. was as accurate a replica of the step in question as could be made by human hands.

"This 18th day of December, 1951.

/s/ R. T. Ronner

"Witness:

/s/ Virginia Bland

/s/ Betty Jean Overby."

Statements and Affidavits were offered by the Carrier after the investigation by M. M. DesChamps, Chief of Property Protection, signed February 12, 1952, by W. E. Jenkins, Assistant Auditor Freight Receipts, signed February 12, 1952, by Dr. Kennon C. Walden, Chief Surgeon, signed February 11, 1952.

None of the statements or affidavits of the Employees or Carrier should be taken into consideration in the matter before us here; all of the Carrier's employees were available to be heard at the investigation and also the Claimant's witnesses were available to be heard; Phillips should have offered testimony and the Claimant should have told his part of what occurred on the night of October 3, 1951; the representatives of the Claimant should not have concluded the investigation after the Carrier had rested its case, even though they considered the evidence as hearsay. A continuance should have been demanded and granted in order to obtain the testimony of Dr. Ronner; if not granted, then that question properly comes before this Board.

The question to be decided after reading all the testimony is, did this Claimant violate any rule? We fail to find that he did, therefore, in absence of such a showing by the Carrier we hold that the Carrier acted in an arbitrary manner and without sufficient evidence and the discipline is unwarranted. The claim should be sustained.

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 Carrier's assessment of discipline imposed was arbitrary and without just cause.

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: (Sgd.) A. Ivan Tummon
Secretary

Dated at Chicago, Illinois, this 26th day of January, 1953.

DISSENT TO AWARD 6056, DOCKET CL-6152

That Claimant Glover was guilty of the charges preferred against him by the Carrier is supported by the following facts of record:

Claimant was notified in writing of the charges preferred against him. He was instructed to appear for investigation. He appeared at the investigation and had with him representatives of his own choice. Among his representatives was B. B. Phillips, District Chairman of the Organization.

The investigation was conducted December 10, 1951. Claimant refused to answer questions or to testify in his own behalf.

The first information Carrier had that Glover was implicated in the case was when Phillips made a statement to Assistant General Chief Clerk Johnson to the effect that the Company had nothing against him (Phillips) since Glover was actually the man who was present in the building and who had arranged for taking of photographs and making of the cast. The Carrier questioned claimant with regard thereto, and claimant denied any connection therewith. This denial caused the Carrier to have its Special Service Department investigate. As a result thereof, the case was developed against claimant.

During the course of the investigation, Phillips was asked the direct question: "Mr. Phillips, do you deny the correctness of the statement that Mr. Johnson made?" (Mr. Johnson was present at the investigation of claimant and testified.) Phillips refused to answer the question directed to him.

The affidavit of Phillips denying that he made the statement to Johnson and the statement of Dr. Ronner were made several days after the investigation had been completed. Incidentally, this same Phillips was dismissed from the service of the Carrier as the result of an investigation of a charge similar to that made against claimant.

The action of claimant and representative Phillips at the investigation indicated the guilt of claimant of the charges preferred against him.

For the above reasons, we dissent.

/s/ C. P. Dugan

/s/ J. E. Kemp

/s/ R. M. Butler

/s/ W. H. Castle

/s/ E. T. Horsley