

Award No. 6116

Docket No. CL-6063

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Fred W. Messmore, 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 October 31, 1951, in the treatment accorded Clerk B. B. Phillips, Jr. in dismissing him from service, and
2. That employe B. B. Phillips, Jr. shall be restored to service with all rights unimpaired and compensated for wage loss sustained beginning November 1, 1951, and subsequent thereto until restored to service.

OPINION OF BOARD: This is a discipline case. It appears from the record the Claimant, B. B. Phillips, for the past seven years has been employed by the Carrier in its General Offices as a Clerk in the Office of the Auditor of Freight Receipts, Wilmington, North Carolina.

By letter dated October 18, 1951, Claimant was notified to appear for investigation Tuesday, October 23, at 10:00 A. M., to answer to the following charges: "Entering A. C. L. General Office Building "A" after office hours on October 3, 1951, accompanied by outsiders for purposes not connected with your employment with this Company."

The Claimant appeared with his representatives at the appointed hour. Some difficulty arose with respect to the taking of evidence at the hearing which is not material to a determination of this claim. As a consequence the hearing was continued to 4:00 o'clock the same afternoon, and proceeded at that hour. Before the investigation the Claimant was informed of the charge against him.

Upon completion of the investigation the Claimant was dismissed from service, to become effective at the close of business on October 31, 1951.

The contention of the Employees briefly summarized is as follows:

1. That the charge is not sustained by the evidence.
2. That the Carrier acted in an arbitrary manner and abused its sound discretion in dismissing Claimant from service.
3. No rule of the current Agreement has been violated by Claimant.

The Claim is a request to this Board to order Mr. Phillips' reinstatement to service with seniority rights, pass privileges, and all other rights restored, and that he be paid for all time lost at the rate of the position he held at the time of his dismissal.

The record shows the Carrier properly complied with the procedural requirements leading up to the hearing.

The evidence is not in substantial dispute. We set forth such part thereof deemed necessary in arriving at a decision in this case.

It appears, for at least 30 years, the building in question has remained unlocked at least until midnight, or after. During this time it is not unusual for employees to return to their desks after regular working hours during the week, or on Saturdays, Sundays, and holidays, sometimes to complete unfinished work, but in most cases to study records, review correspondence or otherwise equip themselves for greater responsibility leading to promotion. The Carrier states it has never restricted the activities of its employees when they occupy the building for such purposes. The building was usually locked up at midnight after the cleaning was finished, and reopened in the morning at the appropriate hour for business.

On September 28, 1951, Claimant addressed a communication to his superior, as follows: "If agreeable to you I will be absent from office from 8:30 A.M., 10/2-51, until released by the court account under subpoena of the court."

The record shows that Charlie Hart, the janitor and night-watchman of the building was on duty the night of October 3, 1951. He was in the basement of the building at about 8:30 P.M. The Claimant had entered the building and was on the first floor. He called to Hart two or three times to come up. Hart responded to the call, and the Claimant introduced him to a Mr. Knight, professional photographer, and another gentleman who was with Knight. They informed Hart they wanted to take some pictures of a spiral staircase in the building. They proceeded to the spiral staircase. The Claimant wanted Hart to unlock the door. It was unlocked and then pulled open. They went to the top of the third floor. Arrangements were made for taking the pictures. Hart stayed about 15 minutes until the pictures were taken. He testified that four or five pictures were taken. Phillips left the building with the two men.

The Claimant testified in substance: "I asked Mr. Hart who was in charge of the building, for permission to go up there. I called him from the basement and introduced him to the people that were going to take the pictures. He accompanied me up there to see if the door was open. I thought that was all the authority I needed. He was the man here at the time." Phillips agreed with Hart's testimony as heretofore summarized.

Phillips testified further that he told Hart what they wanted to do, and after they went up to the third floor. He testified: "I did not take the pictures. I accompanied the person that did take them, but I didn't even hold the camera or any facility with it."

Mr. Wilson, Auditor of Freight Receipts, stated at the investigation: "The offense with which Mr. Phillips is charged is not recognized in the Revised Agreement between the parties effective July 16, 1951. However, his action on that occasion is regarded as an unwarranted trespass on property of the Company."

On a few occasions during office hours the Company, as a courtesy, permitted employes, their friends, and others, to view parades or other spectacles from the windows of the building.

The objection is not Phillips' presence in the building at that time, but was to the fact that he was accompanied by outsiders not connected with his employment.

It appears from the record that the Claimant is District Chairman of the Organization representing the employes in the General Office. An employe of the Company was involved in a damage suit with the Company, and the pictures taken of the circular staircase might be used as evidence in the case. The history of this litigation is very vague in the record, and likewise the use made of the pictures if admitted in evidence, and there is no showing that they were so admitted. We find nothing prejudicial to the Company's substantial rights in this respect.

We deem it of little importance in the state of the record before us to discuss the taking of the pictures to be used as evidence. In many jurisdictions it is not uncommon to have pictures taken of certain objects, structures, or scenes without an order of court.

As to the admissibility of the same in evidence, that is a different matter. In this case we are not informed as to whether or not the pictures were admitted as evidence.

The dominant factor in this case is, did the Claimant violate any rule of the current Agreement? It is admitted that he did not. In the absence of such a showing, no other course is left open to this Board than to hold that the Carrier acted in an arbitrary manner in exacting the discipline as it did in the instant case. It is not our function to affirm or disagree with the Claimant's action in this case, and our opinion would therefore, under the circumstances, be of little value. Citation of authority becomes unnecessary under the circumstances of this case. However, where it is shown the discipline is unwarranted, or the Carrier acted arbitrarily without sufficient evidence or just cause, then the Carrier's exaction of discipline cannot stand. See Awards 4325, 5543, 5787.

After a careful consideration of the record in this case the Board concludes that the Carrier so acted here. The claim should be sustained.

We hold that Claimant Phillips be restored to his position with seniority rights unimpaired, and with pay for time lost, if any.

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

AWARD

Claim sustained in accordance with the Opinion.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A. Ivan Tummon
Secretary

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

DISSENT TO AWARD 6116, DOCKET CL-6063

This is a companion case to Docket CL-6152, Award 6056.

The offense for which Claimant in Award 6056 was dismissed was committed on the same night and at approximately the same time and same place as the offense for which Claimant in the instant case was dismissed.

The Referee in this case, during the course of presentation of same, was made aware of the pendency of the dispute in Docket CL-6152, was cognizant of the facts, and was furnished with a copy of Award 6056 and the dissent thereto.

The dissent to Award 6056 is made a part of this dissent.

The actions of Claimant and his representatives in the instant case, in their effort to block the orderly procedure of the investigation under the Agreement rules, obviously prevented the Carrier from developing facts and indicate guilt.

While this Award states—

“The record shows the Carrier properly complied with the procedural requirements leading up to the investigation.”

the majority herein erroneously conclude that:

“The dominant factor in this case is, did the Claimant violate any rule of the current Agreement? * * * In the absence of such a showing, no other course is left open to this Board than to hold that the Carrier acted in an arbitrary manner in exacting the discipline as it did in the instant case.”

Of course the Agreement does not list the various offenses for which the Carrier may impose discipline; they are legion. The Award ignores the “Cardinal Rule of Conduct.” The Claimant herein was charged with improper conduct. The record of investigation contains substantial proof of conduct detrimental to the interests of his employer.

For the foregoing reasons this Award is in error and consequently we dissent.

/s/ C. P. Dugan

/s/ E. T. Horsley

/s/ W. H. Castle

/s/ R. M. Butler

/s/ J. E. Kemp