

The Second Division consisted of the regular members and in addition Referee Dana E. Eischen when award was rendered.

Parties to Dispute: (System Federation No. 21, Railway Employees'
(Department, A. F. of L. - C. I. O.
((Carmen)
(
(Southern Railway Company

Dispute: Claim of Employee:

1. That under the current Agreement, Carman D. E. Sparks, Chattanooga, Tennessee was unjustly dismissed from service on November 23, 1973.
2. That accordingly, the Carrier be ordered to return Carman D. E. Sparks to service with pay for all time lost beginning November 23, 1973 and with all rights due him under the Agreement unimpaired including health and welfare and retirement benefits.

Findings:

The Second Division of the Adjustment Board, upon the whole record and all the evidence, finds that:

The carrier or carriers and the employe or employes involved in this dispute are respectively carrier and employe within the meaning of the Railway Labor Act as approved June 21, 1934.

This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

Parties to said dispute were given due notice of hearing thereon.

There is no dispute regarding the factual context out of which this claim arose. Claimant entered Carrier's service as Carman Apprentice on December 21, 1952 at Spartanburg, South Carolina and he completed his apprenticeship in 1962 when he transferred to Chattanooga, Tennessee. So far as the record shows his service was satisfactory until November 23, 1973 when he was suspended from service by Carrier's Master Mechanic at Chattanooga, H. W. Sanders and served with a notice of investigation reading as follows:

"Dear Mr. Sparks:

I refer to preliminary investigation held on November 23, 1973, at which time you were suspended from service pending a formal investigation in connection with charge of conduct unbecoming an employee of Southern Railway Company; in particular, this charge involves your arrest by Hamilton County, Tennessee detectives, and preliminary hearing held on November

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Award No. 7119
Docket No. 6837
2-SOU-CM-'76

"14, 1973, in Hamilton County, Tennessee, General Sessions Court in connection with charges against you of receiving and concealing two stolen motorcycles and possession of 39 cartons of unstamped cigarets.

You are hereby notified to report for investigation in connection with the above charge, to be held in my office beginning at 2:00 PM, November 27, 1973.

You may bring any witnesses or accredited representatives you so desire.

Yours truly,

Master Mechanic"

On November 28, 1973 an investigation was conducted by Master Mechanic H. W. Sanders. By letter of December 24, 1973 the Local Chairman filed a claim in favor of Claimant reading, in pertinent part, as follows:

"Mr. Sanders, inasmuch as no one present at the hearing for Mr. Sparks could explain 'company policy' and the charges being vague and unusual in the sense that this is the first time that the Company has disciplined an employee before he was convicted in a court of law, I request that you restore Mr. Sparks to service with pay for all time, regular and overtime, lost and all seniority, vacation, retirement, and health and welfare benefits unimpaired by this suspension,

As of the date of this letter Mr. Sparks has not been indicted nor charged by the Hamilton County Grand Jury. If he is held out of service until the Grand Jury true bills or no bills him he stands to lose many months of pay. Since Mr. Sparks performance in carrying out his duties as a Carman are not in dispute we feel that he should be entitled to work his assignment until such time as the charges preferred by you are proved in a court of law.

Very truly yours,

/s/ JLK
Jack L. Kreis,
Local Chairman, No. 211"

Thereafter, H. W. Sanders reviewed the record which he had developed as hearing officer and, by letter dated January 1, 1974, H. W. Sanders informed Claimant as follows:

"Dear Mr. Sparks:

With reference to investigation conducted in my office November 28, 1973, wherein you were charged with conduct unbecoming an employee of Southern Railway Company, in particular, this charge involved with your arrest by Hamilton County, Tennessee detectives, and preliminary hearing held on November 14, 1973, in Hamilton County, Tennessee, General Sessions Court in connection with charges against you of receiving and concealing two stolen motorcycles and possession of 39 cartons of unstamped cigarettes.

A study of the evidence adduced in this investigation clearly shows you guilty of charges of conduct unbecoming an employee of Southern Railway.

You are dismissed from the service of Southern Railway, Please turn in any property of Southern Railway you may have in your possession.

Yours truly,

/s/ H. W. SANDERS
H. W. Sanders
Master Mechanic"

By subsequent letters dated January 26, 1974 and March 22, 1974, the General Chairman protested the dismissal on grounds inter alia that: 1) Claimant had not been indicted, tried or convicted, but merely arrested at the time of his dismissal and 2) Claimant had not received a fair and impartial investigation and had been dismissed unjustly because H. W. Sanders had acted as accuser, judge and jury. This appeal letter concluded as follows:

"Due to the fact that Mr. Sparks was dismissed without just and sufficient cause and was not given a fair and impartial investigation, we are requesting that he be restored to service with all rights unimpaired including retirement, health and welfare benefits beginning November 23, 1973 he be paid for all time lost including regular and overtime until he is restored to service.

We respectfully request that this claim be allowed as presented."

These appeals were denied at the highest level by letter dated July 19, 1974, which pointed out that investigation had revealed claimant had a prior arrest record and concluded as follows:

"As you have heretofore been advised, in view of the nature of the charges against Mr. Sparks, it was not to the carrier's best interest that he be continued in service. He was accordingly dismissed following an investigation afforded him in accordance with the provisions of Rule 34.

Claim being without basis and unsupported by the agreement, I confirm my previous declination of the same."

By letter of August 6, 1974 the General Chairman advised of his intent to appeal the denial of the instant claim and informed Carrier further as follows:

"You advise that your investigation developed that Mr. Sparks had previously been arrested on February 19, 1960, November 16, 1963, March 11, 1967, March 6, 1972 and January 13, 1973. All these incidents occurred while Mr. Sparks was away from Southern Railway property. At no time has he ever been charged with an unlawful act while on the property or while on duty.

Mr. Sparks had been employed since 1952. His first arrest was in 1960. He was not charged by the company in that incident or any of the other incidents you referred to. He remained in service over twelve (12) years after his first arrest and was a good employee. Then he was dismissed over a charge that he has not yet been convicted of. As was pointed out in conference on July 15, 1974, Mr. Sparks was not charged with his past record but was only charged with his arrest on November 14, 1973.

This is to advise that your decision is not acceptable and will be appealed.

Very truly yours,

E. L. Deal
General Chairman, Carmen"

Accordingly the claim comes to us for disposition.

Confining our review to the record developed on the property, as we must under the rules of the National Railroad Adjustment Board, we find that the issues joined are only two: 1) Whether Claimant was afforded a fair and impartial investigation and determination of guilt and 2) Whether mere arrest without indictment, trial, guilty plea or conviction is grounds for discharge

In this connection, we must deem irrelevant for our purposes, evidence adduced for the first time before our Board of certain ex post facto developments, to wit; 1) that the hearing and investigation procedures objected to in this case have been amended to avoid overlapping prosecutorial and judgemental roles and 2) that the criminal charge against Claimant terminated, some months after he was suspended, by a withdrawal of the motorcycle charges and a guilty plea on the unstamped cigarette charges; with a suspended 6 months sentence and court costs being imposed by the Hamilton County Court.

We have considered carefully the two basic issues joined on the property and conclude that we must concur with the position of the Organization that Claimant was not afforded a fair and impartial investigation. Carrier relies heavily upon our earlier denial Award 6824 wherein we declined to reinstate another of the employes at Chattanooga who had been dismissed for conduct unbecoming an employe. But review of that case points up essential distinctive features from our present case. Of primary importance, there was no evidence of prejudicial irregularities in the hearing procedure and, secondly, Carrier did not initiate disciplinary action until after trial and conviction. We deem establishment of these points to be sufficiently important to quote verbatim from Award 6824 as follows:

"The Organization insists that Claimant was denied an immediate investigation, in violation of Rule 34. A close reading of the entire record compels us to disagree. There was no need, let alone obligation, for disciplinary investigation and action upon the mere arrest of Claimant in August 1972, nor was there any basis at that time for a charge of conduct unbecoming an employe. Indeed, disciplinary action premised upon a bare arrest, before trial and conviction, would be of questionable validity under the just and sufficient cause requirement of Rule 43."

In any event, we find that we cannot reach the substantive issue herein because of fatal prejudicial error in the prosecution of the Carrier's charges against Claimant. Specifically we note that the unrefuted record establishes that Master Mechanic H. W. Sanders played the following roles in this case: 1) He was informed by anonymous phone call of Claimant's arrest on November 7, 1973; 2) He directed Carrier security forces to conduct a field investigation; 3) He conducted a preliminary investigation of Claimant on the basis of which he suspended Claimant on November 23, 1973; 4) He prepared formal charges against Claimant; 5) Over the objection of the Organization, he acted as Hearing Officer in the formal hearing and investigation of Claimant held in his office on November 28, 1973; 6) He reviewed the record of his own investigation of his own charges against Claimant and on January 2, 1974 determined that they were supported by the record and he imposed discipline of dismissal; 7) He denied the Organization's appeal of his decision and overruled its objection to his multiple roles. The foregoing facts are established by documents heretofore cited and by the following exchanges in the transcript of the investigation held November 28, 1973:

"Mr. Kreis to Mr. Gann

Q: Mr. Gann, where did you come across this information pertaining to Mr. Sparks?

A: I first received a phone call from Mr. Sanders that Mr. Sparks had been arrested. I then called Chief Detective Cornish down at the jail, and he advised me that he had and I went down to the jail and got a copy of the arrest sheet from Mr. Cornish's office."

* * *

"Mr. Kreis to Mr. Sanders

Q: Mr. Sanders, will you state for the record who is preferring the charges?

A: The charges are being preferred by Master Mechanic H. W. Sanders, myself, as a representative of Southern Railway, in execution of their policy established because of the nature of Southern Railway's business of transporting commodities in interstate commerce.

Mr. Summers to Mr. Sanders

Q: May I make an inquiry? This is Summers representing Mr. Sparks. As I understand, sir, you will make a determination and such decision in this hearing, is that right?

A: No. If you will let me get these preliminary procedures out of the way, then I will come back to you.

Q: All right."

* * *

"Q: If you are going to make a statement for the record at the conclusion of this you can make it.

A: Well, I'm not going to make it for the record, I want to to make, before we get into it, it is my understanding that you are hearing examiner and you are also the one who preferred the charges. Now I don't think that is a matter of what we call due process of law. We feel that, I don't think I misinterpret it, me saying it personally but I don't know you can't be fair and impartial, but I think when you put a person in position of being prosecutor and judge at the same time, that it brings about, it removes the air of

" impartiality completely. I hope you will take that in the light of nothing questioning your integrity. It is just a matter that you know when we have one judge that tries a judges case.

Q: Excuse me. You will have an opportunity to make a full statement when we conclude this. Again I am the presiding officer of this and as such the charges stand as they are and all I am interested in is getting a firm yes or no are the charges true or not.

A: I just wanted to see in the record that we are objecting to this type procedure, Mr. Sanders.

Q: You are on the record now, but nevertheless we are not in a Criminal Court. We just investigate the charges whether there is a violation of what has been established as Southern Railway policy."

* * *

"Mr. Sanders to Mr. Sparks

Q: Mr, Sparks, move your chair in a little closer and we will let you make a statement. Mr. Sparks, you have heard the charges read and the statements made. Will you make a statement as to these charges?

A: I was charged with possession of unstamped cigarettes, and possession of two stolen motorcycles. Charged on possession of two stolen motorcycles, this was thrown out of court. I haven't been proved innocent, I mean guilty. But until I am proven guilty I don't see any right that you have to fire me. That's my opinion, of course your is your way. Until the case comes up I don't see any grounds to fire me.

Q: Well, the charges in the letter that we read, and the charges against you, is why you were charged with conduct unbecoming a Southern Railway employee. Are the charges of Hamilton County correct?

A: The charges are correct.

Mr. Sanders to Mr. Kreis

Q: Any questions Mr. Kreis?

A: Yes sir.

"Mr. Kreis to Mr. Sparks

Q: Mr. Sparks, are these facts or allegations?

A: Allegations."

* * *

Q: Mr. Summers?

A: Yes sir. First of all I appreciate the opportunity of being here as counsel for Mr. Sparks, and I hope that anything that I've said, both on and off the record is being, be not misconstrued. Nothing I have said toward you is not to you as an individual but some procedure that we are have some, maybe difference of opinion on. I would also second Mr. Kreis' motion, or request that he be reinstated pending a final determination. I'm speaking not only as a lawyer, I'm ignorant of, but my daddy has worked for the railroad for about 35 years, and I have been around the railroads a little bit when I was a youngster, so I know a little, not much, but first of all, sir, and I think a procedure where you are placed in an unfortunate situation happening to prefer the charge and being judge also has put you in a very difficult situation, but you have assumed it and that, I'm saying this, that I think that you have to bring the charges then I think of course that someone else ought to be the hearing examiner. Thats just a matter of procedure."

* * *

Q: Mr. Summers, I ask you this if you heard this was it conducted a fair and impartial manner?"

* * *

"A: You did the best that you can, but you put a man in the position of having to be judge and prosecutor at the same time, he can't be completely fair and impartial as hard as he may try and I think you've tried. In my opinion it is an impossibility because I have been a prosecutor in the District Attorneys office and since then now I'm a judge too, but I have never tried to combine two of those positions at the same time."

* * *

"Q: Mr. Buckner?

"A: No sir, I don't think it is fair and impartial for the same reason as Mr. Kreis and Mr. Summers. I find it hard to believe that a person could fill office prosecutor and judge too, and also the fact is bring the charges you have refused to answer some of the questions."

We have reviewed the conflicting awards cited by the parties on the question of multiplicity of roles by Carrier officers in discipline cases. We continue to adhere to our earlier general opinions that Carrier combines such functions in one individual at its peril; that some minor overlapping of roles, while not to be encouraged, is not prima facie evidence without more of prejudicial procedural imperfections; that the greater the merging of roles the more compelling the influence of prejudgment or prejudice and, that each such case must turn on its own merits. In the instant case we find that H. W. Sanders did not actually testify against Claimant in the hearing but that is literally the only function he did not fulfill in this matter. He activated the investigation, preferred the charges, held the hearing, reviewed the record, assessed the discipline, and denied the appeal. In so doing he fulfilled roles of investigator, prosecutor, trial judge and appellate judge. The disinterested development of evidence, the unbiased review thereof and the objective assessment of appropriate penalty inherent in concepts of fair and impartial discipline cannot be accomplished with such egregious overlapping of functions. This was not a mere technicality but a substantial denial of Claimant's rights. We are left with no alternative but to sustain the claim. See Awards 4536, 6329, 6439, 6795 and 7032.

A W A R D

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Attest: Executive Secretary
National Railroad Adjustment Board

By Rosemarie Brasch
Rosemarie Brasch - Administrative Assistant

Dated at Chicago, Illinois, this 3rd day of August, 1976