

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 Employees:

1. That under the current Agreement, Carman B. M. Hodge, Chattanooga, Tennessee was improperly dismissed from service on March 7, 1973.
2. That accordingly, the Carrier be ordered to return Carman B. M. Hodge to service with pay for all time lost beginning March 7, 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 employee or employees involved in this dispute are respectively carrier and employee 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.

Claimant was arrested on August 2, 1972 and charged with larceny by shoplifting in connection with the removal of a television set from a department store in Chattanooga, Tennessee. At trial on December 5, 1972 Claimant entered a guilty plea to misdemeanor shoplifting, a lesser included offense. On January 15, 1973 sentence was pronounced whereby Claimant was fined \$25.00 and ordered to serve 90 days in the Hamilton County Penal Farm, and costs. The 90 day sentence was suspended on condition of defendant's good behavior for 11 months, 29 days.

By letter dated February 8, 1973 Claimant was notified as follows:

"Please arrange to attend an investigation in my office, 10 am, Saturday February 10, 1973. In this investigation you will be charged with conduct unbecoming a Southern Railway employee in that you were arrested on a charge of shoplifting by the Chattanooga Police and was (sic) convicted and sentenced in Hamilton County Criminal Court.

"You may bring any witnesses and/or Representatives that you so desire.

Very truly,

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

Subsequently, by letter dated March 7, 1973 Claimant was advised of the following:

"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."

The Organization alleges that the discharge was improper on the grounds that 1) Carrier violated Rule 34 of the Agreement by not affording Claimant an "immediate" investigation, 2) the charge of "conduct unbecoming an employee" was not proven on the record and, therefore, 3) the discharge was arbitrary and unreasonable.

Article 34, insofar as it is relevant to the instant case reads as follows:

"34. Procedure in Dealing with Grievances:

An employee will not be dismissed without just and sufficient cause or before a preliminary investigation, which shall be held immediately by the highest officer in charge at the point employed. If, after the preliminary investigation, the case is appealed, an investigation will be held within five days and if it is found that the employee has been unjustly taken out of service, he shall be reinstated and paid for time lost."

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 employee. 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. Focusing on the period following conviction and sentencing on January 15, 1973 we find that Carrier initiated preliminary investigation on February 6, 1973,

served notice of investigation upon Claimant on February 8, 1973 and conducted the hearing and investigation on February 10, 1973. While we recognize that the word "immediately" admits of no dilatory tactics nor conscious delays, we also are guided by a rule of reason in applying Agreement language in each particular case. Whereas the facts in another case might compel a different conclusion, we are of the opinion that Carrier herein proceeded to charge Claimant and afford him an investigation immediately when it knew, or reasonably should have known, of his conviction and sentencing for shoplifting, the conduct with which he was charged by Carrier.

It cannot be gainsaid that the conduct with which Claimant was charged was proven at the investigation. Claimant is an admitted shoplifter, whatever the motivation for his plea bargaining may have been. The transcript of investigation and Claimant's own admission comprise substantial evidence on the record to support Carrier's charge.

Finally, we cannot in all the circumstances herein conclude that dismissal from service was so arbitrary, unreasonable and capricious as to warrant substituting our judgement for that of Carrier. It may be that justice should be tempered with mercy in such matters, but Carrier was within its recognized prerogatives to refuse to continue in its service an employee who had been convicted and sentenced for dishonesty by the criminal courts. See Awards 2787, 5043.

On the basis of the foregoing, we must conclude that the dismissal was not improper and the claim must be denied.

A W A R D

Claim denied.

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 28th day of February, 1975.