

**Award No. 5223
Docket No. 4988
2-IC-EW-'67**

**NATIONAL RAILROAD ADJUSTMENT BOARD
SECOND DIVISION**

The Second Division consisted of the regular members and in addition Referee Harold M. Weston when award was rendered.

PARTIES TO DISPUTE:

**SYSTEM FEDERATION NO. 99, RAILWAY EMPLOYEES'
DEPARTMENT, AFL-CIO (Electrical Workers)**

ILLINOIS CENTRAL RAILROAD COMPANY

DISPUTE: CLAIM OF EMPLOYEES:

1. That under the current agreement, Section Lineman J. F. Orrick was unjustly suspended from service from the Illinois Central Railroad on May 15, 1964, and was unjustly discharged from service on July 14, 1964.

2. That accordingly the Illinois Central Railroad be ordered to compensate the Claimant's widow or his estate up to the date of his death, which was September 13, 1964; to clear his record of this discipline and restore all other rights unimpaired, including,

- (a) Pay in lieu of vacations.
- (b) Pay the premiums for Health & Welfare, life insurance, and all other benefits for period of claim to the date of his death, September 13, 1964.

EMPLOYEES' STATEMENT OF FACTS: Section Lineman J. F. Orrick, hereinafter referred to as the Claimant, was employed as a Section Lineman by the Illinois Central Railroad Company, hereinafter referred to as the Carrier, with a seniority date of September 21, 1949, and assigned to Dyersburg, Tennessee, as his headquarters.

In a letter dated May 4, 1964, Division Engineer L. E. Brault charged the Claimant,

"Please be present at formal investigation to be held in the Track Supervisors' Office at Dyersburg, Tennessee, at 10:00 A. M., May 7, 1964, for the purpose of determining your responsibility, if any, concerning alleged misuse of company gasoline in your personal automobile.

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 waived right of appearance at hearing thereon.

Claimant, a section lineman, was suspended from service on May 15, 1964, pending an investigation of charges that he had misused company gasoline by having it placed in his own automobile. After a hearing had been held in the matter, Carrier found the charges substantiated by the evidence and on July 14, 1964, dismissed Claimant from its service.

Carrier maintains that the claim is barred since it was not filed within the sixty day period prescribed by Article V of the August 21, 1954, Agreement. The difficulty with this point is that Carrier's representatives did not even mention any time-limit objection when they first replied to, and declined, the claim on the property. (The objection was not raised until considerably later when the claim reached a higher grievance appeals level. It therefore was untimely and must be deemed waived.)

Petitioner contends that the suspension and dismissal must be set aside because the same Carrier official, Division Engineer Brault, levelled the charges against Claimant, served as both hearing officer and witness and imposed the discipline. It also alleges that Brault prejudged the case.

There is no valid objection to having a hearing officer hand down the decision after the hearing has been held. On the contrary, this is the desirable procedure for the hearing officer is the official who has had the opportunity to observe the demeanor of the witnesses and to hear what they have to say. While it would be well to avoid having the same official make the charges and act as hearing officer, we are not disposed to find that that combination of roles, standing alone, constitutes reversible error.

The record does reveal defect, however, that are prejudicial and cause us concern. Before any hearing had been held, Brault notified the Union, by letter of May 19, 1964, that "I considered Mr. Orrick's offense of sufficient magnitude to remove him from service." Since he had already arrived at that decision, Brault was not in a position, either as a matter of appearance or substance, to conduct the hearing of July 8, 1964, in the necessary impartial manner.

During the course of the hearing, Brault further betrayed his predisposition when, although the introduction by evidence had not been completed, he assumed the veracity of investigators' statements that he had read into the record. Thus, at page 13 of the hearing transcript, after pointing out that those statements alleged that Claimant had taken the gas, he asked Claimant, "What use did you make of this amount of gasoline?" Again, on page 15 of that transcript, he made the same assumption of a critical fact in questioning Claimant.

While we do not find merit in Petitioner's charge that Brault also served as a witness merely because he read statements into the record, we are of the opinion that he displayed substantial bias before the hearing was completed and seemed more a prosecutor than an official seeking impartially to obtain and assess the facts. If discipline hearings prescribed by collective bargaining agreements are to possess any meaning, they must be conducted impartially and in line with elementary standards of fair play, no matter how informal the proceedings may be. 7

Claimant died on September 13, 1964. This fact does not affect our exclusive primary jurisdiction nor the right of Claimant's widow or estate to receive the amount due him. The purpose of the Railway Labor Act is fulfilled if the claim itself arises out of the employment relationship. See Pennsylvania Railroad Company v. Day, 360 U.S. 548, 552, 552; 79 S. Ct. 1322, 1324 (1959).

In the light of the defects mentioned above, the discipline in question cannot be upheld on the record developed in this case. We will sustain the claim to the extent that Claimant's widow or estate will be reimbursed for all wages, including any vacation benefits to which he would have been entitled if not suspended or discharged, that Claimant would have earned from the date of his suspension to the date of his death, less any wages he may have received during that period. In view of Awards 3883, 4532 and 4866, we will not require Carrier to pay the premiums for Health and Welfare, life insurance and other items mentioned in Part 2(b) of the claim.

AWARD

Claim sustained in all respects except subparagraph (b) of Part 2.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of SECOND DIVISION

ATTEST: Charles C. McCarthy
Executive Secretary

Dated at Chicago, Illinois, this 20th day of July, 1967.