

**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.

Your file and previous work record will be reviewed at the investigation."

A copy of that letter is attached and identified as Exhibit A.

In a letter dated May 15, 1964, Division Engineer L. E. Brault suspended the Claimant from service pending the investigation. A copy of that letter is attached and identified as Exhibit B.

On May 19, 1964, the Local Chairman protested the Claimant's removal from service, (Exhibit C). Division Engineer L. E. Brault stated in Exhibit D that he considered "Mr. Orrick's offense of sufficient magnitude to remove him from service.", obviously pre-judging the accused (Claimant).

The investigation was postponed indefinitely on May 27, 1964, at the request of the Claimant.

On May 29, 1964, the Local Chairman protested the charge as it was not precise. The charges did not state the time, place, or circumstances under which the alleged misuse of company gasoline occurred. A copy of the protest is attached and identified as Exhibit E.

Also on this date, Local Chairman Terrell requested the names and addresses of all witnesses in behalf of the Carrier, as well as any statements, affidavits, or reports that the Hearing Officer had obtained from witnesses, and stated that copies of these statements, affidavits, or reports, should be made available to the Union Committee. A copy of Local Chairman Terrell's letter is attached and identified as Exhibit F.

Under date of June 1, 1964, Carrier informed the Local Chairman that C. H. Edney, Assistant Superintendent Communications; R. R. Moss, Communications Supervisor; and R. T. Bodker, Assistant Special Agent would be the Carrier's witnesses. Division Engineer L. E. Brault also stated,

"To my knowledge these men do not have any affidavits to present at this investigation."

A copy of that letter is attached and identified as Exhibit G. However, as shown in the transcript of the investigation, the Carrier did have affidavits from other witnesses not named in the letter to the Local Chairman, which were obtained on April 27, 1964, prior to the Division Engineer's statement.

Under this same date, Division Engineer L. E. Brault answered the Local Chairman's protest (Exhibit E). A copy of Division Engineer Brault's letter is attached and identified as Exhibit H.

The investigation was held on July 8, 1964. Since the Carrier has reproduced the investigation record, the Employees will not burden the Board's files by duplicating that record. However, should the Carrier for some reason fail to supply the Board with the hearing record, the Employees will do so.

Division Engineer L. E. Brault charged the Claimant with misuse of company gasoline. Division Engineer L. E. Brault suspended the Claimant prior to the investigation. Division Engineer L. E. Brault was the Hearing Officer at the investigation. Division Engineer L. E. Brault gave testimony

as a witness at the investigation, as shown on page number 10 of the stenographic report of the investigation. Division Engineer L. E. Brault studied the transcript of the investigation and his decision was that the Claimant was guilty of violating Maintenance of Way and Structures Rule 9, which was not a part of the charge (see Exhibit A). Division Engineer L. E. Brault also decided that the Claimant was guilty of misuse of company gasoline, and he dismissed the Claimant from service of the Illinois Central Railroad Company. A copy of Division Engineer Brault's letter, finding the Claimant guilty and dismissing him from service is attached and identified as Exhibit I.

A claim was filed and handled with all authorized Carrier officers, including an appeal to Mr. W. J. Cassin, Manager of Labor Relations. A copy of the appeal letter dated December 2, 1964, is attached and identified as Exhibit J. Mr. H. W. Listen, Labor Relations Staff Officer, replied under date of January 29, 1965. A copy of his declination letter is attached and identified as Exhibit K. Further correspondence between the Carrier's Labor Relations Department and the General Chairman is attached and identified as Exhibits L through N.

The Agreement effective April 1, 1935, as subsequently amended, is controlling.

**POSITION OF EMPLOYEES:** It is submitted that within the meaning of Rule 36 of the controlling collective bargaining agreement, in pertinent part reading:

"Should any employe subject to this agreement believe he has been unjustly dealt with, or any of the provisions of this agreement have been violated, the case shall be taken \* \* \*."

the Claimant was unjustly dealt with and the agreement was violated.

Rule 38 of the Agreement provides in pertinent part that:

"No employe shall be disciplined without a fair hearing by a designated officer of the carrier."

There is no question that the hearing officer disciplined the Claimant when he suspended him from service on May 15, 1964, (Exhibit B) after charging him on May 4, 1964, (Exhibit A).

It cannot be justly found that the Claimant was given a fair hearing, for the reason that Mr. Brault was the accuser, prosecutor, witness, judge, and discharged the Claimant from service. On page 10 of the hearing transcript, Division Engineer Brault testified that:

"On April 27, 1964, Assistant Special Agent Bodker conducted an investigation of the amount and frequency of Mr. Orrick's gasoline purchases and company use in Mr. Orrick's motor car at Humble Oil and Refinery Bulk Plant, Baker Street, Dyersburg. At that time he secured statements from Mr. J. C. Castellaw, owner-operator of the Castellaw Humble Oil and Refinery Company Bulk Plant, Dyersburg, Tennessee, and Mr. Obie Harris, truck driver, an employe of Mr. Castellaw, in regard to Mr. Orrick's company gasoline purchases since he has been located at Dyersburg. Mr. Castellaw's statement reads as follows:"

Rule 38 also provides that:

"At a reasonable time prior to the hearing, such employe will be apprised of the precise charge against him."

It is obvious that the charge made against the Claimant (Exhibit A) on May 4, 1964, could not be accepted as a precise charge as it did not state when, where, or how the company gasoline was misused, nor was there any reference to Carrier's Rule 9. This obviously was not a precise charge as provided for and required by the terms of the controlling collective bargaining agreement.

The Carrier also placed in the stenographic report of the investigation, alleged information concerning what Mr. Brault stated constituted the Claimant's past record.

The Carrier's hearing officer, Mr. Brault, over the objection of Claimant's representative, referred to this so-called record. The fact is that the Claimant has not been charged with any of the alleged items testified to by Mr. Brault on pages 16 and 17 of the hearing transcript, except on the bottom of page 17, which involved a charge for failure to notify the supervisor of his absence from work on April 2 and April 3, 1964.

In that case, the Claimant, after being suspended on April 3, 1964, was not only restored to service with seniority unimpaired, but he was also compensated for wages lost, even though the Carrier alleged that he was guilty of the charge.

Mr. Brault's procedure in testifying to a non-existent record is further evidence of the mistreatment given the Claimant. The fact is, the Claimant's record is clear and the only charge ever made against him is one in which he was reinstated and paid for his wage loss.

The Carrier's staff officer, Mr. H. W. Listen, in his letter of January 29, 1965, raised a question concerning the time limits in connection with that part of the claim dealing with the improper suspension of the Claimant. It is not known whether or not the Carrier will assert such an erroneous position in its submission, but if it does, it would not be timely, as the Carrier officer clearly waived any objection he may have been entitled to raise when he failed to object during the 60 days allowed him to deny the claim and give his reasons for doing so (copy of Assistant Superintendent C. H. Edney's declination letter is attached and identified as Exhibit O), nor was any question raised during that 60 day period allowed for Carrier's declination in writing, giving the reasons for such declination. A copy of Superintendent P. B. Burley's declination letter is attached and identified as Exhibit P.

The Claimant was not proven guilty of any wrongdoing. The evidence clearly points to the villainous tactics used by the Carrier against this Claimant. Accordingly, Claimant's record should be cleared and his dependents are entitled to benefits listed in Part 2 of the Employees' Statement of Claim, and we respectfully request the Honorable Members of this Division to so find.

All matters herein referred to in support of the Employees' Position have been the subject of correspondence or discussion with the Management.

An oral hearing is not requested.

**CARRIER'S STATEMENT OF FACTS:** On November 1, 1963, Section Lineman, J. F. Orrick was assigned to patrol and perform electrical work between Fulton, Kentucky and Covington, Tennessee. He was assigned a company motor car, which he kept at his headquarters at Dyersburg, Tennessee, to cover his territory. Gasoline for the motor car is kept in a fifty-five gallon fuel storage tank at the headquarters. Mr. Orrick had authority to order gasoline to refill the storage tank from the Humble Oil bulk station at Dyersburg and charge it to the company's account.

Assistant Superintendent Communication C. H. Edney learned Mr. Orrick was using his personal automobile instead of his motor car to perform his duties. On March 16, 1964, Mr. Edney gave Mr. Orrick the following written instructions:

"I have information that you are using your private automobile for transportation instead of motor car in performing your maintenance work and clearing of troubles.

Effective this date you are not to use your personal automobile for transportation in performance of your duties, unless authorized by this office or Mr. R. R. Moss."

In an interview with Assistant Special Agent R. T. Bodker on April 6, 1964, Mr. Orrick admitted he disobeyed the above instructions and continued to use his personal automobile on company business without permission. The company also discovered that Mr. Orrick charged an unusual amount of gasoline to the company's account in March and April. In the first four months Mr. Orrick worked the section lineman's assignment, he ordered a total of one hundred eighteen gallons. From March 13 to March 18, he ordered one hundred and forty gallons. Only three work days elapsed between the two purchases. In four months, Mr. Orrick consumed one hundred eighteen gallons. In a span of three work days, he ordered one hundred forty gallons. His storage tank only holds fifty five gallons.

In an interview with Assistant Special Agent Bodker, Special Agent C. T. Webb and Supervisor Communication R. R. Moss on April 30, 1964, Mr. Orrick admitted he had been using company gasoline in his personal automobile.

On May 4, 1964, Division Engineer L. E. Brault instructed Mr. Orrick to appear for a formal investigation on May 7, 1964 "for the purpose of determining your responsibility, if any, concerning alleged misuse of company gasoline in your personal automobile." Mr. Orrick's representative, Mr. C. W. Terrell, requested a postponement to May 22, 1965. The request was granted. After Mr. Orrick requested to return to work on May 18, he was suspended pending the investigation. After two more postponements, a five day postponement at the request of management and an indefinite postponement at the request of the employe's representative, the investigation was held on July 8, 1964.

The investigation revealed Mr. Orrick used his automobile on company business without permission and used company gasoline in his automobile. For his conduct, he was dismissed. Mr. Orrick was killed in an automobile

accident two months later. The pertinent correspondence is attached as Management's Exhibit B.

**POSITION OF CARRIER:** The union does not deny that Mr. Orrick was guilty of the offenses. Instead, it raises a number of procedural objections. We will show each of them are unfounded. We will also show the evidence supports the company's findings.

#### A. THE CLAIM

The claim was not presented within the time limits prescribed in Article V of the August 21, 1954 agreement, which provides that claims must be presented to "the officer of the Carrier authorized to receive same" within sixty days from the date of the occurrence. Mr. Orrick was suspended May 15, 1964. The union did not file claim for time lost until September 10, 1964. See Exhibit B-19.

Even if the union were to prove a valid claim, the claim for "premiums for Health and Welfare, life insurance, and all other benefits" would be invalid. Rule 38 reads in part:

" . . . If it is found that employe has been unjustly suspended or dismissed from the service, such employe shall be reinstated with his seniority rights unimpaired, and compensated for the wage loss, if any, resulting from such suspension or dismissal." (Emphasis ours.)

In Award 2-3883, Referee Carey held that health and welfare benefits can not be considered wage loss. He held:

"The claim for reimbursement of medical and hospital expense for the amount of \$182 which was borne by the claimant, would have been satisfied by the insurance company if the claimant's group insurance had not been cancelled when he was discharged. If this were a common law action for the recovery of consequential damages for breach of contract, and if this Board possessed general judicial powers, such medical and hospital expense, if proven, would constitute proper elements of damage. However, this Board has limited power under the law, and it is confined to the interpretation or application of the collective bargaining agreement entered into by the parties.

The contracting parties have specifically agreed that the damages for contract violation such as occurred in this case, is the amount of wages shown to have been lost, less earnings from other sources. Other elements of consequential damage have been excluded by implication. The term "wage" in its ordinary and popular sense means payment of a specific sum for services performed. That is the sense in which the term is used in this agreement. The language of Rule 34 has been in effect since 1941, long before the contracting parties had provided for group insurance for hospital or medical expenses. The insurance program which was in effect in July 1957 was specifically declared in the 1956 agreement to be in addition to the wage adjustments therein provided. It was by the parties' own arrangement distinguished from wages. Eligibility for hospital and medical insurance protection is derived from employment status, but it is not

in the usual and ordinary sense an integral part of a wage rate. We conclude that this Board lacks the power to order the carrier to reimburse the claimant for his medical and hospital expense."

A host of Second Division Awards support Mr. Carey's holding. See Awards 4367, 4453, 4454, 4529, 4532, 4557, 4611, 4616, 4744, 4747, 4756, 4771, 4780, 4793, 4801, and 4802.

## B. THE STATEMENTS

The union objects to the statements of J. C. Castellaw (pages 10 and 11) and Obie Harris (pages 12 and 13) because Division Engineer Brault did not give Local Chairman Terrell advance notice that the statements would be introduced at the investigation. There is nothing in Rule 39 that requires management to give the accused advance copies of statements to be used at the investigation. Even though he was not obliged to respond, Mr. Brault's response to Mr. Terrell's request of May 29, 1964 was not "underhanded." Mr. Terrell made two requests: (1) the names and addresses of all witnesses and (2) copies of any statements these witnesses might make. Mr. Brault's letter of June 1, 1964 is an accurate response to Mr. Terrell's request. Mr. Brault replied that there would be three witnesses and that they did not have any written statement to present. Mr. Terrell did not ask for all the statements that were to be used at the investigation. He only requested copies of statements from the witnesses who appeared at the investigation.

The signed statements did not prejudice the rights of the accused. The investigation was postponed twice (pages 23 and 24) to permit the accused and his representative to question Messrs. Castellaw and Harris about their statements. When the investigation was resumed, they did not challenge their validity.

## C. THE CHARGES

In Third Division Award 12898, Referee L. M. Hall said:

"... The formation of a charge and the giving notice thereof need not be in the technical language of a criminal complaint. It is sufficient if it appears that one charged understood he was being investigated for the dereliction of duty set forth in the notice. There is nothing in the record to indicate claimants were in any manner misled or prejudiced by the form of notice and charge made. The notice complies with the preciseness required by the rule. See Award 3270 Carter."

The notice, which Mr. Hall ruled complied with the preciseness of the rule, read as follows:

"This investigation is in regards to the alleged misappropriation of commissary supplies."

The charge which the union now contends is imprecise reads:

"... for the purpose of determining your responsibility, if any, concerning alleged misuse of company gasoline in your personal automobile." (Emphasis ours.)

The notice makes clear to the accused what he is being charged with. It in no way prejudiced his rights or hampered him in preparing his defense.

Mr. Orrick quite clearly knew what the investigation was about. Assistant Special Agent Bodker interviewed Mr. Orrick on April 6 about his using his automobile on company business and Messrs. Bodker, Webb, and Moss interviewed Mr. Orrick again on April 30 about his using company gasoline in his personal automobile. Mr. Orrick admitted in both interviews that he had committed the offenses. There is nothing in the record indicating he was misled in any manner by the notice of investigation. He knew what the investigation was about and he had ample time to prepare his defense.

#### D. THE EVIDENCE

In Second Division Award 3874, Referee Anrod said:

"Since determination of a disciplinary penalty imposed upon an employe who has been found guilty of a wrongdoing necessarily involves managerial discretion, we have been reluctant to substitute our judgment for that of the Carrier's and, therefore, have consistently held that the Carrier's disciplinary action can successfully be challenged before this Board only on the ground that it was arbitrary, capricious, or fraught with bad faith."

The evidence in the record overwhelmingly supports the company's findings. At page 7, Mr. Orrick testified:

"Q. Has Mr. Moss permitted you to use your private car on company business since you have been stationed at Dyersburg?

A. No, Sir.

\* \* \* \* \*

Q. Have you used your personal car on company business since you have been at Dyersburg?

A. Yes, sir."

At page 8, Mr. Orrick admitted that he had been instructed not to use his personal automobile. At page 9, Mr. Bodker testified that Mr. Orrick admitted he had been wrong in violating instructions.

The statements of J. C. Castellaw and Obie Harris reveal that one hundred gallons of gasoline were placed in Mr. Orrick's fifty-five gallon storage tank over a span of three work days. There is nothing in the record to explain what Mr. Orrick did with so much gasoline in such a short period. It was impossible for him to consume all the gasoline in his motor car.

There is an abundance of evidence showing that Mr. Orrick ordered gasoline pumped into his automobile. At page 11, Mr. Castellaw testified as follows:

"... On or about March 13, 1964, at the request of Mr. Orrick, ... we placed some in his private automobile.

. . . On or about March 18, 1964 and again on April 3, 1964 at the request of Mr. Orrick, we placed 10 gallons each time into his private automobile."

Mr. Obie Harris said in his statement, which appears at page 12, that:

" . . . I placed 10 gallons of gasoline in Mr. Orrick's automobile at our Bulk Plant on (3) different occasions . . . On or about March 18, 1964 . . . I placed 10 gallons of gasoline in Mr. Orrick's automobile at our Bulk Plant. On or about April 3, 1964, I placed 10 more gallons of gasoline in Mr. Orrick's automobile at our Bulk Plant . . ."

Mr. Orrick, therefore, used at least fifty gallons of company gas in his own car. This conduct alone is sufficient grounds for dismissal.

Mr. Orrick admitted to R. T. Bodker and R. R. Moss in an interview on April 30 that he was using company gas in his automobile. At page 20, the following evidence was introduced:

" . . . Mr. Orrick stated that . . . the other gas was placed in the gas tank of his car at the Bulk Station from time to time."

Mr. Moss verified this fact at pages 21 and 22:

"Q. . . . It is my understanding Mr. Orrick further stated to Mr. Bodker and in your presence that he had used most of his gas in his storage tank in his motor car house in his automobile . . . Is that statement true?

A. Yes, sir."

The evidence is clear. Mr. Orrick violated the instructions of his supervisor. In addition, he took company gasoline for his own automobile. The penalty was justified and the Board should not disturb it.

#### IV. SUMMARY AND CONCLUSION

The claim was not presented until September 10, 1964. The claim for the period Mr. Orrick was suspended is barred by Article V of the August 21, 1954 agreement.

The Second Division has said again and again that health and welfare benefits are not wages lost within the meaning of the discipline rule, Rule 38. Even if the Board were to rule in favor of the claimant, the claim for health and welfare benefits would be clearly invalid.

Mr. Orrick received a fair and impartial investigation and had ample opportunity to prepare his defense. The evidence proved he was guilty of serious wrongdoing. The discipline was warranted.

All data has been made known to the union and made a part of the question in dispute. Oral hearing is waived.

Management asks the Board to deny the claim.

(Exhibits not reproduced.)

**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.

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.