

The Second Division consisted of the regular members and in addition Referee Gilbert H. Vernon when award was rendered.

Parties to Dispute: { International Brotherhood of Electrical Workers
{ St. Louis-San Francisco Railway Company

Dispute: Claim of Employees:

1. That the St. Louis-San Francisco Railway Company violated the current agreement, particularly Rule 35, when on July 18, 1979 Electrician Donald L. Cramer was unjustly dismissed from service.
2. That the St. Louis - San Francisco Railway Company further violated Rules 35, 36, and 40 by not affording Electrician Donald L. Cramer a fair and impartial hearing.
3. That Electrician Donald L. Cramer be made whole because of the improper action of the St. Louis-San Francisco Railway Company and paid for time lost plus twelve per cent (12%) interest with seniority and vacation rights unimpaired, plus all fringe benefits afforded all other employees in his class and craft, including insurance and railroad retirement.
4. In addition, three (3) hours pay at the rate of one and one-half (1-1/2), and two (2) hours pay at the straight time rate are claimed for Electrician Donald L. Cramer having attending his investigation from 1:00 P.M. to 6:00 P.M. on July 11, 1979.
5. Claim for all time loss for being dismissed from service July 18, 1979 through October 30, 1979.

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.

Claimant, at the time of dismissal, was assigned to the 4:00 p.m. to 12:00 p.m. shift as an Electrician at the Springfield, Missouri facility of the Carrier.

On July 2, 1979, the Carrier, over the signature of Mr. J. H. Hall, directed the following letter of charge to the Claimant:

"Dear Sir:

Arrange to report to the office of Superintendent Locomotive shop at 1:00 p.m., July 6, 1979, for formal investigation to determine the facts and your responsibility if any in connection with alleged charge that you were dilatory and indifferent to your duties on June 19, 1979.

It is alleged that at approximately 4:10 p.m., on June 29, 1979, you were assigned to cut the leads on the rear trucks of unit 921, and that this work was not completed until after 9:00 p.m. on this date. This is considered to be far in excess of the normal time to perform this type work.

You are being charged with alleged violation of Rule 'B' of the Rules, Regulations, Safety Rules and Instructions Governing Mechanical Department Employees, Form MP-1 Standard, effective March 1, 1957.

Rule 'B', that part reading: 'Employees who are ... indifferent to duty ... will not be retained in the service.'

Your personal record will be reviewed in this investigation.

The duly authorized representative is being given a copy of this letter."

The investigation was held on July 11, 1979, and as a result Claimant was dismissed effective July 17, 1979. However, on October 22, 1979, the Claimant was offered reinstatement without pay for time lost and without prejudice to a claim for time lost. The Claimant accepted the Carrier's offer on October 30, 1979.

The Carrier argues that the transcript makes apparent that the Claimant is guilty of the charge. They contend that on the date in question "... The Claimant delayed commencing his duties for approximately two hours and he took approximately three hours to complete his duties in connection with cutting out the rear truck on Unit 921." Further, at another point in their submission, they state "... it would appear that the claimant reported for work at 4:00 p.m. and by exercising various delaying tactics, it was 6:00 p.m. when he commenced disconnecting the traction motors. He then completed the job at approximately 9:10 p.m., or approximately 2 hours and 50 minutes later, excluding the meal period from 8:00 p.m. to 8:20 p.m. Such deliberate delaying tactics clearly reflect his indifference to duty and serve as substantial evidence of his violation of Carrier's Rule B."

In support of their contention that the actual time (2 hours and 50 minutes) involved in cutting out the truck was excessive, the Carrier points to the testimony of several witnesses. Foreman Tracy testified that "I had worked in trucks before. It seemed to me like it would take one and one-half to two hours if you had trouble to cut trucks on a 900." The Carrier also directed attention to the testimony of Chief Clerk Kleeman who testified that a test developed for job applicants established that the average time for disconnecting traction motor leads was 25 minutes per motor. The 900 units have three motors per truck. The suggestion is that 75 minutes would be a reasonable time to have completed the task assigned to Mr. Cramer. The test was based on the performance of ten journey-men Electricians.

The Carrier's argument as a whole suggests that the Claimant took approximately 5 hours in total to accomplish a task that should only take 1½ to 2 hours in total or in other words he was dilatory 3 to 3½ hours.

The Carrier, in response to an argument made by the Organization that the hearing was not a fair one as a result of the conduct of Mr. J. H. Hall, the hearing officer, made the following statement:

"In Part 2 of the claim, it is alleged that Carrier violated Rules 35, 36 and 40 by not affording the Claimant a fair and impartial hearing. A review of the transcript indicates that on more than one instance it was necessary for the hearing officer to exert firm control to prevent the representative and the Claimant from delving into extraneous details and situations having absolutely no bearing on the incident under investigation."

The Carrier also argues that Part 5 of the claim is excessive in that they cannot be held liable for time beyond the date of their offer to reinstate. Parts 3 and 4 are excessive, they contend, as there is no contractual support for interest, fringe benefits or pay for attending a hearing.

The Organization makes several procedural arguments as well as arguments regarding the merits contending the Claimant is not guilty as charged. Procedurally speaking, they contend the discipline should be overturned because 1) the charge was imprecise, 2) the Carrier was intent on ridding themselves of the Claimant, 3) the transcript was not accurate and 4) the hearing officer interfered with Claimant's representative during the hearing and "further, the investigating officer took the liberty to inject testimony and hearsay evidence at will ... and continued to insert material he thought damaging to the Claimant ..." In this connection, they direct the Board's attention to several awards which establish that "the hearing officer cannot perform in an adversary position as the accuser, witness, judge and jury."

Regarding the charge, the record shows, according to the Organization, that the Claimant is not guilty. They argue essentially that the Claimant was not responsible for the delay between 4:00-6:00 p.m., the time at which the task was started. They account for the two hour delay in starting the job by the following assertion:

"The Foreman stated the job was assigned at 4:10 P.M. yet the Claimant was not assigned to any job by the Foreman, and he did not locate the Foreman so he could get the laborer to clean up the drop pit till 5:00 P.M. It took the laborer approximately one (1) hour to clean the pit."

Additionally, regarding the time actually involved in the job, the Organization argues that this cannot be considered unreasonable to a degree necessary to establish a Rule B violation because of the condition of the motors. Due to the extreme grease and grime on the motor, it took the Claimant slightly longer than usual. They strongly suggest in this regard that 2 hours and 50 minutes is not unusual under the conditions for a mechanic who had only two weeks experience in this particular job.

The Board will first consider the procedural arguments advanced by the Organization. In considering the arguments, we find no probative evidence to support the various arguments. However, we do wish to direct critical attention to the issue of the conduct of the hearing officer. While in the final analysis we did not find that Mr. Hall's conduct would justify totally vacating the discipline, we do wish to point out that his conduct came extremely close to violating the standards of a fair hearing long established by this Board. It is axiomatic that a hearing officer should not cast himself in an adversary role. There is strong evidence that Mr. Hall nearly did so. The one incident during the hearing that concerned the Board was Mr. Hall's conduct in cross examination of Electrician Vigneaux, a character witness called on behalf of Mr. Cramer. It seems what had happened was that Mr. Hall felt Mr. Vigneaux's testimony was irrelevant so as a result he decided to retaliate by introducing his own irrelevant evidence. While at the same time cautioning Mr. Dodd, the Organization's Representative, from "bringing things up other than related to the charges" (presumably such as Mr. Vigneaux's opinion as to Cramer's ability), Mr. Hall introduced through Mr. Vigneaux a letter Mr. Vigneaux had written critical of Mr. Cramer's performance. The letter is seen to be totally irrelevant to the charge in regard to its contents and particularly in light of the fact it was fifteen years old. The Board can see no purpose in Mr. Hall introducing such a letter at the hearing and in doing so we think he almost crossed the line between trier of facts and prosecutor, a role he should not play. His conduct nearly went beyond a matter of exerting necessary "control" as previously suggested by the Carrier. The above mentioned exchange is quoted below:

"(Hall) Mr. Dodd, it seems you have evidently called Mr. Vigneaux as a character witness, is this correct?

(Dodd) I didn't ask any questions about Mr. Cramer's character but about Mr. Cramer's ability.

(Hall) Since you desire, we are bringing up something that really doesn't relate to the charge against Mr. Cramer, I would like to ask Mr. Vigneaux questions regarding his relation with Mr. Cramer.
(Emphasis added)

"(Dodd) I take the position that Mr. Vigneaux' testimony may well relate to the charges.

Q. By Superintendnet Hall
A. By Electrician Vigneaux

Q. Mr. Vigneaux, did you ever find it necessary to write Mr. Cramer up while you were a forman?

A. If I did I sure don't recollect it.

Q. If you were shown a letter you wrote in your own hand, would you recognize it?

A. I am sure I would.

Q. Mr. Vigneaux, would you read this letter into the record and tell me if this is your handwriting and signature.

(Dodd) Mr. Hall, I object to this matter being brought up.

(Hall) Mr. Dodd, I would exclude it from the testimony and ask you to refrain from bringing up things other than related to the charges. (Emphasis added)

(Dodd) Read the letter.

(Vigneaux) This letter is a very, very old letter.
(Mr. Vigneaux read the letter)

'Mr. Allison Acct. No. 29425

Don Cramer called and said he would be late. Don didn't show up for his shift nor did he call in before the end of his shift which would be 12 Midnight, to report in for the following shift. He has been late almost every Mon or Tues nite & twice last month he didn't show but did report in. I do believe if a man is going to work for a co. he should proteck (sic) his job. It's hard enough to get work done with a short crew let alone not knowing if a person is going to show or not.

(Sgd.) E. J. Vigneaux'

(Hall) Mr. Dodd, any further questions?

Q. By Representative Dodd
A. By Electrician Vigneaux

Q. In reference to that letter, there is no date, can you estimate the time which that letter was written?

A. At least fifteen years ago." (Emphasis added)

As mentioned previously, while we find the above mentioned conduct of Mr. Hall's reprehensible, we do not find that his conduct during the hearing as a whole was improper to a degree that would justify overturning the entire proceeding. This is so because this one incident does not cast a fatal doubt on the nature of the evidence or the basic overall fairness of the hearing. The Claimant was ably represented and had the right to produce evidence and cross examine witnesses. We direct attention to this matter as a serious warning to Mr. Hall and the Carrier that future hearings should be conducted differently.

In considering the Claimant's guilt as related to the charge, we find that he is guilty of violating Rule B but to a degree much less than expressed or implied by the Carrier in their submission. In this regard we do not find that once the Claimant started his assigned task at 6:00 p.m. that he was indifferent at all to his duties and that in regards to the period of time between 4:00 p.m. and 6:00 p.m. the Claimant was dilatory only for approximately 1 hour instead of two hours as suggested by the Carrier. For the sake of discussion, we will treat the period of 4:00 p.m. and 6:00 p.m. and the period of 6:00 p.m. to 9:10 p.m. separately.

Regarding the period of 4:00 p.m. to 6:00 p.m., we find the Claimant was justified in not starting his assignment until approximately 4:50 p.m. to 5:00 p.m. instead of 6:00 p.m. as suggested by the Organization. This means that in the Board's opinion the Claimant had no reason and cannot justify his failure to accomplish anything from approximately 4:50 to 6:00 p.m. There is evidence that the Claimant was unable to start the task of cutting the traction motor due to unsafe footing as a result of oil on the drop table and because other employees had not finished their work on the motor. Additionally, there is substantial evidence to support the conclusion that the Claimant was able to start his assignment by 4:50 p.m. instead of 6:00 p.m. as claimed by the Organization.

In this regard, we observe the following excerpts of testimony by Mr. Whaley, Mr. Cramer's Foreman, and excerpts from a statement submitted by him.

- "Q. You have no knowledge of the pit. In other words, prior to the job beginning, you didn't inspect the pits or the job itself to see if the conditions were right for the job to begin?
- A. I did inspect the job to see the trucks on the locomotive were down, went down and looked at it. As far as the pit is concerned, I didn't look at it. The drop table surface did have oil on it."
(Emphasis added)

And from his statement:

"The machinist and pipefitter started working at approx. 4:15 p. and were finished with their part of the truck removal at approx 4:50 p.

"During the time the other crafts were performing their work, Elect. Cramer asked me to have floor dry spread on the drop table surface as it was very oily. I told Mr. Cramer I would assign a laborer to the drop table and sent Laborer Gage to do the job. Mr. Gage finished his assignment at approx. 4:45 p." (Emphasis added)

Mr. Whaley also testified that it was approximately 4:20 when Mr. Cramer approached him, instead of 5:00 p.m. as asserted by Mr. Cramer. This is corroborated by the testimony of Mr. E. Stroud, General Foreman, who stated that Mr. Whaley approached him approximately 4:30 seeking permission to clean the drop table. Also, the possibility that Mr. Cramer was mistaken about the time that he talked to Whaley and the time the Laborer finished cleaning is significant. He made several statements during the hearing such as the following, "I had no special reason to make a diligent time study," and "there again I am not absolute on the time because I knew no reason to be."

We also note that Mr. Cramer argued that when the Laborer spread floor dry the first time (4:45) he missed a spot underneath the center motor and he (Mr. Cramer) was precluded from starting until 6:00 P.M. when it was taken care of. In handling this contention we need look only as far as the following testimony by the Claimant:

- "Q. Mr. Cramer, would it have been possible to start disconnecting other motors while this laborer was taking care of the floor dry on the center motor?
A. It would have been possible, yes sir ..."

In regard to the period of 6:00 p.m. to 9:10 p.m., however, we cannot find the Claimant indifferent to his duties. First it must be noted that 20 minutes of this period is accounted for by the supper break. We are then dealing with a 2-hour and 50 minute period. Regarding this period of time, we do not find that the Carrier has shown by way of substantial evidence that under the conditions taking 2 hours and 50 minutes to complete the task of cutting out the traction motors on a 900 series engine was so unreasonable as to constitute being "indifferent to duty".

The time that it took Mr. Cramer to accomplish the task only exceeded the maximum time according to the Carrier by 50 minutes, which is not an extremely long period. There are many reasons in the record to believe that this extra 50 minutes was necessary and reasonable and not as a result of Mr. Cramer being dilatory. First, Mr. Cramer testified that the leads were extremely dirty and that it took time to clean them. He testified:

- "Q. Then what did you do?
A. I unhooked the traction motor leads on each end. I might bring out, this particular 900 was excessively oily and greasy with a large accumulation of coated soggy debris around the boots retaining clamps, motor leads and carbody frame. This necessitated getting a putty knife to scrape away this accumulation to

"even distinguish one boot from another. I unhooked the leads cleaning them properly in order to get to them. I had two motors unhooked before time to eat at 8:00 o'clock." (Emphasis added)

There is nothing in the record that would indicate that this wasn't the case as there was no testimony from Mr. Whaley or any other Carrier witness that would indicate anyone but Mr. Cramer made a close inspection of the motors. Further, there is evidence that would indicate that Mr. Cramer did spend time cleaning the motor. Foreman Anderson, who supervised the reinstallation of the truck in question the next day, inspected the truck and testified:

- "Q. What work was performed on this unit?
A. They had changed the No. 5 traction motor and the truck had been cleaned, all leads wiped off. It was ready to go back."

"Q. The conditions were quite normal, boots in place, all the clamps were on the boots, boots nice and clean, brackets all nice and clean.
A. Yes."

Secondly, although it was established that grease and grime on the motors is normal, Foreman Whaley admitted that the amount of accumulation on the leads "would probably be a factor ..." in how long it took to do the job. Further in this regard, Mr. Stroud admitted on page twenty of the transcript that there could be conditions that would cause the removal to exceed four hours. Also Electrician Miller testified the time required to change motors varies a great deal, sometimes up to six hours. His testimony is quite revealing in respect to our conclusion that 2 hours and 50 minutes is not an unreasonably long period to have accomplished the task once started.

- "Q. By Representative Dodd
A. By Electrician Miller

Q. Mr. Miller, your experience in the truck gang is quite current. Have you had several trucks come in under what you call normal conditions, not a great deal of grease and oil.
A. Hardly any. In other words, where everything went right, what you consider normal conditions, I don't think you can say it is normal conditions, every unit is different, depending on how much drain pipes are hooked up, some drain pipes are left loose, some are completely coated with oil and coated with dirt two inches thick. Some come in clean. I have never seen what I consider normal. Everyone is different.

Q. There are some a lot easier than others?
A. There are come you can take out in one hour, others, I would say I was proficient in the job, always got

"it done, there are some you can't pull out in three hours and there are some you can pull out in one hour. (Emphasis added)"

Q. What would you consider, everything considered, the average time for truck removal?

A. Out of what unit?

Q. 900

A. If it was dirty and leads not working, over a couple of hours, two and a half hours.

Q. I know it would be hard to recall all the trucks you have done, but, have you ever encountered conditions on a 900 where it took longer than two hours to two and a half hours to remove the trucks.

A. I remember a couple of them. I can think of back last fall, one I worked on it from 4:00 until after 10:00. I had one come in late back in the winter, we pulled it out. I think they had a man stay overtime to finish pulling the truck down. The truck was not out when I left at midnight. It was on Friday night, they held a man over."
(Emphasis added)

Thirdly, many mechanical jobs take longer than normally expected. Foreman Whaley testified:

"Q. You do state there have been times that a job took longer than you considered should have been taken with that years experience.

A. Yes sir, there have been instances where the job may have taken longer than normally required to perform."

Assistant General Foreman Stroud testified:

"Q. In that length of time, there has been a lot of jobs that took longer to do than you originally anticipated?

A. Yes."

In summary, we find that overall the Claimant was dilatory only for a period of a little more than an hour instead of three hours as the Carrier suggests.

Having found the Claimant guilty of something less than what he was charged with it is the Board's next task to consider whether the quantum of discipline imposed was arbitrary, capricious or excessive. It is the opinion of the Board that the maximum discipline for an offense of this nature that could be considered reasonable by any standard is 30 days. The Board believes that the 98 day suspension is excessive for several reasons. First, we have already noted that Claimant was guilty of being indifferent to his duties to lesser degree than argued by the Carrier. Secondly, the offense, and the degree to which Mr. Cramer is guilty of it,

is not extremely serious. Thirdly, a reading of the transcript suggests that, as previously noted, others have taken longer than normally anticipated in completing jobs and further that discipline is not always imposed. Neither Mr. Stroud or Mr. Whaley could remember that during their tenure, 11 years and 12 years respectively, anybody had been cited for a disciplinary investigation. This suggests that 90 days is excessive discipline for this offense. However, we do feel that the Carrier would be justified in imposing some discipline. Some discipline would be justified because Mr. Cramer has had previous discipline problems and because some of the delay in accomplishing the task was willful on his part. Further in this regard the Organization did not convince us that the discipline was wholly unreasonable.

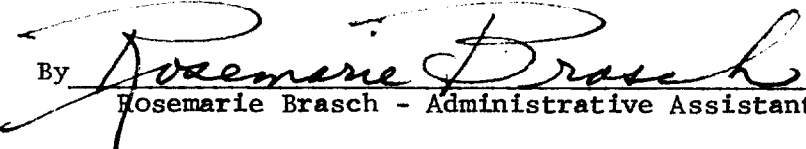
It is the Board's finding that the Claimant should be paid for all time lost between August 16 and October 22, 1979, inclusive, the date the Carrier offered reinstatement. The Carrier's liability stops as of the date of their offer to reinstate. Also, the portion of the claim relating to interest, fringe benefits and pay for attending the hearing are denied as they are not supported by the Agreement.

A W A R D

The discipline is modified to the extent indicated in the Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Attest: Executive Secretary
National Railroad Adjustment Board

By 
Rosemarie Brasch - Administrative Assistant

Dated at Chicago, Illinois, this 27th day of May, 1981.