

CORRECTED

NATIONAL RAILROAD ADJUSTMENT BOARD
Form 1 **SECOND DIVISION** Award No. 12700
Docket No. 12696
94-2-93-2-64

The Second Division consisted of the regular members and in addition Referee John F. Hennecke when award was rendered.

(International Association of Machinists and
(Aerospace Workers
PARTIES TO DISPUTE: (
(Atchison, Topeka & Santa Fe Railway Company

STATEMENT OF CLAIM:

- "1. That the Atchison Topeka and Santa Fe Railway Company (hereinafter referred to as the "Carrier") violated Rule 40 of the Controlling Agreement, Form 2642-A Std., effective September 1, 1974, when it wrongfully suspended from service for sixty days Machinist B. J. Higgins, (hereinafter referred to as Claimant) starting June 30, 1992, and ending August 28, 1992, ensuing an investigation at Argentine, Kansas on July 20, 1992.
2. That, accordingly the Carrier reimburse the Claimant for his lost wages at the Machinist pro rata rate and that his personal record be expunged of all records of this processing."

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 employed as a machinist on the second shift (4:00 P.M. - 12:00 Mid) at Carrier's Argentine facility in Kansas City, Kansas. First line supervisors who supervise work on GE-manufactured locomotives are employees of General Electric.

On Friday, June 26, 1992, a national rail dispute was ended. Carrier's Director, LMIT instructed third shift GE supervisor M.M. Wear to contact all SFX employees who worked for GE Maintenance to inform them that the work stoppage was over and to report for the next regular shift. Supervisor Wear made the calls as instructed, including a call to Claimant at his home at approximately 2:30 A.M. Claimant objected to being called in the middle of the night, since he was not scheduled to work until 4:00 P.M. on Saturday, June 27.

Near the end of his shift, at 11:23 P.M. on June 27, Claimant confronted Supervisor Wear at the head of the ramp and asked if he was the one who had called him in the early morning hours of June 26. Supervisor Wear acknowledged that he was. Claimant proceeded to ask why the call was made and indicated that the call had disrupted his family life. Claimant then stated that if he was ever called again like that, he would shove the phone up a part of the caller's anatomy.

Supervisor Wear wrote up the incident and sent a memo to Carrier's Director, LMIT, requesting that disciplinary action be taken, before going off duty on the morning of Sunday, June 28.

Carrier's Director, LMIT read the memo late in the afternoon on Monday, June 29. At 9:25 P.M. on Tuesday, June 30, Carrier's Equipment Supervisor delivered a letter to Claimant at work, advising him that he was being removed from service, pending a Formal Investigation. Claimant returned his tools to his locker, changed clothes and left the property without incident.

On Wednesday, July 1, 1992, Carrier's Director LMIT sent a letter to Claimant instructing him to report for a Formal Investigation, regarding the June 27 incident, which was scheduled for 9:30 A.M. on July 20, 1992.

At the Formal Investigation, Claimant's representatives raised an objection as to the timeliness of the Investigation under Rule 40 of the Agreement, as amended by Mediation Agreement dated September 19, 1985, and requested that the Investigation be canceled. Section (c) of that agreement reads as follows:

"(c) Formal Investigation, when accorded under the provisions of this Rule, must be convened within twenty (20) calendar days (30 calendar days if the employee is not suspended from service) from the date the Carrier has factual knowledge of the occurrence to be investigated. . . ."

Claimant's representative also submitted as Employees Exhibit "A", correspondence involving two instances (1988 and 1991) wherein the Carrier had canceled scheduled Investigations when the Carrier had not scheduled the Investigations in accordance with Rule 40.

The critical question which this Board must address is when did Carrier have "factual knowledge" of the incident under investigation. If Carrier had "factual knowledge" on or after June 30, then the Investigation was timely. If Carrier had this knowledge before June 30, then the Investigation was untimely.

The Organization contends that since the incident occurred on June 27, a memo was sent by the GE Supervisor on June 28 and received by the Director, LMIT on June 29, and that Claimant was removed from service on June 30, that Carrier had "factual knowledge prior to June 30." If Carrier had such knowledge prior to June 30, then it violated Rule 40 when it scheduled the formal investigation for July 20, and the discipline assessed as a result of that investigation must be set aside. The Organization relies upon Award No. 1 of Public Law Board 4764, which held:

"... we view the notice requirements of Rule 29 to be valid under all circumstances, not just those in which prejudice or impairment may obtain or are demonstrated. If the procedural requirements of any of the disciplinary provisions of the Agreement are not followed the resulting investigation becomes void ab initio and any discipline assessed can not stand."

Carrier acknowledges that its Director, LMIT received GE Supervisor Wear's memo late in the afternoon of June 29, but contends that he did not have "factual knowledge" until he discussed the situation with others on June 30; therefore, the investigation was held in a timely manner. Carrier relies upon Third Division Award 23500, which held:

"In the opinion of this Board the term 'knowledge' presupposes dependable information beyond mere assertion without proof, and contemplates a reasonable period of investigation to obtain such information."

Carrier further argues that even assuming, arguendo, that Carrier went beyond the time limit, such technical violation is not fatal. Carrier cites awards where the discipline assessed by the Carrier was upheld even though there was a technical violation of the procedures in the discipline rule and concluded that a proper remedy would be to pay the Claimant for the number of days involved in the technical violation.

The Board concurs with the findings of Third Division Award 23500 that a Carrier went beyond the time limit, such technical violation is not fatal. Carrier cites awards where the discipline assessed by the Carrier was upheld even though there was a technical violation of the procedures in the Discipline Rule and concluded that a proper remedy would be to pay the Claimant for the number of days involved in the technical violation.

The Board concurs with the findings of Third Division Award 23500 that a Carrier is entitled to a certain latitude in order to conduct further investigation to obtain additional factual information beyond a mere assertion prior to scheduling a Formal Investigation. The question to be resolved here is whether Carrier, in this instance, did so. Carrier contends that its Director, LMIT discussed the situation with others on June 30; however, Carrier did not identify who these "others" were. During the Investigation, Supervisor Wear testified that he posted his memo on June 28 and then was in Kentucky for several days, beginning on June 29. He further testified (on page 12) that he did not discuss the incident with his plant manager (Mr. Smith) until four days later when he saw him in Kentucky. He stated that the following week he contacted Carrier to ask what was taking place. Based upon the record, the Board cannot conclude that Carrier's Director, LMIT spoke with Supervisor Wear in Kentucky prior to the notice for a Formal Investigation being sent to Claimant.

Carrier's letter of June 30, removing Claimant from service, referred to a conference between Claimant and the Carrier that date; however, Claimant testified that no such conference took place (page 21). Carrier's Equipment Supervisor, who hand delivered the June 30 letter, testified that he did not have a conference with Claimant and although the letter he delivered made reference to a conference, he had no knowledge of any such conference taking place (page 17). Based on the above testimony, the Board must conclude that Carrier's Director, LMIT did not discuss the incident with Claimant prior to his being served with formal notice to appear for an Investigation.

Supervisor Wear testified that he and Claimant were the only ones present at the time the incident took place (page 11). Therefore, the Board must conclude that if Carrier's Director, LMIT did not discuss the incident with Supervisor Wear or Claimant, prior to the notice for formal investigation, then the discussions he had with "others" could not have been to develop factual information regarding what had actually occurred on the night of June 27. Carrier had all of the "factual knowledge" it would have concerning this incident when Supervisor Wear's memo was received on June 29. The Board finds that since Carrier had factual knowledge of the incident on June 28, and there is nothing in the record to show that Carrier obtained any additional factual information prior to its scheduling of the Formal Investigation for July 20, we must conclude that Carrier violated the twenty day requirement in Rule 40, as amended by the September 19, 1985 Mediation Agreement.

The Board further finds Carrier's contention, that a proper remedy would only be the payment to Claimant for the number of days involved in the technical violation, to be unfounded. The awards cited by Carrier are clearly distinguishable from the instant claim. The Board agrees with the findings of Award 1 of Public Law Board 4764. When Carrier does not follow the procedural requirements of the disciplinary provisions of the Agreement by scheduling the Investigation in accordance with the requirements of the Agreement, it gives up its right to hold such Investigation, and any disciplinary action resulting from such Investigation cannot stand. We believe this to be consistent with Carrier's own actions, in previous cases cited by the Organization, when Investigations were canceled by Carrier due to the untimely scheduling of those Investigations.

A W A R D

Claim sustained in accordance with the Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Attest: _____

Linda Woods
Linda Woods - Arbitration Assistant

Dated at Chicago, Illinois, this 4th day of May 1994.