PUBLIC LAW BOARD NO. 4373

PARTIES	SOUTHERN PACIFIC TRANSPORTATION COMPANY) (EASTERN LINES))	
	)	AWARD NO. 12
TO	AND)	
	)	CASE NO. 22
	BROTHERHOOD OF MAINTENANCE OF WAY)	
DISPUTE	EMPLOYEES)	

STATEMENT OF CLAIM:

1. Carrier violated the effective Agreement when Houston Division Foreman M. F. Hayes was unjustly dismissed from service.

2. Claimant Hayes shall now be reinstated with pay for all time lost commencing September 9, 1987, and on a continuing basis, with seniority, vacation, and all other benefits due him restored.

HISTORY OF DISPUTE:

On September 9, 1987 a Carrier special agent observed Claimant, an I&R Foreman, at a service station near the Carrier's facility in Lufkin, Texas. The agent saw claimant pumping gasoline into his personal vehicle, a truck. In the bed of the truck was a five-gallon gasoline can belonging to the Carrier. At no time did Claimant pump gasoline into the can. After Claimant left the station the special agent determined from an employee of the station that Claimant had charged the gasoline purchase. The special agent obtained the hard copy of the charge ticket which verified that Claimant had used a company credit card to charge the gasoline. Claimant was suspended from service later that day.

The Carrier notified Claimant to appear for formal investigation on the charge that he had engaged in an act of dishonesty. Subsequent to the investigation Claimant was notified by letter of October 5, 1987 that on the

basis of evidence adduced at the investigation he had been found guilty of the charge and was dismissed from the Carrier's service.

The Organization grieved the discipline. The Carrier denied the grievance. The Organization appealed the denial to the highest officer of the Carrier designated to handle such disputes. However, the disspute remains unresolved, and it is before this Board for final and binding determination.

FINDINGS:

The Board upon the whole record and all the evidence finds that the employees and the Carrier are employees and Carrier within the meaning of the Railway Labor Act, as amended, 45 U.S.C. §§151 et seq. The Board also finds it has jurisdiction to decide the dispute in this case. The Board further finds that the parties to the dispute, including Claimant, were given due notice of the hearing in this case.

At the outset the Organization raises a number of procedural objections with respect to the investigation, none of which we find have merit. The Organization argues that the Carrier's unilateral postponement of the investigation violated Article 14(b) which provides that investigations will be held within fifteen days unless additional time is requested for good cause. The Carrier's postponement, urges the Organiation, was not done at the Organization's request and contained no statement of the reason therefor. However, the Carrier's postponement apparently was in conformity with the established practice on the property that either party may have a postponement if it wants one.

The Organization attacks the charge letter as vague and indefinite in that it failed to apprise Claimant of the particular manner in which he had been dishonest.While it is true that the charge letter refers only to "alleged disonesty", Claimant had been informed verbally at the time of his suspension that he was being accused of stealing gasoline. Accordingly, we do not believe the notice was fatally defective.

The Organization maintains that the Carrier officer who charged and suspended Claimant was not the proper person to do so. However, we can find nothing in the applicable agreement which specifies a particular Carrier office to perform that function.

The Organization alleges that the Carrier failed to call all witnesses having pertinent information with respect to the charge or failed to allow the Organization to do so. Specifically, the Organization maintains that an informant on whose information the special agent was acting when he observed Claimant on September 9, 1987 and Claimant's motor car driver should have been called. However, we believe the Carrier's point is well taken that the informant, apparantly not a Carrier employee, was beyond the authority of the Carrier to call as a witness. Moreover, the evidence as to Claimant's guilt came from the special agent and not the informant. The hearing officer specifically stated that the hearing would be recessed in order to secure the testimony of Claimant's motor car driver. However, the Organization chose to submit a written statement by that individual rather than postpone the investigation.

The Organization maintains that the hearing officer improperly denied the Organization the right to submit evidence concerning prior instances in which Claimant allegedly purchased gasoline with his own funds for use in company vehicles. However, we believe the hearing officer's refusal was not prejudicial error inasmuch as information related to conduct prior to the incident with which Claimant was being charged.

Our review of the record in this case fails to disclose any evidence of bias on the part of the hearing officer as alleged by the Organization. What the Organization argues are unfair evidentiary rulings allowing certain evidence to be presented by the Carrier but disallowing similar contradictory evidence by the Organization are in our view simply legitimate actions designed to assure that the investigation is held in an orderly and efficient manner. We perceive no unfairness in such rulings.

With respect to the merits of the case Claimant candidly admitted his actions at the gasoline station. However, Claimant contended that in fact he swapped personal gasoline for company gasoline as had become his custom over the preceeding three or four weeks. Claimant argued that inasmuch as the Carrier's gas can was full with gasoline Claimant had purchased for use in his tractor but had not yet had the opportunity to use, and desiring to avoid pouring five gallons out of the can simply to refiill it, Claimant placed the gasoline in his truck. However, a Carrier officer who watched Claimant arrive at work on September 9 observed that he poured no gasoline from the five gallon can into the track vehicle. Thereafter the officer examined the gasoline can, finding that it was only one-third full. Claimant contended that his motor car driver

had placed gasoline in the track vehicle from the five gallon can which accounted for why it was only one-third full at the time the Carrier officer observed it. However, according to the written statement submitted by the driver he filled the track vehicle from gasoline in Claimant's truck and not from the five gallon can.

On the basis of the record in this case we believe the Carrier reasonably could conclude that Claimant's defense of a "swap" was false. It is the province of the Carrier and not this Board to resolve evidentiary conflicts. Our function is simply to determine whether there is any substantial evidence in the record, which if credited or believed, would support the Carrier's finding of guilt. We believe the record in this case meets that test.

However, we cannot find that permanent dismissal was appropriate in this case. Claimant is an eleven year employee with an unblemished record. We recognize that Claimant's offense involved dishonesty and therefore was a serious one striking at the heart of the carrier/employee relationship. However, we believe Claimant essentially committed petty theft which as a general rule does not warrant permanent dismissal.

AWARD

Claim sustained to the extent that Claimant shall be restored to the Carrier's service. Claim denied in all other respects.

The Carrier will make this award effective forthwith.

William E. Fredenberger, Jr.
Chairman and Neutral Member

R. O. Naylor
Carrier Member

Sol A. Hammons, Jr.
Employee Member

Dated: At Houston, Texas October 31, 1989.