PUBLIC LAW BOARD NO. 4777

PARTIES	SOUTHERN PACIFIC TRANSPORTATION COMPANY (EASTERN LINES)	AWARD NO. 6
TO	AND	CASE NO. 21
DISPUTE	BROTHERHOOD OF LOCOMOTIVE ENGINEERS	

STATEMENT OF CLAIM:

Protest of Brotherhood of Locomotive Engineers, against the unwarranted and unjustified dismissal of Engineer D. A. Womble; Claim of Engineer D. A. Womble for all time lost from date held from service, February 24, 1993, including time spent attending formal investigation on March 9, 1993, through and including March 12, 1993, until date reinstated to service with seniority and vacation rights unimpaired.

HISTORY OF DISPUTE:

On April 27, 1992 Claimant worked as Engineer on a local switcher from Caldwell, Texas to Hearne, Texas. When he got on the engine at Caldwell he was required to adjust the seat on the Engineer's side of the locomotive so that it would face in the direction of the movement. Claimant maintained that he injured his back while doing so. Claimant filed a Form 2611 the same date and informed a Carrier officer of his alleged injury who transported Claimant to a nearby hospital for treatment. Claimant was admitted to the hospital but released the next day whereupon he was driven by a Carrier officer to Hearne from where he drove to his home in Victoria, Texas.

Claimant was offered and accepted the program of wage continuation in which he participated from April 28, 1992 until January 18, 1993 when he obtained a medical release from a Carrier approved physician to return to service. During that period Claimant received medical treatment for his injury to his back and engaged in a program of physical rehabilitation.

Claimant reported for service on January 23, 1993 and worked continuously until February 20 when he marked off with a sore back. On February 22 a Carrier physician removed Claimant from service because his back condition had become progressively worse, aggravated by the lateral movement of locomotives.

By letter of February 25, 1993 the Carrier notified Claimant that he was suspended from service pending formal investigation and to appear for formal investigation ". . . in connection with your alleged disregard for the affairs of the Company, indifference to duty and dishonesty which came to our attention February 24, 1993, in connection with the personal injury you alleged to have sustained on April 27, 1992, . . ." in violation of Rule 607 of the Carrier's rules and regulations. By letter of March 15, 1993 the Carrier notified Claimant that he had been found guilty of the charges 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 dispute 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.

The Organization raises a number of procedural and substantive arguments in support of the claim, one of which is that the Carrier violated the time limits of Article 32, Section 1(a) of the applicable schedule agreement providing in pertinent part:

> No employee covered by this agreement will be disciplined or discharged without a fair and impartial formal investigation before a proper officer of the Company. . . . Nothing herein restricts suspension in proper cases pending investigation, which shall be prompt, ordinarily within five (5) days.

The Organization maintains that the investigation in this case was not prompt as required by the rule. The Carrier argues that under the circumstances of this case it did not violate Article 32, Section 1(a).

By way of background, on October 23, 1992 Claimant's live-in girlfriend gave a written statement to the Carrier alleging that Claimant had not injured himself adjusting the engineer's seat on the locomotive on April 27, 1992 but had sustained such injury on March 14, 1992 while chasing a hog owned by his son. The statement further alleged that Claimant had avoided immediate medical treatment for the injury in order to wait for an opportunity to make it appear as though the injury occurred on the job so that he would be compensated by the Carrier for the injury. The woman's statement was corroborated to some extent by a statement from her daughter on November 3, 1992. On November 18, 1992 the Carrier videotaped an individual the Carrier alleges to be Claimant performing physical tasks which in the Carrier's view are inconsistent with the physical limitations alleged by Claimant and in connection with which he was receiving salary continuation.

Claimant returned to service on January 18, 1993 upon being released by a Carrier physician to do so. Claimant reported for work on January 23, 1993 and worked continuously until February 20, 1993 at which time he marked off with a sore back. A Carrier physician removed Claimant from service on February 22, 1993 due to Claimant's progressively worsening back condition. On February 25, 1993 the Carrier notified Claimant to appear for formal investigation upon the charges at issue in this case.

The question this Board must resolve is whether the investigation was "prompt" within the meaning of Article 32,

Section 1(a). We believe that under the circumstances of this case it was not.

Although the notice of investigation stated that Claimant's ". . . alleged disregard for the affairs of the Company, indifference to duty and dishonesty . . ." came to its attention on February 24, 1993, the record does not substantiate that statement. We believe the Organization's point is well taken that the substance of the charges against Claimant arose from the statements of his live-in girlfriend and her daughter and from the video taken of Claimant performing certain work. The video was taken on November 18, 1992 and the statements of the two women were rendered prior to that date. Thus, information which became the substance of the charges against Claimant was known to the Carrier for over three months prior to February 24, 1993.

Public Law Board No. 3604 in Award No. 24, Oct. 12, 1984 (Seidenberg, Neutral) between the same parties interpreted Article 32, Section 1(a) in a manner which we find instructive with respect to the instant case. That Board was faced with a series of unilateral postponements of the investigation which delayed it from November 18, 1981 to January 14, 1982. The Board found in pertinent part: "The common law rule on convening Investigations in this industry is that it must be done promptly, absent extraordinary or valid reasons for not acting promptly." Although the Board agreed with the Carrier that the five-day time limit of Article 32, Section 1(a) applied to employees who had been removed

from service pending investigation, the Board found further that ". . . this does not mean that the Carrier has carte blanc to convene all other types of Investigations when it is convenient for it to do so." Finding that the Carrier's action had denied the Claimant a fair and impartial investigation, the Board set aside the discipline and paid the Claimant for all time lost.

The instant case involves the question of whether there was undue delay by the Carrier in charging Claimant. While that was not the issue before Public Law Board No. 3604 in Award No. 24, we believe the rationale of that award specifically addresses the question. As that Board recognized a Carrier does not have carte blanc to convene an investigation when it is convenient for it to do so. It is bound by the requirement of Article 32, Section 1(a) that the investigation must be prompt.

In response to the hiatus between the time the Carrier knew or reasonably should have known of the basis for the charges it eventually leveled against Claimant, the Carrier maintains that such hiatus was the product of its desire to be very careful before bringing such serious charges against Claimant. However, the record does not establish that the Carrier learned of further information after November 18, 1992 which either added to the information it had obtained on or before that date or removed any doubts as to the validity of such information. In short, as in the case before Public Law Board No. 3604 in Award No. 24 the record is

devoid of any compelling information or circumstances which would justify the delay in this case.

In view of the foregoing we must conclude that in this case the Carrier violated the requirement of Article 32, Section 1(a) that it conduct a prompt investigation and that, accordingly, the claim must be sustained without inquiry into the merits.

AWARD

Claim sustained.

The Carrier will make this award effective within thirty days of the date hereof.

William E. Fredenberger, Jr.
Chairman and Neutral Member

W. E. Loomis
Carrier Member

D. M. Hahs
Employee Member

DATED: Feb. 1, 1996