

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD  
THIRD DIVISION**

Award No. 33449  
Docket No. MS-34564  
99-3-98-3-224

The Third Division consisted of the regular members and in addition Referee John M. Livingood when award was rendered.

(Joseph Michael Fleming

**PARTIES TO DISPUTE:** (

(Burlington Northern Santa Fe Railway Company (former  
( The Atchison Topeka and Santa Fe Railway Company)

**STATEMENT OF CLAIM:**

“This letter is to serve notice, as required by the Uniform Rules of Procedure of the National Railway Adjustment Board effective May 16, 1994, of our intention to file an Ex Parte Submission within 75 days covering an unadjusted dispute between Joseph Michael Fleming and Burlington Northern and Santa Fe Railway wherein the Railroad terminated Mr. Fleming’s employment based on an accusation that he falsified payroll records. Subsequent to his termination, Mr. Fleming has presented proof to the Railroad that the payroll documents in question were forged and/or altered by his former supervisor, but the Railroad has, in violation of provisions of the collective bargaining agreement between the carrier and Mr. Fleming’s union-The Brotherhood of Maintenance Way Employees, refused to reinstate him with all back pay, seniority, and benefits.”

**FINDINGS:**

The Third 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, an employee of the Carrier for approximately 16 years, was dismissed from service following an Investigation concerning falsification of payroll. The Organization representing the Claimant appealed the case on the property and, when unresolved, agreed with the Carrier to present the case to Public Law Board No. 4244.

There are certain facts that are not in dispute and have been incorporated in the Submissions of the parties to this Board. The Neutral Member of Public Law Board No. 4244 rendered a preliminary decision which denied the Organization's claim. Subsequently, the Organization requested an executive session of that Public Law Board. Also, the Organization contacted the Carrier directly to request that the Claimant be returned to service. The Carrier agreed to reinstate the Claimant, and the Organization withdrew the case from further handling. The Carrier wrote the Claimant several times regarding his return to service on a leniency basis without pay for time lost. The Claimant was not agreeable to the terms of the reinstatement.

The Carrier has raised a procedural issue regarding the Board's "jurisdiction to decide a case wherein the Organization and the Carrier have reached a compromise settlement and the claim has been withdrawn from further handling by the Organization." The Carrier asserts that once a claim has been withdrawn by an employee's statutory representative it cannot be properly considered by this Board, citing Third Division Award 28397:

"This Board cannot address the merits involved in this dispute in view of the circumstances surrounding the disposition of the dispute during the handling on the property. The Organization's General Chairman is the statutory representative . . . . In that capacity he has the right to file claims on behalf of such employees and handle those claims to conclusion. Included in his handling of claims is the right to withdraw such claims if he chooses. In this instance it appears that the General Chairman found that the Claimant had not appeared for his physical examination during the Claim period and therefore concluded that the Claim should be withdrawn. This Board has no authority to overrule an agreement made between the Organization and the Carrier, in this instance an agreement to withdraw the Claim. Hence, the Claim must be dismissed."

Additionally, the Carrier cites Third Division Awards 30624 and 31071 for its position that claims "that are withdrawn are settled and the same claim cannot be resubmitted" to this Board for adjudication.

It is clear from the record that once the adverse preliminary award, denying reinstatement, was rendered in this case, the Organization requested reconsideration of the case by the Carrier and obtained a conditional reinstatement of the Claimant, withdrawing the claim in the process.

Based on the circumstances surrounding the disposition of the dispute during the handling on the property, this Board cannot address the merits involved in this dispute. The Claim in this case was withdrawn by the Organization in consideration of the Carrier's willingness to reinstate the Claimant on a conditional basis. The principle asserted by the Carrier is itself well settled and one in which this Board is in agreement. The claim was settled and withdrawn on the property, and this Board has no authority to overrule an agreement made by the Organization and the Carrier. The Claim must be dismissed.

**AWARD**

Claim dismissed.

**ORDER**

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) not be made.

**NATIONAL RAILROAD ADJUSTMENT BOARD**  
By Order of Third Division

Dated at Chicago, Illinois, this 23rd day of August 1999.