

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 20583
Docket Number MW-20654

Robert A. **Franden**, Referee

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way **Employes**
(
(The Atchison, Topeka and Santa Fe Railway Company
(- Western Lines -

STATEMENT OF CLAIM: Claim of the System **Committee** of the Brotherhood that:

(1) The Carrier violated the Agreement, particularly, but not limited to Section 1 of Article V when, on April 24, 1972, it dismissed B. **J. Lail**, said dismissal being arbitrary, unjust and in abuse of discretion by inflicting this drastic and excessive penalty on charges not sustained by the record (System **File 130-187-46**).

(2) The Carrier now reinstate B. **J. Lail** to his **former** position of **B&B** painter, with seniority, vacation and all other rights unimpaired and compensate him for wage loss beginning April 24, 1972 continuing forward to date he is restored to service.

OPINION OF BOARD: Claimant was dismissed from the service of the Carrier subsequent to an investigation properly held under the terms of the agreement.

The dismissal decision was appealed. Following a conference held with the General **Manager**, the following letters were exchanged between the General Manager and General Chair-

"March 31, 1972

File: 15-262649

Mr. G. E. Tressler
General Chairman, **BofMWE**
Room 201, 500 Main
Newton, Kansas 67114

Dear Sir:

This letter will confirm understanding reached in our conference today regarding former Northern Division **B&B** Helper B. **J. Lail**.

"As I stated to you, this man's 'attendance record' is far from satisfactory. He failed to protect his job ~~on~~ many occasions and offered various excuses such as car breaking down, sickness of wife, brother in hospital, etc. **Undoubtedly** some of these excuses were legitimate, but many others were questionable and indicated that he really was not interested in working for the Railway ~~Com-~~pany or that he wanted **only** to work at his convenience, which arrangement is not acceptable to the Railway Company. If we cannot depend on an employee we are better off without him.

However, I am agreeable to reinstating him without pay with the distinct understanding that he **will** be expected in the future to protect his assignment and by copy of this letter Mr. **Beauchamp** will carry out this agreement. In addition to division officers emphasizing this understanding with **Lail**, I understood that **you** also will have a talk **with** him and emphasize that he **will** be expected to take care of his job in the future.

I would appreciate your acknowledgment of this agree-
=, particularly the feature of your withdrawing claim for pay while he has been out of service.

Yours truly,

/s/ F. N. Stuppi

cc: Mr. **Beauchamp**"

"April 5, 1972

Mr. **F. N. Stuppi**.
General Manager
A T & S F Railway
Amarillo, Texas

Dear Sir:

This has reference to your letter March 31, 1972 regarding understanding reached in conference March 31, 1972 regarding reinstatement of Northern Division B & B helper, **B. J. Lail**.

"This **is** to advise that it was mutually agreed that B. J. Lail would be reinstated with seniority rights unimpaired, without compensation for wage loss during the period he was out of service.

During our conference I also stated that I would advise B. J. **Lail** that he will be expected to take care of his job in the future.

Yours very truly,

/s/ G. E. Tressler
General Chairman

GET/db"

The General Chairman then sent the following letter to the Claimant.

"April 5, 1972

Mr. B. J. Lail
712-1/2 W. 14th
Sulphur, Oklahoma

Dear Sir and Brother:

This has reference to claim in your behalf for reinstatement to your former position as B & B painter on the Northern **Division**.

Claim was discussed in conference March 31, 1972 and it was mutually agreed that you would be reinstated to your former position with seniority rights unimpaired, without **compensation** for wage loss.

I wish to take this opportunity to **impress** upon you the necessity of protecting your job in the future.

I would be happy to discuss this case with you the first **time** that we have an opportunity to do so.

With best wishes, I am,

Fraternally yours,

/s/ G. E. Tressler
General Chairman

GET:db"

The Carrier has refused to reinstate the Claimant on the grounds that he has not fulfilled the conditions of the agreement to reinstate set out in the letters above. On April 24, 1972 the General Manager informed the General Chairman of his withdrawal of the offer to reinstate in the letter quoted herein.

"Referring to my letter of March 31, 1972, regarding conditional commitment made in conference to reinstate former Northern Division **B&B Helper B. J. Lail** without pay for time lost, also, your subsequent letter of April 5, 1972.

As stated to you by Assistant General Manager J. R. Fitzgerald during recent telephone **conversation**, Mr. Lail contacted our Agent at **Wynnewood**, Oklahoma, on April 10, 1972 and made inquiry concerning his reinstatement. Mr. Lail was under the influence of intoxicants at the time and made several threats relative to returning to work and hurting his back in order to sue the railroad company and get even for having been discharged. In addition, we have made some further investigation concerning Mr. Lail and find that he still has a serious drinking problem.

In view of the additional information developed in connection with Mr. **Lail** and the fact that he has not fulfilled the conditions under which we agreed to reinstate him, I am not agreeable to returning him to the service of this Company at this time. My offer of reinstatement is accordingly withdrawn In view of the circumstances and the pending claim in his behalf is respectfully declined for the reasons outlined herein and in my format decision of August 23, 1971."

The Organization has based this claim on the grounds that the dismissal claim was adjusted on the property by the agreement to reinstate, which agreement was breached by the Carrier. **The** Carrier has responded that the Claimant was not an employee at the time of the filing **of this** claim and therefore is not entitled to proceed against the Carrier under the terms of the Maintenance of Way **agreement**.

The letter of the General Manager dated March 31, 1972, makes it abundantly clear that a negotiated agreement was reached which adjusted the dismissal claim on the property. The final paragraph of said letter asking for an acknowledgement of the agreement and for withdrawal of the claim for wages along with the General

Chairman's April 5th letter acknowledging the agreement including the withdrawal of the claim for wage loss constitute an offer and acceptance which underpin an enforceable agreement.

The Carrier has alleged that said agreement contains certain conditions precedent which have not been met by the **Claimant**. We do not agree. The Carrier has not shown that the **Claimant** failed to meet an expressed or implied obligation placed upon him by the terms of the Agreement. The Carrier agreed to the reinstatement of the Claimant without liability for wage loss with seniority rights unimpaired.

After that Agreement was made the Carrier had every right to discipline the Claimant for his subsequent conduct. **It** should have been done, however, under the discipline provisions of the Agreement,

We will sustain the claim. The proper measure for monetary damages is the same as that set out in the Agreement in Article V section 6 for an **employee** unjustly dismissed.

FINDINGS: The Third Division of the Adjustment Board, upon the whole record and all the evidence, finds and holds:

That the parties waived oral hearing;

That the Carrier and the **Employees** involved in this dispute are respectively Carrier and Employees within the meaning of the Railway Labor Act, as approved June 21, 1934;

That this Division of the Adjustment Board has jurisdiction over the dispute involved herein; and

That the Agreement was violated.

A W A R D

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST:

A. W. Paulos
Executive Secretary

Dated at Chicago, Illinois, this 17th day of January 1975.