Clmt signed waiver of invest w/o Org concurrence. Carrier moved she and implemented disp
1 - clear violation of Rule 27
2 - no $ this time.
3 - Carrier put on notice to comply or suffer $ pay next time

Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 31435
Docket No. MW-30593
96-3-92-3-356

The Third Division consisted of the regular members and in addition Referee Edwin H. Benn when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(
(Consolidated Rail Corporation

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

(1) The Agreement was violated when the Carrier removed Mr. F. Greco, Jr. from service from September 25 through October 1, 1990 and extracted a waiver from him without notice, knowledge or participation of his representative (System Docket MW-1760).

(2) The Claimant shall "... be paid ten (10) hours straight time all overtime pay for days listed, credit for the months and to be made whole."

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 waived right of appearance at hearing thereon.

On October 1, 1990 Carrier charged Claimant, a Class 2 Machine Operator, with violation of Safety Rule 3302 stemming from a September 24, 1990 collision between Claimant's ballast regulator and a tamper at MP 315.5 near Latrobe, Pennsylvania.

On October 2, 1990, and without participation by the Organization, Claimant signed a waiver concerning the proposed discipline which waiver stated that "I waive any right I may have

to an [sic] hearing by the Consolidated Rail Corporation ...." Claimant then accepted a five day suspension. According to a statement from Production Engineer McCurdy, Claimant "was given the right to union representation before excepting [sic] the term of the waiver. However, he waived the union representation and sign[ed] the waiver of his own free will."

Rule 27, Section 2 states:

"Section 2. Alternative to hearings.

(a) An employee may be disciplined by reprimand or suspension without a hearing when the involved employee, his union representative and the authorized official of the Company agree, in writing, to the responsibility of the employee and the discipline to be imposed.

(b) Discipline imposed in accordance with paragraph (a) of this Section is final with no right of appeal."

Therefore, Claimant voluntarily waived a Hearing and accepted the discipline. Notwithstanding the voluntary nature of Claimant's actions, nevertheless, the Carrier violated the plain language of Rule 27, Section 2(a). In order for such waivers to be legitimate, the parties agreed that "the involved employee, his union representative and the authorized official of the Company" must agree to the waiver [emphasis added]. Here the Organization was not given an opportunity to agree to the waiver. Therefore, the Rule was violated.

Aside from the fact that the language of Rule 27, Section 2(a) is clear requiring the employee, the Carrier and the Organization to agree to a waiver, along with the fact that this Board has no authority to change that language, we note that the function of the union representative in cases of employees waiving hearings and accepting discipline is not merely a pro forma one. Aside from playing a role in advising the affected employee concerning the consequences or advisability of accepting proposed discipline, the union representative also serves the interests of other employees by policing the Agreement to assure that other employees' contractual rights are not affected by any such waiver. The employee is obviously free to decline union representation and negotiate his own settlement. But, the bottom line here is that the parties agreed as a matter of contract that the Organization must also agree to any waiver of hearing. That was not done in this case. Rule 27, Section 2 was violated.

The real issue here is the remedy. The Organization seeks compensation for Claimant not only for the time Claimant did not work as a result of accepting the discipline, but also for overtime

that Claimant's job was worked on Claimant's rest days -- a remedy the Carrier views as excessive.

For a remedy, we find that Claimant is entitled to no monetary relief. The status of the evidence before us is that Claimant voluntarily declined representation by the Organization, voluntarily waived the hearing and voluntarily accepted the discipline without any coercion from the Carrier. To award Claimant any compensation would be wholly inconsistent with the voluntary actions taken by Claimant. Because of Claimant's voluntary actions, Claimant is estopped from receiving any benefit from the Organization's efforts in this case. Finding a violation of Rule 27, Section 2(a) but not permitting Claimant affirmative relief strikes the appropriate balance between the Carrier's obligations under Rule 27, Section 2(a) and the ability of an individual employee to settle his own claims and grievances. See Second Division Award 9875 and authority cited therein.

However, from a remedy standpoint, the Organization's institutional concerns must still be addressed. The Carrier violated Rule 27, Section 2(a) which required the Organization also to agree to the type of waiver involved in this case. To maintain that Rule's meaning, as a remedy, the Carrier shall be directed to comply with the plain terms of that Rule. In the future, the Organization must be permitted, as the parties agreed in Rule 27, Section 2(a) the opportunity to "agree, in writing" to any similar proposed waivers before those waivers are implemented. Failure of the Carrier in the future to follow the plain language of Rule 27, Section 2(a) will not preclude this Board from implementing more direct affirmative relief as the circumstances require.

The Carrier's argument that an earlier claim was filed and withdrawn over the disciplinary aspects of this case bars this matter is not persuasive. This claim, timely filed, addresses the Organization's institutional concerns concerning the Carrier's taking the waiver without the Organization's agreement. While the matters certainly overlap, we view the claims as sufficiently distinct.

We have also considered the Carrier's cited authority for the proposition that employee waivers are well-accepted bars to further processing of claims. The cited Awards, however (see e.g., Third Division Award 21183; Second Division Award 12175; First Division Award 24252) do not address the narrow issue in this case in light of the specific language of Rule 27, Section 2(a)'s requirement that the Organization also agree to any employee waiver taken under that section. Those Awards are therefore distinguishable from the instant matter, particularly because of the language of Rule 27, Section 2(a).

AWARD

Claim sustained in accordance with the Findings.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) be made. The Carrier is ordered to make the Award effective on or before 30 days following the postmark date the Award is transmitted to the parties.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Dated at Chicago, Illinois, this 25th day of April 1996.

LABOR MEMBER'S CONCURRENCE AND DISSENT
TO
AWARD 31435, DOCKET MW-30593
(Referee Benn)

Since the award was sustained in part, a concurrence is required only to the extent that the Majority correctly determined that the Carrier violated the Agreement when it extracted a waiver from the Claimant without the concurrence of his union representative as stipulated in the Agreement. The operative rule of the Agreement at dispute in this case is Rule 27, Section 2(a), which reads:

> "Section 2. Alternative to hearings.
>
> (a) An employee may be disciplined by reprimand or suspension without a hearing, when the involved employee, his union representative and the authorized official of the Company agree, in writing, to the responsibility of the employee and the discipline to be imposed."

The dissent is directed towards the Majority's erroneous finding that the Claimant should not be made whole for the time suspended. The Majority's line of reasoning does violence to the Agreement by effectively negating the language that the parties had agreed upon. The Majority's reasoning was that the Claimant was not coerced into signing the waiver but voluntarily declined Union representation and accepted the discipline. The problem here is that this dispute pertains to the mandatory right of the Union to be involved when an employe waives discipline. This Organization is compelled to dissent because as Rule 27, Section 2(a) states, three parties must be involved when an employe signs a waiver in

lieu of a hearing. Although the Majority recognizes the fact that all three parties must agree, it nevertheless allowed the Carrier to escape without incurring a monetary liability. It has been well established by this Board that all parties to an agreement have the responsibility of policing the Agreement. Award 20237. It is not the sole province of the Organization to police the Agreement but the Carrier also is responsible to properly apply the terms and conditions thereof.

The Majority stated:

> "*** Finding a violation of Rule 27, Section 2(a) but not permitting Claimant affirmative relief strikes the appropriate balance between the Carrier's obligations under Rule 27, Section 2(a) and the ability of an individual employee to settle his own claims and grievances. ***"

The problem here is that the very Agreement language cited by the Majority, i.e., Rule 27, Section 2(a), specifically limits an employe's ability to sign a waiver, thereby settling his own claim. As we have stated above, the Agreement clearly states that three parties are required to concur before an employe may sign a waiver of hearing. Those parties are the involved employe, his union representative and the authorized official of the Company. Absent one of the above-cited parties, the waiver is null and void. Hence, the Majority's reasoning is flawed because there was no

"appropriate balance" reached in this case. The Majority has effectively written the Organization out of the rule and thereby altered the Agreement under the guise of an interpretation. The very reasoning used by the Majority (an employe's right to settle his own claims and grievances) is limited by the clear and unambiguous language of Rule 27, Section 2(a). Finally, the Majority's decision to put the Carrier on notice that any future failures to comply with the provisions of Rule 27, Section 2(a) may lead to affirmative relief, is a hollow victory that weakens the integrity of the Agreement. Therefore, I dissent to the Majority's decision not to award the Claimant the affirmative relief requested.

Respectfully submitted,

Roy C. Robinson

Roy C. Robinson
Labor Member