NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Form 1

Award No. 31538
Docket No. MW-31899
96-3-94-3-235

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

(Brotherhood of Maintenance of Way Employes

PARTIES TO DISPUTE: (

(Burlington Northern Railroad Company

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

1. The dismissal of Grinder Operator D. D. Nortell for alleged violation of Rules G of the Maintenance of Way Rules and 565 of the Safety and General Rules Book, on March 26, 1993 was arbitrary, capricious, on the basis on unproven charges, and in violation of the Agreement (System File S-P-497-0/MWB 93-06-23C).

2. As a consequence of the violation referred to in Part (1) above, the Claimant shall be reinstated to service with seniority and all other rights unimpaired, his record shall be cleared of the charges leveled against him and he shall be compensated for all wage loss suffered."

FINDINGS:

The Third Division of the Adjustment Board, upon the whole record and all of 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 February 22, 1993, during a conversation with Claimant, the Welding Supervisor detected the odor of alcohol on Claimant's breath. The Welding Supervisor reported the incident to the Roadmaster, who summoned Claimant into his office and also smelled alcohol on Claimant's breath. The Roadmaster then advised Claimant that he would be taken out of service and subject to an Investigation. The Roadmaster also advised Claimant that the best course of action for Claimant to take would be to sign a waiver of his right to an Investigation and enter a rehabilitation program. The Roadmaster telephoned the Organization Vice General Chairman and advised him that signing a waiver and entering a rehabilitation program was in the Claimant's best interests. Claimant agreed to the waiver and the Vice-Chairman approved the agreement on the phone.

The waiver which Claimant signed on February 22, 1993 admits to a violation of Rule 565 of the Safety Rule Book, represents that Claimant had been fully advised of his rights, and recognizes that the violation "is a dismissal offense." It further provides:

> "I understand that this violation will become a part of my personal record and that I will be dismissed for it. I also understand that I must meet with the Employee Assistance Coordinator, follow any prescribed program he/she deems appropriate, and obtain his/her approval to return to service. After successfully passing a urinalysis test, I will then be allowed to return to service subject to a one-year probationary period, the Employee Assistance Coordinator may extend my probationary period, but if I fail the program, an investigation will be held to determine the facts of why I failed the program.
>
> I understand that this violation will be part of and remain on my personal record. I also realize and acknowledge that a second proven Rule 565 violation that occurs within a ten-year period will result in dismissal with no opportunity for re-employment.
>
> I waive my right to any claims as a result of my violation of Rule 565."

Thereafter, Claimant was evaluated by the EAP counselor who recommended out-patient treatment, and Claimant was restored to service. However, on February 26, 1993, after having checked Claimant's record and determined that he had a prior Rule G waiver in January 1988, Carrier wrote to Claimant as follows:

"In connection with your alleged violation of Rule "565" on February 22. 1993, review of your personal record, upon receipt, reveals that in December, 1987 you were dismissed from service for violation of Rule G.

As this dismissal, along with the instant case, constitutes two violations within a ten-year period, the offer of waiver of investigation for first violators is withdrawn account inapplicable."

On the same date, Carrier directed Claimant to report for an Investigation on March 3, 1993 into his alleged Rule 565 violation. The Investigation was held as scheduled and, on March 26, 1993 Carrier advised Claimant that he had been found in violation of Rule 565 and was dismissed from service.

The Organization contends that Carrier violated Claimant's due process rights by rescinding the waiver. The Organization argues that the waiver was a quid-pro-quo agreement that bound Carrier. It maintains that Carrier induced Claimant to sign the waiver as a means of getting his job back. Had the waiver not been offered, according to the Organization, Claimant would have requested a urinalysis which could have established his innocence.

The Organization observes that Claimant complied with the requirement of the waiver agreement and was restored to service. According to the Organization, subjecting Claimant to a subsequent Investigation and dismissal amounted to impermissible double jeopardy.

The Organization further argues that Claimant was denied a fair and impartial Hearing. It contends that Carrier failed to prove that Claimant violated Rule 565. The Organization maintains that the mere odor of alcohol, unaccompanied by any evidence of impairment such as slurred speech or an unsteady gait, cannot establish a violation of Rule 565. In the Organization's view, Claimant's admission of guilt contained in his wavier cannot be relied on to establish the violation because the admission was given in exchange for the waiver agreement which Carrier rescinded.

Carrier argues that the sole issues for this Board's resolution are whether it proved Claimant's guilt by substantial evidence and whether the penalty imposed was arbitrary and capricious. It maintains that undisputed testimony and Claimant's

admissions adequately established his guilt. Carrier observes that Claimant had prior experience with Carrier's drug and alcohol policy, knew that he could request a urinalysis and failed to do so.

Carrier further contends that the penalty of dismissal was not arbitrary or capricious. Carrier notes that this was Claimant's second Rule G/Rule 565 violation within a ten year period. According to Carrier, Claimant was aware, following his prior Rule G violation, that he would be dismissed for a second violation. Carrier maintains that dismissal for a second Rule G/Rule 565 offense within a ten-year period has been upheld in several prior Awards.

Carrier observes that Claimant never advised his supervisors that he had a prior Rule G waiver. Carrier notes that Rule G and Rule 565 are the same Rule. The supervisors were not aware of Claimant's prior record at the time they offered him a waiver. In Carrier's view, they acted in good faith. As soon as they realized their error, they rescinded the waiver and proceeded to an Investigation.

The threshold issue which the Board finds to be dispositive is whether Carrier's purported rescission of Claimant's Rule 565 waiver was valid. We have concluded that the rescission was not valid and that Carrier was bound by the waiver agreement. Consequently, it was not free to conduct an Investigation and dismiss the Claimant.

Carrier's letter of February 26, 1993 characterized its action as rescinding its offer of a Rule 565 waiver. However, at that point, the matter had progressed well beyond a simple offer. Claimant had accepted the offer and the Organization, acting through the Vice General Chairman had approved it. Claimant had been evaluated by the EAP counselor, out-patient treatment had been found to be appropriate, and Claimant had been restored to service. In other words, the offer had ripened into an Agreement, a significant portion of which had been performed.

Claimant accepted Carrier's offer because it afforded him the opportunity to get his job back. In exchange, Claimant gave up the valuable right to contest the charge against him in an Investigation. In other words, there was ample consideration on both sides of the Agreement. It was too late in the process for Carrier to rescind the waiver Agreement unilaterally, unless there was a proper basis for invalidating it.

Carrier observes that Rule G and Rule 565 are identical, that Claimant's supervisors believed that this was Claimant's first Rule G/Rule 565 offense, and that Claimant failed to disclose his prior Rule G violation. Although misrepresentation often provides a basis for rescinding an agreement, there is no evidence in the record that Claimant misrepresented that the matter was his first drug/alcohol offense.

Rather, the supervisors and the Claimant testified that the Roadmaster, after confirming the odor of alcohol on Claimant's breath, advised Claimant that it was in his best interests to sign the waiver and move as quickly as possible into a rehabilitation program. There is no evidence that the supervisors asked Claimant whether he had any prior Rule G/Rule 565 offenses. The waiver form, apparently drafted by Carrier, that Claimant signed, nowhere represents that this was Claimant's first offense.

Carrier's General Roadmaster testified, on cross-examination, that an employee's personal record should be checked before a waiver agreement is offered. Claimant's supervisors failed to do so. Their motives were pure -- they wanted to help Claimant by moving him into a rehabilitation program as soon as possible. However, there is no basis in the record for concluding that Claimant misrepresented his status, thereby invalidating the waiver Agreement.

Claimant's January 4, 1988, Rule G waiver provided, in part:

> "I understand that this Rule G violation will be part of and will remain on my personal record. I also realize and acknowledge that a second proven Rule G violation that occurs within a ten-year period will result in dismissal with no opportunity for re-employment."

This provision does not invalidate the 1993 Rule 565 waiver. Carrier has the inherent managerial right to offer an offender leniency. Carrier exercises that right when it offers leniency reinstatement in first offense Rule G/Rule 565 waivers. That Carrier retains the right to offer leniency in a first or second offense was recognized in Public Law Board No. 2806, Award 36, cited by Carrier. Carrier is correct that several Awards have denied claims attacking dismissals for second Rule G/Rule 565 violations. Whether the provision of the waiver Agreement precludes a Claimant from contesting dismissal where a second violation is proven, however, is not an issue presented by this case to this Board. Rather, the question is whether the provision precludes Carrier from offering leniency even if it is not obligated to do so. We conclude that the provision does not preclude Carrier's exercise of its managerial right to offer leniency.

In the instant case Carrier, acting through its Roadmaster, offered Claimant leniency through a Rule 565 waiver Agreement. Although at the time of the offer, the

Roadmaster was not aware of Claimant's Rule G wavier signed just over five years before the offer, this resulted from the Roadmaster's failure to check Claimant's personal record before making the offer. It was not induced by any misrepresentation by Claimant of his status.

The offer was accepted and performance had begun. At that point, Carrier was bound by the agreement and could not rescind it unilaterally.

During processing of the claim on the property, the Organization requested a time limit extension. Carrier agreed, subject to several provisos, including, "that any monetary liability which the Carrier may incur in the eventual disposition of these claims shall exclude the period between the expiration of your original time limits for appeal and extension of such time limits granted at your request." The Organization accepted these terms.

Carrier maintains that the time limit extension agreement mitigates its monetary liability in this case. We agree. In accordance with prior precedent, Carrier's monetary liability shall not include the period covered by the time limits extension. See Fourth Division Award 4974.

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 July 1996.