Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 36904
Docket No. CL-37177
04-3-02-3-164

The Third Division consisted of the regular members and in addition Referee Marty E. Zusman when award was rendered.

PARTIES TO DISPUTE: (Transportation Communications International Union
(
(Canadian Pacific Railway Company (former Delaware
(and Hudson Railway Company, Inc.)

STATEMENT OF CLAIM:

"Claim of the System Committee of the TCU (DH01/003) that:

(a) The Carrier violated the Clerks' Rules Agreement effective September 26, 1990, as revised, particularly Rules 4(j) and other rules, as well as Article VI (D&H) Guaranteed Clerical Extra Board of the Agreement dated July 15, 1998, when commencing the Month of December 2000 and each month thereafter, they refused to properly compensate Claimant Walters with the appropriate "monthly" guarantee rate of pay for Guaranteed Clerical Extra Board Employees and instead have advised her that they will only compensate her for actual hour/days worked;

(b) The monthly guarantee should be based on a rate of $2,358.40, effective January 1, 2001, and can only be reduced by her straight-time earnings, missed calls, etc.;

(c) Claimant Walters was hired as a Guaranteed Clerical Extra Board employee on October 16, 2000 and has not been displaced or advised that her Guaranteed Clerical Extra Board Position has been abolished in accordance with the provisions of Rule 13;

(d) Claimant Walters should now be allowed the difference between her actual straight-time earnings and the appropriate Monthly Guaranteed Clerical Extra Board rate of pay, commencing December 2000 and for each and every month thereinafter that the Carrier refuses to compensate her as required by the

aforementioned provisions of the Rules Agreement, on account of this violation."

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.

The claim at bar disputes the proper application of Rule 13 and the alleged failure of the Carrier to properly compensate the Claimant for each month from December 2000 through April 2001. The Claimant occupied the position of a Guaranteed Extra Clerk since October 2000. The Organization alleges that the Guaranteed Extra Clerk position was abolished by written letter of March 19, 2001. Because this was the first written notice of furlough, the Claimant was not properly compensated at her monthly Extra Board guarantee, as per Article VI, the Guaranteed Clerical Extra Board provisions.

The Carrier maintains throughout this dispute that it verbally notified the Claimant of her furlough on February 15, 2001. Because there is no requirement that she be notified in writing, it was proper and accepted compliance with Rule 13. As such, she was provided her proper guarantee in December and January and properly compensated for February 2001. The Carrier denies any Agreement violation.

The Board carefully reviewed the record with particular reference to Rule 13 and the record of the Claimant's earnings in each of the disputed months. Rule 13 states in pertinent part:

"When regularly assigned employees are reduced and/or positions are abolished, at least five (5) working days advance notice shall be given employees affected thereby, except as otherwise provided in

paragraphs (c) and (d) of this Rule. Unassigned employees laid off shall receive as much notice as possible."

Our reading of Rule 13 (c) and (d) does not show them as relevant to this dispute. We studied the Organization's evidence of "written" advance notices issued on May 6, 1996, December 9, 1999 and May 17, 2001, as argued proof that there is past practice both prior and subsequent to this dispute of furloughs requiring written notice.

Rule 13(a) makes no reference to advance 'written' notice; only that notice "be given employees affected thereby." Absent clear Agreement language, there must be equally clear past practice. Such evidence must prove a long term agreed upon practice by both parties to the dispute. This is not shown by three bulletins. The burden of proof is not demonstrated with this type of evidence that written notices were served by long established practice and violated in this instant case.

The Board finds in this record a statement from the Carrier that it gave verbal notice on February 15, 2001. This is supported by the Claimant whose letter on February 15, 2001 states:

". . . You have informed me that my official status is a 'spare clerk'. As a 'spare clerk' I am under no obligation to be available 24-7."

Clearly, the Claimant had been informed that she was furloughed on February 15, 2001. The Board finds this the date of proper notification, resolving the first issue at bar.

As to the second issue of proper compensation, the Board must now consider December 2000, January 2001, and February following furlough. There are no rights due from March 2001 or thereafter. Accordingly, the Board reviewed each of the Monthly Guaranteed Extra Board Claim forms submitted, along with the Organization's position that they should be properly paid. We also noted the Carrier's position that the Claimant was properly paid; compensated accordingly for $31.84 following her February 15, 2001 furlough.

The Board tried to carefully work through these arguments by studying both the Claimant's payment records and the applicable Agreement; Article VI, paragraph C. We are aware that the Agreement requires a pro-rata reduction when the Claimant is no longer on the guaranteed position and that the guarantee is offset for straight time compensation. Because notification of furlough requires five days advanced notice, we

reach the following conclusions. The Claimant earned more than her guarantee in December and January. Therefore, in both months, no payment is due.

The Board carefully studied the Carrier's payments in February, as opposed to the Claimant's record of earnings. We cannot find support for the Carrier's conclusions that it properly paid the Claimant the amount of $31.84. We are reluctant to include our calculations, but based upon the notification of February 15, 2001 and the five-day notification requirement, the Claimant worked 20 out of 28 days in the month. Given the record, the Claimant's guarantee per month was $2,358.40 for February, which, less compensation, sick days and previous payment, does not amount to what the Carrier argues in the record, or what the Organization requests.

On the basis of the Board's determination we remand this case to the parties to determine exactly how much the Claimant is due.

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 February 2004.