PLB. 4070
CASE NO. 39
AWARD NO.

PUBLIC LAW BOARD NO. 4070

PARTIES TO DISPUTE: Transportation Communications Workers International Union
and
Union Pacific Railroad Company.

STATEMENT OF CLAIM:

It is the claim of the System Committee of the Organization that:

1. The Company violated the Rules of the May 16, 1981 Schedule Agreement between the Parties, specifically Rule 18, when they arbitrarily suspended Clerks C.M. DiPeco and A.M. Silva's protection benefits.

2. The Company shall now reinstate Claimants protective benefits and compensate them for all lost wages, including interest, commencing on date their protection payments were terminated. In addition, they should be reimbursed for any medical and dental expenses occurring to themselves of their dependents during the period their protection benefits are arbitrarily suspended.

OPINION OF THE BOARD:

The instant dispute involves the notice provisions surrounding a work recall. The Claimants are two Canadian citizens who worked in the Carrier's Toronto, Ontario Marketing and Sales office until it closed on December 1, 1987. Claimants DiPeco, with a seniority date of January 4, 1980, and Silva, with a seniority date of April 23, 1979, were furloughed on November 30, 1987. Both employees drew a monthly protective benefits allowance while on furlough.

By notice dated July 8, 1988 the Claimants were notified that there were openings in the Carrier's National Customer Service Center in St. Louis, Missouri, for Customer Service representatives. According to the Carrier, it had not been successful in filling the vacancies through the normal bulletining process, and the Claimants were subject to recall throughout the Union Pacific system. The letter stated that the form stating whether the employees would accept the positions in St. Louis must be received back by the Carrier by 5:00 p.m. July 18, 1988.

The Union contends that Claimant Silva did not receive this letter until July 15 and Ms. DiPeco did not receive it until July 18, 1988. The Claimants responded by accepting two of the positions in St. Louis via a registered letter dated July 18, 1988, but apparently not mailed until July 20th, according to the Organization's statement of facts. The letter was addressed to three employees, including the one listed as a contact person, Mr. Cvetas, on the recall letter, via the mail room.

The Carrier contends that Mr. Cvetas did not receive the letter and forms until July 26, 1988. At that point, he disqualified the Claimants from receiving further benefits because they had not accepted the offer within the July 18th deadline.

The Organization filed a claim on behalf of the Claimants on August 25, 1988. The Organization relies upon Rule 18 of the Schedule Agreement, which states,

> RULE 18. REDUCTION IN FORCE.
> (e-2) Furloughed employees failing to return to service within ten (10) days after being notified by registered or certified U.S. Mail or telegram sent to last address on file,

> or give satisfactory reason for not doing so, shall forfeit all service and seniority rights.

The Carrier contends, on the other hand, that the applicable agreement is the UP-CSC Memorandum of Agreement #1 between the Parties. In the opening paragraph of that agreement it states the purpose of the agreement in the following manner,

> "as a result of the establishment of the new Seniority Zone 210 at St. Louis, Mo., in the UP National Customer Service Center (NCSC), the parties mutually recognize the need to provide a method of filling vacancies on existing Customer Service Representative (CSR) positions that may occur in the future."

Article I, Section 4 of that Agreement states,

> (a) In the event an application is not received for the position, notice will be sent to all furloughed protected employes receiving compensation from the Carrier recalling them to the unfilled position in inverse seniority order. These furloughed protected employes ... must within ten (10) calendar days from date of notice elect one (1) of the following options under the UP February 7, 1965 Agreement, as amended.....

The Carrier contends that the second agreement, as the more specific of the two, controls this situation. The Carrier further argues that the "date of notice" here was July 8, 1988 and because the Claimants did not respond within ten days of that date, they effectively elected the third option, which calls for the temporary suspension of the monetary benefits provided under the Agreement.

The Board concludes, however, that the Carrier failed to provide notice as required by either agreement, for the following reasons. First, the Carrier contends that the second agreement referred to above takes precedence over the first agreement because it is more specific. However, the second agreement is not more

specific as to the notice requirement, since it does not specify the method of notifying the employees. Furthermore, there is nothing in the second agreement which indicates that it supersedes the primary collective bargaining agreement as it relates to every aspect of recall from furloughs. Therefore, this Board concludes that the second agreement does not negate the notice provisions of the first agreement.

Second, even under the agreement relied upon by the Carrier, it is not clear that the Carrier's view should prevail. The agreement states that the employe must respond within ten (10) days from the "date of notice." The Carrier contends that the unambiguous meaning of this phrase refers to the date of a written notice sent to employes informing them of the recall. However, the language of the agreement itself does not refer to written notice. Therefore, it is just as reasonable to conclude that "date of notice" refers to the date on which the employee receives notice, whether it be a written letter, a telegram, a telephone call, or some other form of communication.

The fact that the letter addressed to the Claimants stated that they must respond by July 18th does not control the outcome of the dispute over this issue. If the Carrier placed a limitation on the offer which was not agreed to by the Parties in the agreement, the mere communication of this limitation to the employes in question is not controlling.

Furthermore, the language of the collective bargaining agreement supports this interpretation. The language of Rule 18

states that an employee must return to service within ten (10) days of "being notified," by registered or certified U.S. mail or telegram, that a position is available. This language suggests that "notice" occurs when an employee receives a letter or telegram informing her or him of a recall from furlough.

Under these circumstances, the Board concludes that the Carrier has not established that notice is to be measured from the date the letter was sent to the affected employes. The Carrier suggests that the requirement in the collective bargaining agreement that employes "return to service" means that they must actually resume working within ten days, not that they must accept a position within ten days. However, the Board concludes that the provisions appear to be intended to give employes ten days within which to make a major decision, and notify the Carrier of their return to service. Often an acceptance involves the decision of whether to relocate to a geographic location which may be very far from their current home. For example, the facts of the instant case would require these Claimants to accept a job in a location which would involve leaving Canada and moving to the United States. It does not seem reasonable that the Parties would have intended this section to mean that employes must make the decision, notify the Carrier, move and begin working at the new location all within ten days -- or forfeit their protective benefits.

Furthermore, if the "date of notice" referred unequivocally to the date on the printed letter, an employe might have far less than ten days to make a decision. The Carrier has not established

that the notices in question were in fact mailed on the date noted on the letters. The Organization contends that the Claimants did not receive them until July 15th and July 18th. If this were the case, one Claimant would have had less than three days and the other would have had less than one day in which to decide to leave her country and take a job in another country. The Board finds it difficult to believe that the Parties intended this result through the notice provisions of either agreement.

The Carrier contends that the Organization has not established that the Claimants did in fact receive the letters on the dates they claim. However, without a "return receipt" or some other method employed by the Carrier, such as a record of a telephone call or telegram, it would be nearly impossible for an individual employe to establish exactly when she received a piece of mail at her home.

It appears that the letters to employes in the United States were sent certified mail -- return receipt requested. (Carrier's Exhibit C, p. 1). This suggests that the Carrier recognized its responsibility to establish that -- and when -- individual employes received the notice, at least with regards to American employes. Furthermore, it appears that the Carrier's officers were mistaken in concluding that Canada does not have a process for certified or registered mail, as the Organization has obtained a letter from the postal service in Ontario stating that Canada accepts registered letters from the U.S. Furthermore, if there were doubt over the

Canadian mail system, the Carrier should have used an alternative method, such as a telephone call or telegram.

The Organization also argued on the property that the Carrier had no right to notify the Claimants that if they could not work in the U.S., due to immigration problems, their protective benefits would be cut off. In the context of this case that scenario has not occurred and therefore is not an appropriate issue for this Board to decide at this time.

Under these circumstances, the Board concludes that the claims should be granted. The Claimants did not receive proper agreement notice and therefore should not have been disqualified from accepting the offer.

AWARD

The claim is sustained.

This Board, after consideration of the dispute identified above, hereby orders that awards favorable to Claimants Silva and DiPeco be granted. The Carrier is ordered to reimburse the Claimants for all lost protective benefits, retroactive to the date their payments were terminated. In addition, the Carrier is ordered to reimburse them for any medical or dental benefits lost during the period during which their protective benefits were suspended.

Adopted at Chicago, Illinois on 9/11/90.

Lamont E. Stallworth, Neutral Member

Carrier Member

Labor Member

Carrier Member

Labor Member