Form 1 **NATIONAL RAILROAD ADJUSTMENT BOARD**
THIRD DIVISION

Award No. 42252
Docket No. MW-41947
16-3-NRAB-00003-120262

The Third Division consisted of the regular members and in addition Referee Sinclair Kossoff when award was rendered.

PARTIES TO DISPUTE: **(Brotherhood of Maintenance of Way Employes Division - IBT Rail Conference**
(Union Pacific Railroad Company (former Missouri Pacific Railroad Company)

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

(1) The Agreement was violated when the Carrier refused to allow Mr. G. Edwards to work on January 9, 2011 and when it failed and refused to allow him the rest day per diem for January 2, 2011 through January 8, 2011 and the per diem for January 9, 2011 and the travel allowance for the round trip from his work location at Dickerson Yard in Fort Worth, Texas to his residence in Orange, Texas and returning to his work location (System File UP-510-JF-11/1549138 MPR).

(2) As a consequence of the violation referred to in Part (1) above, Claimant G. Edwards shall now have the unauthorized absence (UA) for January 9, 2011 removed from his record and he shall be compensated for eight (8) hours at his respective straight time rate of pay for January 9, 2011 and any other pay he may have lost as a result of not being allowed to work on said date and he shall be allowed the per diem for a total of four hundred fifty-six dollars ($456.00) and he shall be allowed the applicable travel allowance for his round trip from his work location at Dickerson Yard in Fort Worth, Texas to his residence in Orange, Texas and returning to his work location."

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.

On March 1, 2011, the Organization presented a claim to the Carrier that on January 9, 2011, Supervisor Dee Johnson disallowed the Claimant the opportunity to work that day because he reported for a job briefing at 7:30 A.M. that had started at 7:00 A.M. The Organization asserted that the reason the Claimant reported at 7:30 A.M. was that at a 7:00 A.M. job briefing on January 5, Supervisor Johnson stated that when the gang returned to work on January 9, 2011, they would begin work at 7:30 A.M. The Organization purported to attach to its March 1 claim letter a statement dated February 15, 2011, signed by the Claimant pursuant to 28 U.S.C. §1746 under penalty of perjury that on January 5, 2011, at a 7:00 A.M. job briefing at a Fort Worth, Texas, location, "Dee Johnson, the supervisor of the 9169 Tie Gang, stated that when we returned to work on January 9, 2011 we would begin work at 7:30 A.M."

The Claimant further said in his signed statement that after the January 5 job briefing, he never heard any corrections to the start time and was not briefed again by Supervisor Johnson or anyone regarding the start time. The Organization also purported to attach to its March 1, 2011 claim letter signed statements pursuant to 28 U.S.C. §1746 under penalty of perjury from three employees who were members of the same gang as the Claimant. The statements, which are dated January 15, 2011, each declares that "on or about January 5, 2011," the employee was working in the Fort Worth, Texas, location for the Carrier and at a 7:00 A.M. job briefing, "Dee Johnson, the supervisor of the 9169 Tie Gang, stated that when we returned to work on January 9, 2011, we would begin work at 7:30 A.M."

The Carrier replied to the claim by letter dated April 26, 2011. The letter noted the Organization's assertion that it had submitted attachments to its claim letter in verification of the allegations presented in the claim. However, the Carrier stated, it was ". . . unable to locate any attachments that have been submitted by the Organization pertaining to this instant case." If the Organization contended that such attachments existed, the Carrier requested, ". . . please provide them so that the Carrier can review them for any validity pertaining to [the Claimant's] case." Regarding the substance of the claim, the Carrier asserted that because the Claimant did not report at the proper assembly point at the designated starting time he was not entitled to the remedy requested in the claim. The Carrier noted that ". . . the remaining gang members arrived to the gang assembly point prior to the designated start time of 7:00 A.M."

The Organization appealed the denial of the claim by letter dated May 9, 2011. Regarding the attachments that the Carrier stated that it did not receive, the Organization asserted that ". . . [t]hese attachments do exist and we take exception that the Carrier is deliberately denying their existence . . . so they don't have to satisfy the remedy of this claim." The Organization stated that copies of the attachments were provided with the original claim and asked whether "the Carrier conveniently misplaced them" to benefit its own needs.

The Carrier responded by letter dated June 23, 2011, which included an email statement from Supervisor Johnson. In the email Supervisor Johnson stated that on the last day of work before the rest days the employees were told that the job briefing would be at 7:30 A.M. on January 9. On January 5 and January 6, the email stated, the employees were told that the job briefing would be at 7:00 A.M. on January 9. The Claimant, Supervisor Johnson stated, was informed both times. Supervisor Johnson's email also stated, "No one else was neither tardy or UA [Unauthorized Absence] for 1-09-11." The Carrier cited Third Division Awards which, it asserted, held that ". . . the Carrier has the right to send an employee home if he or she fails to come to work on time."

The next communication between the Parties, according to the record, was a letter to the Carrier dated July 11, 2011, from the Organization requesting to conference the instant claim with three other claims by telephone on August 12, 2011. Thereafter, by letter to the Carrier dated September 2, 2011, the Organization confirmed that a conference had been held on August 12, 2011, and reiterated the Organization's previous arguments. The Organization also stated, "Supervisor Johnson violated Rule 32 of the Current Agreement when he changed the starting

time back to its original time by not giving the employees under his charge a thirty-six (36) hour notice." Referring to the Carrier's letter of June 23, 2011, and the enclosed statement of Supervisor Johnson, the Organization asserted that the statement ". . . is false as all employees were not properly notified at the job briefing that [the] time would be changed to 7:00 A.M., as contradicted by attachments A, B, and C."

Rule 36 of the Parties' Agreement requires that on-line employees will not receive a daily per diem allowance for rest days, holidays, and personal leave days, ". . . when the employee is voluntarily absent from service when work is available to him on the workday immediately preceding or the workday immediately following such rest days, holidays, or personal leave days." On the basis of that provision, the Carrier denied payment to the Claimant of a per diem allowance for his rest days of January 2 through 8, 2011, because the Claimant did not work on January 9, 2011. The Organization contends that the Carrier failed to inform the Claimant that the starting time had been changed back to 7:00 A.M. and that, therefore, he was improperly denied the right to work on January 9, 2011 for reporting late for the job briefing on that date. As a result, the Organization maintains, the Claimant is entitled to be paid a per diem allowance for the rest days involved and for January 9 and to be reimbursed for not being permitted to work on January 9, 2011.

Had the Carrier not given the Claimant notice that the reporting time had been changed back to 7:00 A.M. from 7:30 A.M. for January 9, 2011, there would be merit to the Organization's claim. An employee is entitled to reasonable notice of a change in his reporting time. The Carrier, citing supporting Third Division cases, argues that an irreconcilable dispute of facts exists whether the Claimant was notified of the starting time change, and that in such case, the claim must be denied. The irreconcilable conflict in a material fact argument, which the Carrier relies on, is a function of the burden of proof. Where the evidence adduced on an issue of material fact is equally credible and persuasive for both Parties, then the Party with the burden of proof will have that issue resolved against it because it has been unable to sustain its burden to show that its version of the facts is correct.

The Organization argues that the Claimant's assertion that on January 5, 2011, Supervisor Johnson instructed the gang that the start time for January 9, 2011, would be 7:30 A.M. ". . . was supported by the statements of three (3) of Claimant's co-workers, who all stated that they heard Mr. Johnson establish a 7:30 A.M. start time for the January 9, 2011 work day." It is true that the Claimant's coworkers are in agreement that Supervisor Johnson instructed his gang that the

starting time for January 9, 2011, would be 7:30 A.M. Supervisor Johnson himself admits that he originally gave such an instruction. According to his statement, however, he changed that instruction and, on January 5 and 6, 2011, told the employees on his gang that the job briefing would be at 7:00 A.M. on January 9. Pertaining specifically to January 5, 2011, the statements of the three witnesses and the Claimant are not the same.

In his declaration the Claimant states unequivocally that on January 5, 2011, Supervisor Johnson ". . . stated that when we returned to work on January 9, 2011 we would begin work at 7:30 A.M." The three other employees, however, stated that "on or about" January 5, 2011, Supervisor Johnson ". . . stated that when we returned to work on January 9, 2011, we would begin work at 7:30 A.M." The word "about" in the phrase "on or about" means "approximately." See The New Oxford American Dictionary (2001) which defines "about" when "used with a number or quantity" as "approximately." The same dictionary defines "approximate" as "close to the actual, but not completely accurate or exact."

It appears that the three corroborating witnesses were not willing to state unequivocally that it was on January 5, 2011, that Supervisor Johnson said that when they returned to work on January 9, they would begin work at 7:30 A.M. As noted, Supervisor Johnson does not deny that prior to January 5 he told the employees on the gang that they would start at 7:30 A.M. Because the three corroborative declarants were not willing to state unequivocally that the instruction to report at 7:30 A.M. was given by Supervisor Johnson on January 5, 2011, their statements cannot be considered as fully supportive of the Claimant's position.

Supervisor Johnson, moreover, said in his statement that on January 6, 2011, he also instructed gang 9169, including the Claimant, that the job briefing time for January 9, 2011, would be 7:00 A.M. None of the three coworkers of the Claimant disputed that statement. Nor did the Organization provide a statement by any other witness disputing Supervisor Johnson's statement regarding his instructions on January 6. The Claimant acknowledges that he worked on January 6, 2011. For January 6, 2011, it is, therefore, the Claimant's word against the Supervisor's. The Supervisor's statement is supported by the fact that it is undisputed on the record that all employees on the gang reported for work in time for the 7:00 A.M. job briefing. On this record it must be found that the Organization did not sustain its burden of proof that the Claimant was not informed at least 36 hours before January 9 that the starting time for January 9, 2011, had been changed from 7:30 A.M. to 7:00 A.M. The claim for a per diem allowance for the Claimant's rest days

and for January 9, 2011, must therefore be denied. The request to have the unauthorized absence for January 9, 2011, removed from the Claimant's record and that he be compensated for that day must also be denied.

The claim for travel allowance for the round trip from the Claimant's work location in Fort Worth, Texas, to his residence in Orange, Texas, and returning to his work location is allowed. The Organization correctly points out that Rule 37 of the Parties' Agreement, which is titled Rest Day Travel Allowance, unlike Rule 36, which contains the title Expense Allowances - Mobile Service, has no disqualifying language based on the employee's voluntarily absenting himself from service on the workday immediately preceding or the workday immediately following rest days, holidays, or personal leave days. The only disqualifying language in Rule 37 pertains to employees who do not make themselves available for work on a certain percentage of their regularly scheduled workdays. There is no contention the Claimant came within that language. He is, therefore, entitled to receive his rest day travel allowance as provided in Rule 37 of the Agreement.

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 29th day of February 2016.