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

Award No. 42476
Docket No. MW-42154
16-3-NRAB-00003-130099

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 failed to allow Mr. J. Ellis a meal period on September 1, 2011 (System File JE2011-5/1561331 MPR).

(2) As a consequence of the violation referred to in Part (1) above, Claimant J. Ellis shall now be compensated for thirty (30) minutes at his respective time and one-half rate of pay."

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.

By letter dated September 25, 2011, Allied Federation District Chairman Jonathan Ellis filed a claim with the Carrier alleging that "Supervisor Mr. Doug Sharp, the Foreman, and the sub-group coordinators did not call or permit the Spike-driver operator Mr. Jonathan Ellis on curb Gang #9112 of rail south the allowed right to have lunch and refused to pay him what he is to get under the agreement made between Union Pacific Railroad and the Union ALLIED FEDERATION. . . ." The letter stated, "It is the organization[']s position that the carrier did not allow the claimant the opportunity for lunch only the time to perform work duties as an Operator where the work was performed this is wrong!" Rule 35 of the Agreement then in effect was claimed to have been violated. The remedy requested was 30 minutes' pay at the overtime rate for September 1, 2011.

The September 25, 2011, letter provided the following alleged details regarding the claim:

> **"The work was being done at Langtry Texas on the Sanderson Subdivision M.P. 438 to M.P. 440. Under the form B number #73435 we traveled to mp. 438.95 to mp. 439.11 under the direction of Supervisor Doug Sharp and our front-line supervisor and to finish this curb 100%. The claimant was instructed by the subgroup coordinator leave your machines that are still in work mode and go to the front of the crane and begin doing trackman work laying out the <u>on track material</u> until it is time to start spiking when asked about lunch we are told that time is not available for it and to perform the work of your craft."**

The Carrier, by an Engineering Supervisor, answered the claim in a letter dated November 17, 2011. The reference heading on the letter listed eight claims to which it pertained dated respectively September 1, 2, 3, 5, 6, 8, 17, and 24, 2011. The letter stated several objections to the claim, the first being that no statements were provided in support of the claim. The Carrier further argued that "it is not the responsibility of the Supervisors and Managers to personally speak to each and every employee and tell them when to take their lunch break." Because of the size of the group, 27 employees, the letter continued, and the scope and nature of their work, "it is communicated to the employees as a whole that even if they are not personally instructed as to an exact time and place at which they are to take their meal period, they are still given permission and authority to take their meal period when practicable."

The Engineering Supervisor continued in the Carrier's letter that he "has six (6) years of experience in working on large system gangs and hereby testifies that it is not traditional practice, for any employee, to work their entire shift without being afforded a meal period simply because they had not been 'instructed' to take lunch." The letter insisted that "[a]ll employees, including Mr. Ellis, are allowed and encouraged to take a meal period in accordance with Rule 35 of the Agreement." It is not a rule violation, the letter asserted, if an employee fails to take a meal period because of his own poor time management. The Carrier enclosed the following written statement dated 11/16/2011 by Track Supervisor Douglas V. Sharp which he sent to the Engineering Supervisor:

> **"Mitchell, In reference to the previous time calls on Gang 9112 Mr. Lacey was the foreman on the gang and it was his responsibility to call lunch for the gang. And there is no other claims from the rest of the 27 other employees on this gang except Mr. Ellis which is putting the claims in for himself and Mr. Lacey. It is an understanding on my gang that if an employee is not awarded his lunch to present this to me the next day so I can take [note] of this and I also don't mind paying the overtime if this does happen. But everyone on the gang takes there [sic] lunch. These employees are claiming this form [sic from?] two months ago without any acknowledgement to myself or anyone else on this gang. FYI Mr. Lacey was also disqualified off gang 9112 on Sept. 20 for other gang related issues."**

The Carrier denied the claim.

By letter dated January 13, 2012, the Organization appealed the denial. The letter quoted Rule 35 and argued that it was violated based on the allegations of the original claim letter of September 25, 2011. Enclosed with the Organization's appeal was a Statement for Claims Document consisting of a six-question questionnaire filled out by one employee. The employee answered "No" to the question whether he had lunch every day; "No" to the question of whether he was always paid for his lunch; "Yes" to the question if his supervisor ever told him that he will not pay for lunch; "No" to the question if the employee knew "what the CPI process is"; and "No" to the question of whether the "CPI" process is in place every day. That employee was neither Mr. Ellis nor Mr. Lacey.

The Carrier replied to the appeal by letter dated February 27, 2012. It first repeated the arguments made by the Engineering Supervisor in his letter of

November 17, 2011. It then argued that the Organization failed to provide documentation or other evidence that the Claimant was denied a meal period on the specific dates alleged. Citing the statement by Track Supervisor Sharp, which spoke of an understanding on his gang that employees not awarded their lunch were to present the matter to him the next day, the Carrier asserted that the Organization "has also failed to show that the Claimant ever talked with Supervisor Sharp regarding a missed meal period and/or was denied payment for the same." The Carrier then pointed to the fact that there were 27 employees on the gang "and only the Claimant and Foreman Lacey had claims filed by the Claimant regarding a missing meal period."

The Carrier then addressed the questionnaire that was included with the Organization's appeal. The Carrier asserted that the questionnaire did not provide evidence of a violation and that it was "vague and contains no dates." The Carrier asked why, if that employee had been denied meal periods as alleged in the questionnaire, no claim was filed on his behalf. The Carrier argued that the questionnaire was "unpersuasive in proving the Organization position." The Carrier contended that the contradictory positions of the parties created a dispute of facts which required dismissal of the claim because of the failure of the moving party to meet its burden of proof.

The Carrier concluded with the observation that the claim "specifically states the Claimant was not told by his Foreman to take lunch." The Carrier asserted that it found this "peculiar" because the Organization also filed several claims of denial of a meal period in behalf of the Foreman involved, Mr. Lacey, who, according to the Carrier, was "foreman of the Claimant's gang during the period of the claim dates." The Carrier contended that the Organization considered Foreman Lacey to be responsible to instruct members of the gang to observe their meal period but that he did not do so for himself or the Claimant. The Organization asserts, "The Claimant is the party who filed the claims on behalf of Mr. Lacey. Thus, it appears as if Mr. Lacey did not authorize a meal period for himself or the Claimant and then the Claimant filed claims on each of their behalves." The Carrier contends that this betokens a lack of merit to the Organization's case.

The Organization's entire claim rests on the claim letter dated September 25, 2011. The Board finds the letter vague. After stating that "we traveled" to a particular milepost "under the direction of Supervisor Doug Sharp and our front-line supervisor" to finish a curve, the letter describes the alleged violation:

> **"The claimant was instructed by the subgroup coordinator leave your machines that are still in work mode and go to the front of the crane and begin doing trackman work laying out the on track material until it is time to start spiking when asked about lunch we are told that time is not available for it and to perform the work of your craft. Then we travel to mp. 432.30 to Shumia to set up equipment to lay opposite rail."**

Rule 35 (a) of the applicable Agreement provides that "[w]hen a meal period is allowed, it will be between the ending of the fourth hour and the beginning of the seventh hour after starting work, unless otherwise agreed upon by the employees affected and the local supervisory officers." The claim letter does not state what time employees asked about lunch. So far as appears from the letter, when employees asked about lunch and were told that time was not available for it and to perform the work of their craft, there was sufficient time to finish that phase of the work and still have lunch.

There is no allegation that employees asked for lunch before traveling to Shumia or any explanation why such request was not made. Further in reference to the statement "we are told that time is not available for lunch," there is no disclosure of who allegedly said that time was not available for it; whether it was a supervisor or someone else. The initial Carrier denial letter dated November 17, 2011, remarked about the lack of detail in the claim letter and that it did "not allow the Carrier much to work with in researching further into this claim." The Board agrees with those observations.

The following assertion by the Carrier's Engineering Supervisor is unchallenged in the record: "Due to the size of the gang, twenty seven (27) employees and scope and nature of their work, it is communicated to the employees as a whole that even if they are not personally instructed as to an exact time and place at which they are to take their meal period, they are still given permission and authority to take their meal period when practicable." In light of the nature of railroad work, the foregoing statement seems inherently credible. It is not in the interest of the employees or the railroad for employees to work without a meal. Other than the reference to a single request about lunch and the response by an unidentified person that time was not available, the record contains no details of efforts by the Claimant to take a meal period on the date in question. That fact together with the additional fact that Claimant was the only one among 27 employees who claimed not to have been allowed to take a meal period that day

causes this Board to conclude that the Organization has not met its burden to establish that despite reasonable efforts on the part of the Claimant to take a meal period on September 1, 2011, the Carrier did not allow him to do so. The claim will be denied.

AWARD

Claim denied.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an Award favorable to the Claimant(s) not be made.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Dated at Chicago, Illinois, this 28th day of November 2016.