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

Award No. 43543
Docket No. MW-43043
19-3-NRAB-00003-150232

The Third Division consisted of the regular members and in addition Referee Kathryn A. VanDagens 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 provide not less than four (4) working days' notice of job abolishment for all positions on Gangs 9711 and 1910 as required by Rule 10(b) when it provided notices of job abolishment after starting time on December 17, 2012 (System File UP937PA12/1579056 MPR).

(2) As a consequence of the violation referred to in Part (1) above, the affected members of Gangs 9711 and 1910 shall each be paid eleven (11) hours at their respective straight time rates of pay and they shall each be paid their daily per diem allowance."

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 Claimants established and hold seniority in the Carrier's Maintenance of Way Department. They were regularly assigned to Gangs 9711 and 1910 and were working under a T-1 consecutive compressed half work period. On December 17, 2012, at 7:30 am, the start time of their shifts, Supervisor Staman told the Claimants that their positions were being abolished at the end of the work day on December 20, 2012.

Rule 10, Force Reduction, provides in part:

> **"(b) Not less than five (5) working days' advance notice will be given before regularly established positions are abolished, except for positions on a gang working ten (10) hours or more a day on a compressed work period will require not less than four (4) working days' notice of abolishment."**

The Organization filed this claim on January 25, 2013, alleging that the Carrier owed each the Claimant eleven hours pay plus their per diem because they were not given proper notice of the abolishment of their positions. The Carrier denied the claim on February 19, 2013, asserting that proper notice was given. The parties processed the claim on-property but were unable to reach resolution. It is now properly before this Board for final adjudication.

The Organization contends that Rule 10 of the parties' Agreement was violated, because the Claimants were given less than four days' advance notice of the abolishment of their positions. The Organization contends that the Claimants were notified of the abolishment on December 17 after their workday had begun and that the working day of the notice should not be included in computing the number of days of notice. The Organization contends that the Claimants' positions were abolished three working days after they received the abolishment notice.

The Carrier contends that it did not violate the Agreement, because affording the Claimants notice of abolishment at the beginning of their shift on December 17, 2012,

effective the end of the shift on December 20, satisfies the condition that not less than four days' notice be provided. The Carrier contends that the Claimants were afforded 43 hours' notice, as Supervisor Staman pointed out in his statement. The Carrier contends that since the Claimants were given notice at the beginning of their shift, arbitral precedent stating that the day of the notice cannot be counted is inapplicable. The Carrier further contends that in any event, the Claimants are not entitled to be paid a per diem allowance when they were home and not incurring expenses.

The burden is on the Organization to show a violation of the Agreement. In support of its argument that the day the abolishment notice is given cannot be counted for purposes of counting the number of days, it cites Third Division Awards 31032 and 17219, among others. What these decisions and others make abundantly clear, is that the day that notice is given to the employees cannot be counted when computing whether sufficient advance notice is given. "Further, we do not agree with Carrier's argument that the working day, during which the Claimant received said notice in this instance, must be included in computing said "five" working days advance notice. See Award 15839 and 15964." Third Division Award 17219.

The Carrier concedes that in Third Division Award 17219, this Board found that when notice was given at 11 am after the shift began at 7 am, the day could not be included. However, it argues that this claim can easily be distinguished, because here it gave notice at the start of the Claimants' shift, not several hours into it.

The Carrier's position misconstrues this long and consistent line of cases. The mandate that a Carrier provide sufficient advanced notice of position abolishment has been referred to as a "strict requirement." Third Division Award 15839. As such, the day of notice cannot be included in the computation period, no matter how small a part. Most awards do not mention the time of the notice, as regardless of how much of the employee's shift has transpired, the day of the notice is not included. "Further, the Board is not convinced by Carrier's arguments and Awards that the working day, during which the Claimants received their notices, must be included in computing the five working days advance notice." Third Division Award 15839. "However, the requirement of 'not less' than five working days' advance notice must logically be read to exclude the day on which notice is given (although it does include, with equal logic, the last day worked). This view is supported by Third Division Award 21766, citing previous Awards to the same effect." Third Division Award 27016.

Finally, the Carrier cites Third Division Award 41588 wherein a claim was denied when notice was given on May 11 for an abolishment effective May 15. This Board notes that the timeliness of the notice was not raised in the claim before that Board, and thus, is not discussed. Therefore, we do not find that the Award persuades us that a different result should be reached in this case.

The purpose of the advance notification period is to ensure that employees whose positions are abolished have sufficient time to make plans to exercise their seniority rights to other jobs. Third Division Award 31032. The Claimants were deprived of the full measure of the benefit when they were given notice on December 17 that their positions were to be abolished December 20.

The Claimants are entitled to one day's pay due to the Carrier providing only three days' notice of the abolishment, when four days' notice was required by the Agreement. The Claimant's request for a per diem allowance in addition is denied, for the reasons they did not demonstrate that they satisfied the conditions necessary to be paid per diem allowance pursuant to 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 27th day of March 2019.

CARRIER MEMBERS' DISSENT

to

THIRD DIVISION AWARD 43543

(Referee Kathryn A. VanDagens)

Notwithstanding the evidence of record established proper notice of abolishment was given at the start of shift, or the existence of the on-property decision of Third Division Award 41588, the Majority confusingly chose to rely on off-property, non-party decisions as basis for its decision.

What is most surprising, the Majority goes so far as to hold that it does not even matter "how small a part" of the day is impacted for the day not to count in the notice calculation. So despite the Claimants having received notification at the start of shift, despite the Claimants having more than forty (40) hours advance notice of the abolishment, and despite absolutely no showing Claimants ever suffered a lack of "sufficient time to make plans," the Majority elected to issue a windfall when no harm was ever demonstrated.

While the Carrier will adhere to the Majority's order, such will not be considered as precedent in future cases. Respectfully dissenting,

Derek E. Hinds

Derek E. Hinds

Jeanie Arnold

Jeanie L. Arnold

March 27, 2019