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

Award No. 43978
Docket No. MW-44772
20-3-NRAB-00003-180218

The Third Division consisted of the regular members and in addition Referee I. B. Helburn when award was rendered.

(Brotherhood of Maintenance of Way Employes Division
(IBT Rail Conference
PARTIES TO DISPUTE: (
(Kansas City Southern Railway Company
(former Gateway Western Railway Company

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

(1) The Agreement was violated when the Carrier failed and refused to properly comply with Rule 7 and provide Mr. J. Wallis with a proper meal period or compensation after he worked more than ten (10) hours a day on July 23, 2016, August 17, 2016 and September 1, 15 and 20, 2016 ([System File C 16 07 23 (052)/K0416-6911 GWR].

(2) As a consequence of the violation referred to in Part (1) above, Claimant J. Wallis shall now '* be compensated a total *of six (6) hours at the time and one-half rate of pay which totals $225.99 for the Claimant* plus late payment penalties based on a daily periodic rate of .0271% (Annual Percentage Rate of 9.9%) calculated by multiplying the balance of the claim by the daily periodic rate and then by the corresponding number of days over sixty (60) that this claim remains unpaid.' (Emphasis in original)."**

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 aforementioned claim was timely filed and properly process on the property without resolution and, therefore, progressed to this Board for final adjudication.

The Organization contends that the Carrier violated Rules 7(b), 7(d) and 7(f) on the dates noted in the claim because Claimant J. Wallis worked more than ten (10) hours on four (4) of the dates and close to eighteen (18) hours on one date. The Carrier has not disputed the Organization's assertions of time worked. Attached statements show a past practice in accordance with Rule 7 as the Organization interprets the rule. Furthermore, the Carrier has not provided a valid defense. While, due to a typographical error, the initial claim wrongfully referred to Rule 17, the claim letter and the quoted Agreement provision later in the letter establish Rule 7 as the relevant Rule. Carrier reference to Rule 7(c) is erroneous because that rule refers to a meal taken during a normal work period rather than meals taken after a ten (10) hour work period. The Carrier's assertion that the Claimant could have procured his own hot meal and expensed it is "preposterous" because Rule 7(e) obligated the Carrier to provide the meal. The Rule does not excuse the Carrier from the obligation to provide the meal because of logistical issues. The claim for second and third meals did not involve pyramiding because the claim was not for a double payment.

The Carrier notes that the initial claim referenced Rule 17, which was not the claim handled on the property. The procedural error should cause the Board to dismiss the claim for lack of jurisdiction. Regarding the merits, the Organization has failed to satisfy its burden of proof because none of the language in Rule 7 supports the claim. The Claimant was paid continuously. Rule 7(e) does not mandate a penalty for not providing a hot meal. The Carrier is not contractually compelled to bring a hot meal to the Claimant, who was not deprived of the opportunity to eat an assigned meal. It was impossible for the Carrier to bring a meal to the Claimant, a Bridge Tender who worked in remote sites where the bridges are located. No issues were raised about eating a meal

within the initial eight (8) hours of work. Train traffic and the timing of likely call-outs are known. The Organization has not shown that meals were not provided or that the Claimant contacted the Carrier to provide meals. Mere assertions do not make a *prima facie* case.

The contract language below has particular relevance to this dispute.

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RULE 7

MEAL PERIOD

(a) Unless otherwise agreed to by the proper officer and duly accredited representative, the assigned meal period shall not be less than thirty (30) minutes nor more than one (1) hour.

(b) If an employee is assigned to a shift consisting of eight (8) consecutive hours or more, then not less than twenty (20) minutes shall be allowed in which to eat, without deduction in pay, during the fourth or fifth hour after the beginning of the job assignment.

(c) When a meal period is allowed as provided in (a), above, it shall be regularly assigned during the fourth or fifth hour after the beginning of the job assignment, unless otherwise agreed to between Management and the duly accredited representative. If the meal period provided for in (a) or (b) above, is not afforded within the assigned period and is worked, the meal period shall be paid for at the overtime rate and twenty (20) minutes with pay in which to eat shall be afforded at the first opportunity.

(d) Employees will not be required to work more than ten (10) hours without being permitted to take a second meal period, and succeeding meal periods will be granted at appropriate intervals of not more than six (6) hours. Time taken for such meal periods will not terminate the continuous service period and will be paid for up to thirty (30) minutes for each such meal period.

(e) The second meal and subsequent meals (if any) under Section (d) shall be furnished by the Carrier, at Carrier expense. The Carrier will make a reasonable effort to ensure that such meal will be hot and substantial.

(f) The Carrier will make suitable arrangements for employees to take additional and succeeding meals for which allowance is made pursuant to Section (d) and (e) above, or for meals on rest days and holidays, when the work extends beyond the time of which the employee has been given notice prior to reporting to work."

Turning to the parties' contentions, in its *ex-parte* submission, the Carrier asserts that this Board should dismiss the claim for lack of jurisdiction because in its initial claim the Organization referenced Rule 17 Meal Period, but in the Notice to the NRAB the Organization referenced Rule 7 Meal Period. The Organization did, indeed, begin with an allegation that the Carrier violated Rule 17, but the letter to the Carrier went on to list the various meal periods for which the Claimant should be compensated and thereafter set forth the relevant sections of Rule 7 Meal Period, labeled as such. The Carrier's declination noted the discrepancy but responded to the allegation that Rule 7 had been violated. After the declination was received, the Organization submitted a further appeal in which they acknowledged the "harmless typographical error" and again focused on the alleged violation of Rule 7 Meal Period. Rule 17 was said by the Carrier to concern Bulletin, but none of the parties' contentions have addressed issues relating to Bulletin. A review of the on-property correspondence establishes unambiguously that the typographical error was, indeed, harmless and neither mislead nor prejudiced the Carrier's effort to defend against the allegation. The case considered on the property is exactly the case now before this Board; therefore, there is no basis whatsoever for this Board to dismiss for lack of jurisdiction.

The Claimant, with established seniority in the Maintenance of Way and Structures Department, was working as a relief Bridge Tender on Gang 655 and headquartered in Pearl, IL at times relevant. He was subject to call-outs. The Board in Third Division Award 43319 involving the same parties found that the language of Rule 7(f) requires the Carrier to "make suitable arrangements for employees to take additional and succeeding meals" when contractually required and, per Rule 7(e), to "make a reasonable effort to ensure that such meal will be hot and substantial." The current Board observes, however, that providing a hot and substantial meal does not

mean that the Carrier is obligated to cater a meal to a remote location when requested to do so by the Bridge Tender. Purchase of a hot, substantial, reimbursable meal by a Bridge Tender on the way on the way to a duty assignment and the placement of the meal in an insulated container designed to retain heat or a microwave oven in the Bridge Tender's operating space at the bridge might be reasonable ways to comply with the negotiated agreement.

In the aforementioned Award 43319, the Board found no evidence showing that the Claimant was prevented from taking a meal, was refused a meal period, was not paid for all hours worked, including overtime hours, or was so busy with the actual bridge tending duties that it was impossible to find time for a meal period. These facts pertain equally to the claim before the current Board. Further consideration of the facts attendant to the instant claim compel that the claim be only partially sustained. The Organization asserts that on July 23, 2016, the Claimant worked 17.75 consecutive hours and should be compensated for two meals. While the Carrier points to two other dates on which total hours worked involved call-outs, no call-out is noted for July 23. While the Organization claims 13.75 hours worked on August 17, 2016, Carrier payroll data indicates that the Claimant did not work that day. The Board finds the payroll data determinative. On September 1 and 15, 2016 the Organization states that the Claimant worked 11.75 hours and 10 hours respectively, but Carrier payroll data indicate that there were call-outs between the eight (8) hours of straight-time and the overtime worked so that the Claimant did not work ten (10) or more consecutive hours. On September 20, 2016 the Organization indicates 11.5 hours of work and the Carrier's payroll data show pay only for eight (8) hours of straight time. Again, this Board finds the payroll data to be compelling. Therefore, the claim is sustained only with regard to July 23, 2016. In Award 43319 the Board found evidence that meals that could have been taken were not furnished by the Carrier and, that the "Claimant shall therefore be entitled to compensation for reasonable meal costs on those claim dates that the claimant worked overtime qualifying him for such meals under Rules 7(d) and (e)." Like the previous Board, we remand the matter to the parties to agree on what the reasonable meal costs ought to be. We retain jurisdiction in the event the parties are unable to agree on reasonable meal costs.

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 5th day of March 2020.