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

Award No. 44115
Docket No. MW-44905
20-3-NRAB-00003-180357

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 Provide Mr. J. Wallis with a proper meal period or compensation after he worked more than ten (10) hours a day on September 22, 23 and 30, October 2, 4, 6, 7, 8, 14, 18, 19, 20, 21 24, 26 and 27 and November 1, 3, 4 and 8, 2016 [System File C16 09 22 (068)/K0416-6983 GAT].

(2) As a consequence of the violation referred to in Part (1) above, Claimant J. Wallis shall now '… be compensated a total of twenty-two (22) hours at the time and one-half rate of pay which totals $828.63 for the Claimant plus late payment penalties based on a daily periodic rate of .02715 (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 alleged violation resulted in a timely filed and properly processed claim that remained unresolved on the property and, therefore, was progressed to this Board for final adjudication

The Claimant, with established seniority in the Maintenance of Way and structures Department, worked as a Bridge Tender in Gang 655 and was headquartered in Pearl, IL. The Organization avers that on the above-noted days in September, October and November 2016 the Claimant worked between ten (10) and eighteen and one-half (18½) days with the Carrier failing to provide hot meals, time to eat the meals or compensation for the missed meal periods. The Carrier has not disputed the Organization's assertions of time worked. Attached statements show a past practice in accordance with Rule 7. As understood by the Organization. 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 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. Moreover, payroll records show that on September 22, the Claimant worked eight (8) straight-time and four and three-quarters (4¾) overtime hours consecutively and then four and one-quarter (4¼) overtime hours after a break. On September 23 the Claimant worked eight (8) straight-time hours and three and one-half (3½) overtime hours consecutively before working five (5) additional overtime hours after a break. On September 30 the Claimant worked eight (8) straight-time hours with a break before working five and one-quarter (5¼) additional overtime hours. October 8 was a rest day on which the Claimant provided no service. On October 14, the Claimant worked a contiguous eight (8) hours of straight time and three-fourths (3/4) of an hour of overtime and then after a break three (3) more hours of overtime. On October 18 a break separated eight (8) hours of straight time and six and a quarter (6¼) hours of overtime. October 25 saw the Claimant work a contiguous eight (8) hours of straight time and three and one quarter (3¼) hours of overtime following a break. On October 27 eight (8) hours of straight time and two and three-fourths (2¾) hours of overtime were separated by a break. On November 3, the Claimant worked a contiguous eight (8) hours of straight time and three (3) hours of overtime and then, following a break, another six and one-half (61/2) hours of overtime. Finally, on November 8 the Claimant worked a contiguous eight (8) hours of straight time and one and three-quarters (1¾) hours of overtime, had a break, and then worked an additional six and three-quarters (6¾) hours of overtime.

The contract language below has particular relevance to this dispute.

"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 September 22, 2016 the Claimant worked 12.75 hours. This is confirmed by Carrier payroll data that the Board considers dispositive. The Organization asserts that on September 23, 2016 the Claimant worked 15.75 hours while payroll data show work for 11.5 consecutive hours. The Organization avers that the Claimant worked 10.30 hours on September 30, 2016, but payroll data show eight (8) hours at standard time and a break before the Claimant was called out for additional work.[1] He is not due a meal for this day. On October 2, 2016 the Claimant worked two (2) overtime hours contiguous with the start of his eight (8) hour shift. He worked ten (10) hours, but not more and therefore was not due a second meal. While the Organization claims a 10.75 hour work day on October 4, 2016, payroll data show only eight (8) hours of standard pay for the day, hence no meal is due. The Organization's claim of 11.50 hours worked on October 6, 2016 is confirmed by payroll data so that he did not receive a meal that was due. Similarly, payroll data confirm the 17.5 contiguous hours worked on October 7, 2016 so that two meals were due. Contrary to the Organization's assertion that 10 (ten) hours were worked on October 8, 2016, payroll data show the Claimant off that day. The Organization lists 12.5 hours worked on October 14, 2016 but payroll data show eight (8) hours straight time and .75 contiguous overtime hours before a break and then a call-out. No meal is due. On October 18, 2016 the Claimant was said to have worked 11.75 hours, but payroll data show eight (8) hours straight time, a break and then a relief assignment. No meal is due. The next day payroll data show eight (8) hours at straight time with no call-out. No meal is due. On October 20, 2016 the Organization's listing of 10.3 (really 10.5) hours is confirmed by payroll data. A meal is due. The Organization shows 12.75 hours worked on October 21, 2016, but payroll data show eight (8) hours of straight time and a contiguous two (2) hours of overtime. Because the Claimant worked ten (10) consecutive hours but not more, no meal is due. No meal is due for October 24, 2016 because payroll data show only eight (8) hours at straight time despite the Organizations indication of more. No meal is due for October 26, 2016 because payroll data show a break after eight (8) hours at straight time. The same is true for the following day and for November 1, 2016. On November

[1] **Based on Carrier payroll data, the Board assumes that a listing of 10.3 hours by the Organization really should be 10.5 hours.**

4, 2016 the Organization claims 18.3 hours with two meals due. Payroll data show 9.75 consecutive hours worked before a break and a 6.75 hour call-out. No meals were due. Finally, on November 8, 2016 payroll data show only an eight-hour shift. No meal is due.

The claim is sustained only to the extent noted above. 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 reasonable meals 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 11th day of August 2020.