Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 40105
Docket No. MW-40488
09-3-NRAB-00003-080317

The Third Division consisted of the regular members and in addition Referee Margo R. Newman when award was rendered.

(Brotherhood of Maintenance of Way Employes Division -
(IBT Rail Conference
PARTIES TO DISPUTE: (
(Soo Line Railroad Company

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

(1) The Agreement was violated when the Carrier allowed Production Crew No. 3 Laborer J. Rodman to be displaced [with less than one (1) full workday notice as required by Rule 12(h)] by Mr. B. Pister on May 31, 2006 (System File C-06-010-034/8-00430-015).

(2) As a consequence of the violation referred to in Part (1) above, Claimant J. Rodman '. . . shall now be reimbursed for the equivalent of 10 hours at the Truck Laborer rate of pay $17.28 per hour X 10 hours = $172.80 and have all overtime, vacation, fringe benefits, and other rights restored which were lost to him as a result of the above violation.'"

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 issue in this case is whether proper displacement notice was given to the Claimant under Rule 12 - FORCE REDUCTION which provides, in pertinent part:

> "(h) An employee whose job is abolished or who is displaced, desiring to exercise displacement rights in accordance with this rule, must notify the proper officer and the employee who is to be displaced not less than one (1) full workday (not including rest days and holidays) in advance of the date he wishes to displace."

The claim alleges that the Claimant was working a Monday through Thursday, ten hour/day workweek, and he was not advised by his Supervisor until Wednesday, May 30 at 10:30 A.M. that he was being displaced by a senior employee. The claim seeks pay for the following work day, May 31, because the Claimant was sent home and not permitted to return after May 30, 2006. The Claimant submitted a handwritten statement saying that supervisor Stetson did not tell him Pister was bumping him until May 30 at 10:00 or 11:00 A.M. and did not permit him to work the next day.

The Carrier's evidence was that Pister notified Staffing Services on May 29 that he was going to displace the Claimant, but did not fax them his displacement notice until 4:40 P.M. that day. Staffing Services notified Stetson, who informed the Claimant verbally at around Noon on May 29 that he was being displaced, as well as at 7:00 A.M. on May 30. It submitted the actual displacement notice sent by Pister and the two page e-mail stream on this issue sent between Stetson and Manager Dragland on May 15 and 16, 2006. The e-mails from Stetson support the Carrier's assertion that the Claimant was told by Stetson that he was going to be displaced on May 29 at Noon and again on May 30 at 7:00 A.M. and was told to call to see if he could displace anyone. Stetson states that he did not deliver the notice in writing to the Claimant until about 10:00 A.M. on May 30, 2006.

The Organization argues that Rule 12(h) is clear and unambiguous and entitles an employee to a full workday's notice of displacement, which the Claimant did not receive by being notified after his shift was already in progress on May 30 that he was being displaced at the end of the day, citing Third Division Awards 17219 and 31032. It points to its July 27, 2006 appeal in asserting that the e-mails and displacement notice provided by the Carrier were either self-serving or unreliable, especially in the face of the Claimant's statement, and do not adequately provide a basis upon which to question the Claimant's assertions. The Organization requests a make whole remedy with respect to the May 31, 2006 workday.

The Carrier contends that the direct evidence it provided was both proper and timely, and affirms Stetson's assertion that he verbally advised the Claimant on May 29 and again at 7:00 A.M. on May 30 that he was being displaced at the end of the work day on May 30, and delivered a copy of the displacement notice faxed in by Pister to the Claimant between 10:00 and 11:00 A.M. on May 30. It argues that Rule 12(h) does not require a written notice, and that the verbal notice on May 29 was sufficient to meet the requirements of Rule 12(h). The Carrier asserts that the Organization failed to sustain its burden of proving a violation, especially with conflicting testimony in the record, citing Third Division Awards 10637, 10601 and 10201, among others.

A careful review of the record convinces the Board that the Organization failed to sustain its burden of establishing a violation of Rule 12(h) in this case. First, Rule 12(h) clearly requires an employee desiring to displace another employee to notify the proper officer and the employee to be displaced not less than a full work day in advance of the date of displacement. Here, Pister notified the Carrier of his intentions on May 29 and later that day sent the displacement notice to the proper Carrier Officer. There is a written e-mail from Stetson stating that he verbally informed the Claimant at noon on May 29 of his displacement at the end of the following work day after having received notice from Staffing Services, but that he did not receive the written displacement notice until the following morning, when he delivered it to the Claimant. While the Claimant's written statement is conflicting, it is possible that when he said that Stetson did not tell him he was being bumped until 10:00 or 11:00 A.M. on May 30, he was referring to the delivery of the written displacement notice by Stetson around that time, and not to any prior verbal discussions they may have had. He did not specifically address possible verbal

communication between himself and Stetson. Because the Organization's position is that written notification of displacement is required, it is possible that the Claimant was only referring to such written notice in his statement. Second, the Board sees no requirement in Rule 12(h) that the employee's notification to the other employee be in writing, and, thus, any verbal notice would also satisfy the required notice of displacement. Third, at best, the conflicting evidence of when notification was actually given raises an irreconcilable dispute of facts which cannot be resolved by looking at the entire record. Thus, the Organization has not sustained its burden of proving that the Claimant received late verbal notice of his displacement, or that the Carrier violated Rule 12(h) by not permitting the Claimant to work on May 31, 2006. For all of these reasons, the claim must 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 19th day of November 2009.