Award No. 13154
Docket No. CL-13252

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

(Supplemental)

John J. McGovern, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF RAILWAY AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYES

ILLINOIS CENTRAL RAILROAD COMPANY

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood (GL-5110) that:

1. Carrier violated rules of the Clerks' Agreement at Winnfield, Louisiana, when on February 23, 1960, it failed to bulletin position No. 677 in accordance with the requirements of the Note to Rule No. 17.

2. W. H. Melton be compensated at the penalty rate ($3.308 per hour) for all time worked in excess of his bulletined and assigned hours 5:30 A. M. through 2:30 P. M. (eight hours per day) retroactive to February 23, 1960, and forward to date position No. 677 is bulletined in accordance with the Note to Rule No. 17.

EMPLOYES' STATEMENT OF FACTS: There are employed at Winnfield, Louisiana, a force of employes who perform the clerical work incidental to the operation of the station and terminal subject to the terms of the Clerks' Agreement between the parties.

Employes think it pertinent at this time to explain Claimant Melton is one of several employes working at Winnfield, Louisiana, who prior to June 3, 1959, were employed by the Tremont and Gulf Railway. Under date of June 3, 1959, Division 4 of the Interstate Commerce Commission issued a certificate authorizing purchase of the properties of the Tremont and Gulf Railway Company by the Illinois Central Railroad Company with the stipulation that the employes affected would be afforded protection in accordance with the conditions prescribed in Oklahoma Railways Company Trustees Abandonment, 257 I.C.C. 177.

Consequently, on June 17, 1960, the Brotherhood and Carrier representatives agreed among other things that the provisions of the agreement between the Tremont and Gulf Railway Company and the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employes, effective January 1, 1945, would continue to apply to former Tremont and

and he is, therefore, in no position to complain; he suffered no loss in earnings and was, as clearly shown, in exactly the same spot with the same rights as would have been the case had the position been bulletined.

There has been no violation of the agreement and the claim should be denied.

(Exhibits not reproduced.)

OPINION OF BOARD: The Claimant in this case occupied a position with assigned hours of 5:30 A. M. to 2:30 P. M. when he was notified that effective February 23, 1960, his hourly assignment of the same position would be changed to 5:00 P. M. to 1:00 A. M. Petitioner alleges that the note to Rule 17 of the basic Agreement was violated. It is quoted verbatim below:

> "NOTE: If the starting time of an established position is so changed as to convert said position from a day to a night assignment, or vice versa, such change shall be deemed to constitute the abolishment of said position and the creation of a new position which must be bulletined under the provisions of Rule 10."

The Carrier readily admits that the new position in accord with the above quoted note, was not bulletined because of an oral Agreement between the Trainmaster, its Agent and the Local Chairman, the Agent of the Organization. In view of this oral Agreement the Carrier contends that the Petitioner is now conclusively estopped from pursuing his claim. We cannot agree with this reasoning. Neither agent had an authority from the principal contracting parties to change or in any way modify the written Agreement. Further, it is too fundamental and too well settled by many awards of this Board that the written contract cannot be changed by an oral Agreement, to require further elaboration. This is not to say that the written Agreement cannot be revised, but to accomplish such revision certain procedures must be followed, all of which are contained in the basic contract. Such procedures however are not at issue in this case.

We must therefore dismiss the oral Agreement as having no significance in the instant dispute. We direct our attention to the written note to Rule 17. There is no question that the position in controversy was changed from a day time to a night time assignment. There is no question that such a change constituted the abolishment of the subject position. There is no question that under these circumstances a new position was created and that this new position should have been bulletined under the provisions of Rule 10. This was not done and therefore we find that the Agreement was violated as stated in Claim number 1.

We come now to the monetary portion of the claim. The Claimant indisputably had two privileges or rights emanating from the change in hours. First, he had the right to retain his position if his seniority permitted, and second the right to displace within 10 days. He was not denied either right, but retained his position and chose not to exercise his displacement rights. These latter rights have nothing to do with the bulletining or failure to bulletin the position, because once his hours had been changed, his displacement rights immediately vested in him. The Claimant found himself in exactly the same position he would have been in had the position been bulletined. He suffered no loss in earnings. We are therefore faced with a situation where we have no damages accruing to the Claimant and no contractual authority for the imposition of a penalty. In view of this, we have no alternative but

to deny the claim for compensation requested in Claim number 2. (Award 12131) inter alia.

FINDINGS: The Third Division of the Adjustment Board, upon the whole record and all the evidence, finds and holds:

That the parties waived oral hearing;

That the Carrier and the Employes involved in this dispute are respectively Carrier and Employes within the meaning of the Railway Labor Act, as approved June 21, 1934;

That this Division of the Adjustment Board has jurisdiction over the dispute involved herein; and

That the Agreement was not violated.

AWARD

Claim No. 1 sustained.

Claim No. 2 denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 11th day of December 1964.

LABOR MEMBER'S DISSENT TO AWARD 13154,
DOCKET CL-13252

My Dissent to Award 13150, Docket CL-13216, is equally applicable here and is adopted as my dissent to this Award 13154.

Additionally, it cannot properly be said that Claimant was not damaged, for one would of necessity have to resort to speculation as to what might have happened had Claimant's position been properly advertised. Certainly Claimant, upon having his position advertised, would have known he was without a position and could have exercised his displacement rights to obtain a "day" position rather than being forced to work at night.

Award 13154 is in error and I dissent.

D. E. Watkins
Labor Member