Award No. 2335
Docket No. CL-2346

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Edward F. Carter, Referee

PARTIES TO DISPUTE:

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

ATLANTIC COAST LINE RAILROAD COMPANY

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employes:

(1) that Carrier is violating past practice and agreement reached with respect thereto during schedule revision negotiations of September and October 1936 in regard to employes being off Saturday afternoons without deductions in pay, and

(2) that all employes of Wilmington Freight Agency who, since February 11, 1941, have been compelled to work beyond the hours regularly worked on Saturdays previous to November 1936, be paid overtime for such service, some positions from 3:00 P. M. to 5:30 P. M. and other positions from 1:00 P. M. to 5:30 P. M.

EMPLOYES' STATEMENT OF FACTS: For a long number of years prior to October 1936 the Wilmington, N. C. Agency employes had been allowed to be off on Saturday afternoon when the normal day's work was finished and paid for a full day. The Transfer and Billing forces usually finished their work between 1:00 P. M. and 3:00 P. M. and a careful check of the records show that on no date, where records were kept of the time employes left their work, did anyone work beyond 3:00 P. M. on Saturday. The records also show that the delivery clerks were allowed to go when the warehouse doors were closed at 1.00 P. M. During the negotiations of revision of agreement in September and October 1936, the Committee representing the employes proposed to extend this Saturday afternoon off with pay to cover all employes under the agreement, which proposal was declined by the Management, but an understanding reached that the past practice of allowing certain freight offices, including Wilmington, the General Offices and certain other departments, Saturday afternoon off with full day's pay would not be discontinued or changed except by agreement.

POSITION OF EMPLOYES: There is in effect an agreement between the parties bearing date of November 1, 1936 from which the following rules are quoted in part or in whole.

RULE I (In part)

"These rules shall govern the hours of service and working conditions of the following employes subject to the exceptions noted below:

lieved from duty, no provision being made for extra payment in case the Carrier was unable to relieve employes on Saturday afternoon. While only a few cases have been cited they are representative of the decision of the Board.

While there is no rule or understanding on this Railroad concerning this matter, the Company has consistently followed the practice of permitting a half-holiday when practicable, but does not feel that it is under any obligation to compensate an employe more than one time for services performed.

The carrier submits that it has in the past and is now properly compensating clerical employes for all services rendered in accordance with the agreement; there is no rule or understanding that they will be paid pro rata or overtime for Saturday afternoon in addition to rate of pay covering their regular assignment, and requests the Board to deny the claim which is without merit.

OPINION OF BOARD: This dispute arises out of the Carrier's alleged violation of a past practice and an Agreement reached with respect thereto regarding Saturday afternoon holidays without reduction in pay, and for overtime pay for all employes of the Wilmington Freight Agency for all work performed on Saturday afternoons beyond the hours regularly worked prior to November 1936 and subsequent to February 11, 1941.

It is admitted by the claimant at the outset that there is no written agreement covering the right of employes to Saturday afternoons off without reduction in pay. In October 1936, it was proposed by the employes that a rule be agreed to extending the Saturday afternoon off practice to all employes under the Agreement. The proposal was declined by the Carrier. Claimant contends that the Carrier orally agreed that the then existing practice regarding Saturday afternoons off would be continued. The Carrier does not deny that this oral understanding was had. The important question for decision is the nature of the practice existing in October 1936 and the effect given it by the parties since that date.

The Clerks' Agreement provides for a six day work week and an eight hour day. It also provides for overtime at the rate of time and one-half when the employe is worked in excess of eight hours on any one day. There is no claim here made that any of the employes involved in this claim worked in excess of eight hours. The claim is bottomed on the contention that as the employes were entitled to Saturday afternoon off without reduction in pay, it was equivalent to a 43½ hour week with pay on a basis of a 48 hour week and that work performed on Saturday afternoon should be treated as overtime. The record does not show that clerical employes of the Wilmington Freight Agency were ever paid overtime for Saturday afternoon work. It is conceded by both parties to the controversy that certain clerical employes in the general offices covered by the Clerks' Agreement have been paid overtime for Saturday afternoon work since October 1940.

The Carrier contends that the Saturday afternoon half-holiday arrangement was first granted to the Wilmington Freight Office clerical employes during the summer months to such clerical forces as could be spared without detriment to the service. In 1911, it was extended to a year round basis on condition that it would not interfere with the regular work of the employes and would not result in the employment of additional forces. The privilege was subsequently extended to Division and Freight Offices. Freight stations were later included—some for the year and some for the summer months only, depending on the volume of business. In some freight stations the half day off was taken on Thursday when the volume of business on Saturday did not permit Saturday afternoon being taken. Since the recent upturn in railroad business, more employes have been required to work on Saturday afternoons, although the Carrier still pursues the practice of releasing as many as can be spared. In other words, the Carrier contends that its oral agreement

of October 1936 was that it would continue the practice of releasing as many clerical employes for a weekly half holiday as could be spared without a reduction in pay. Carrier contends that there was never an agreement or practice which required the payment of additional compensation to employes required to work the full eight hour Saturday assignment.

There are many facts which support the assertions of the Carrier. The very claim filed demanding additional compensation for certain employes, some from 1:00 P. M. to 5:30 P. M. and some from 3:00 P. M. to 5:30 P. M. for Saturday work is an indication that they were released from work only when they could be spared. The fact that the clerical employes of the Wilmington Freight Agency have never been paid overtime for Saturday afternoon work is indicative of the correctness of the Carrier's position. The history of the practice and the long acquiescence of the employes in the interpretation given it, points to the conclusion for which the Carrier contends.

It is a cardinal principle that a modification of an agreement by an oral contract must be established by clear and convincing proof, otherwise the sanctity of written agreements could be destroyed by loose and indefinite statements not intended to be given such import. It is also a fundamental rule that the burden rests upon the party claiming a violation of a practice to prove the existence of the practice as well as the violation thereof. In these respects, the claimant has failed in its proof.

It is urged, however, that the Carrier has paid certain clerical employes in the general office overtime for Saturday afternoon work and claimant advances this as a reason why all employes within the Clerks' Agreement should likewise receive the same compensation. The Carrier denies that all clerical employes in the general office have been allowed overtime for Saturday afternoon work but concedes that the clerks in one department of the general office have been so paid. This is explained by the Carrier as having been permitted by the Supervisor of the department without any authority from the Management and it is urged that such payments cannot constitute a basis for the payment of additional retroactive compensation to all clerical employes. It requires no citation of authority for the statement that unauthorized payments of compensation or payments made through error, do not constitute a practice unless ratified by the Carrier after discovery. Whether such payments could, in any event, amount to the establishment of a practice as to one who has not benefited by them, raises a question which we are not required to discuss or decide. The evidence is not sufficient to sustain the claim in any event.

Our conclusion necessarily is that the practice kept in force by the oral arrangement of October 1936 does not require the payment of overtime for Saturday afternoon work until the expiration of eight hours of service on that day. Claimant insists that all clerical employes under the Clerks' Agreement should be treated alike and paid on the same basis. The difficulty is that the additional compensation paid for Saturday afternoon work, as Claimant admits, was not paid in response to any existing contract. Nor is it shown by satisfactory proof to have been paid in accordance with an existing practice. For this Division to require reparation payments to all clerks under such circumstances would compel its entrance into the field of contract making—a field entirely foreign to the purposes of the Board.

If claimant feels that injustice has resulted which requires corrective measures, it must resort to negotiation to secure the remedy.

FINDINGS: The Third Division of the Adjustment Board, after giving the parties to this dispute due notice of hearing thereon, and upon the whole record and all the evidence, finds and holds:

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 under the practice perpetuated by the oral understanding and agreement of October 1936, clerical employes here involved are not entitled to overtime pay for Saturday afternoon work except in excess of eight hours or that provided by other contract provisions.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: H. A. Johnson
Secretary

Dated at Chicago, Illinois, this 15th day of October, 1943.