Award No. 2349
Docket No. CL-2271

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

MISSOURI PACIFIC RAILROAD COMPANY

(Guy A. Thompson, Trustee)

STATEMENT OF CLAIM: Claim of the General Committee of the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employes on the Missouri Pacific Railroad, that the Carrier violated the Clerks' Agreement:

1. When on December 5th, 12th and 19th, 1942, it required Clerk F. C. Brda and other clerks (as listed in exhibit attached hereto and made a part of this submission) employed in the Auditor of Freight Receipts Office of the Accounting Department of its general offices at St. Louis, Mo., to work Saturday afternoons, 1:25 P. M. to 5:05 P. M., 12:55 P. M. to 4:55 P. M. and 1:05 P. M. to 4:55 P. M. as shown in attached claim exhibit.

2. That F. C. Brda and all other clerks named in the attached claim exhibit shall be compensated additionally on Saturday afternoons, December 5th, 12th and 19th, for the time so worked on the actual minute basis of time and one-half.

3. That similar claims shall be considered filed and shall continue in all such instances hereafter occurring in the Auditor of Freight Receipts Office as that here involved until complaint and claim is disposed of.

EMPLOYES' STATEMENT OF FACTS: On December 3rd, 1942, the Auditor of Freight Receipts posted on bulletin board notice to the employes that commencing Saturday, December 5th, 1942, all employes in divisions in which current work required the working of overtime would be required to work eight (8) hours on Saturday. The notice also set out the schedule for overtime to be worked on Monday, Wednesday and Friday, three (3) hours, except as specially authorized. Copy of the bulletin notice here referred to was furnished to the Division Chairman and is also submitted and designated as Exhibit "A."

On December 3rd, 1942, the Division Chairman of the Clerks' Organization wrote to the Auditor of Freight Receipts, copy submitted and designated as Exhibit "B," and protested the arrangement referred to in the Auditor's bulletin of December 3rd (Employes' Exhibit "A").

Rule 54 is the Overtime Rule. It provides that employes will be compensated on the basis of time and one-half for the actual time worked on the minute basis for TIME IN EXCESS OF EIGHT HOURS. (Emphasis supplied.) These employes did not work in excess of eight hours—they worked but eight hours and were paid for eight hours.

Rule 61 is the Basis of Pay Rule. This is the rule that provides for these classes of employes to be paid on a daily basis. It further provides that the employes' assignments shall not be reduced below six days per week. These employes are six day week workers and they are paid for eight hours on each of the six days, and when they work overtime, that is, over eight hours on any day, they are additionally compensated for the time worked at the overtime rate.

The Carrier respectfully submits that having shown—

(a) The Saturday Afternoon Agreement of February 3, 1922 has not been violated in any manner whatsoever; and

(b) There is no rule contained in the agreement between the Clerks' Organization and the Railroad dated August 1, 1926 to support the Employes' claim,

that the claims of the employes should be denied.

OPINION OF BOARD: On December 3, 1942, the Employes involved in the present claim were notified that beginning Saturday, December 5, 1942, they would be required to work eight hours on Saturday if their current work necessitated the working of overtime. The Clerks' Organization contends that this is a violation of the Saturday Afternoon Agreement and that all clerks required to work the Saturday afternoons of December 5th, 12th and 19th be compensated on the basis of time and one-half.

The pertinent part of the Saturday afternoon agreement is as follows:

> "It is understood that where it has been the practice to allow clerks to be off on Saturday afternoons, this practice will not be rescinded or departed from, except in cases of emergency: In consideration of time allowed off on Saturday afternoon, which will be paid for, the Railroad Company will be entitled to an equivalent in hours of overtime, computed under the rules of the Agreement, before compensating the employe—provided, that when it is not necessary to work an equivalent number of hours, no deduction will be made account of time off."

We have examined the previous awards of this Division dealing with the Saturday Afternoon Agreement and have come to the following conclusions as to its meaning. It must be construed in connection with the Clerks' Agreement which provides for the payment of overtime after eight hours' work on any one day. The Saturday Afternoon Agreement was clearly intended to modify this provision of the Clerks' Agreement so that four hours' work on Saturday was sufficient to earn eight hours' pay except in case of emergency and subject to the other contractual provisions of the Agreement. One of the other considerations for the Saturday Afternoon Agreement was that the employes could be required to offset four hours of overtime against the time taken off on Saturday afternoon for which the Carrier had paid, provided, however, that such overtime need not be worked unless needed.

Construing the applicable provisions of the two agreements together, we think that the employe's regular assignment was completed on Saturday noon unless an emergency existed. It seems clear that the parties agreed to exchange Saturday afternoon work for an equivalent amount of overtime, and unless an emergency existed, an employe required to work on Saturday afternoon performs work outside his regular assignment and should be paid overtime therefor.

The case, therefore, resolves itself into the question whether an emergency existed. An emergency within the purview of the Saturday Afternoon Agreement implies the unusual rather than the usual; the extraordinary rather than the ordinary. It is usually brought about by the happening of some unexpected or unforeseen event. It implies a critical situation requiring immediate relief by whatever means are at hand. See Awards Nos. 2040 and 2268.

No emergency existed in the present case within the intended meaning of the term. The conditions requiring the additional work were brought about by a progressively increased business. While it is true that the increase was largely due to war conditions, it is no different than any other economic condition that might bring about the same result.

We necessarily conclude that the claiming employes were working on Saturday afternoons when no emergent conditions existed, that they were performing work outside their regular assignments and should be compensated therefor on a time and one-half basis. The claim will be sustained as to Clerk F. C. Brda and all other clerks similarly situated.

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 terms of the Saturday Afternoon Agreement in effect, an employe who is required to work on Saturday afternoons is entitled to compensation therefor at time and one-half rate where such work is not made necessary by emergent conditions.

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: H. A. Johnson
Secretary

Dated at Chicago, Illinois, this 28th day of October, 1943.

DISSENT TO AWARD NO. 2349, DOCKET CL-2271

The Opinion of Board in this case, in its first and second paragraphs, states the basis of the claim; in the remaining five paragraphs it gives the decision. The last three paragraphs of the Opinion deal with the question of whether or not an emergency existed; there may be two opinions on such a question; this Award says that in this circumstance an emergency did not exist. If that is true, then the decision and the proper interpretation of this Agreement necessarily must be in application of the Agreement to a situation where an emergency did not exist. And with that situation the third and fourth paragraphs of the Opinion does deal, and gives its improper interpretation.

These third and fourth paragraphs construe the purpose of the Saturday Afternoon Agreement, considered together with the Schedule Agreement, to a conclusion "that the parties agreed to exchange Saturday afternoon work for an equivalent amount of overtime, and unless an emergency existed (i. e., when not in an emergency), an employe required to work on Saturday afternoon performs work outside his regular assignment and should be paid overtime therefor," the finding being that such overtime shall be at time and one-half rate.

That finding is contrary to the plain intent of the parties who drew up the terms of that Agreement and have lived for 20 years and more under its provisions. Its purpose, as disclosed by that fact and by the direct consecutive stipulations of that Agreement, was not to provide for time and one-half rate when Saturday afternoon was worked, but was to provide that when not necessary to work on Saturday afternoon the employes enjoyed that much of a reduction in the eight-hour working period established by their schedule agreement without reduction in the eight-hour pay equally established by their schedule agreement. The Saturday Afternoon Agreement thereupon directly stipulated that the Carrier would be entitled to an equivalent in hours of overtime in exchange for the hours the employes thus had off on Saturday afternoon.

And that Agreement continued in its third from last paragraph to stipulate that adjustment of overtime account of Saturday afternoons off would be made monthly. That stipulation provided within itself the penalty upon the Carrier of pay for time off, i. e., for hours not worked, without recompense in service performed, if it failed within any one month's period to avail itself of the overtime hours to which it was entitled equivalent to the number of hours on Saturday afternoons which the employes had off.

That is, this Agreement, supplementary to the schedule agreement, gave the employes four hours each Saturday off; it required the Carrier to pay therefor and relieved the Carrier from such obligation only if it secured actual work of an equivalent number of hours within the limited period of a month. The stipulations of this Saturday Afternoon Agreement in respect to compensation for hours off, i. e., not worked, on Saturday afternoon are thus provided by the Agreement itself, and as exemplified by the record in this case have been accepted over the years by the Carrier's almost complete grant of the Saturday afternoons off without deduction in pay and almost as completely by refraining from asking of the employes that they give an equal amount of overtime in the month's period that they have had their Saturday afternoons off.

As contrasted with the working period and the pay therefor which the schedule agreement in effect prior to the negotiation of the Saturday Afternoon Agreement, and still effective, provided, it means that the Carrier contracted for, and understood it had contracted to bear for Saturday afternoons a compensation to these employes on the base of 8 hours at their respective rates for 4 hours work, in lieu of that same compensation for 8 hours work which previously it had contracted for and had received.

Note that which is said thus far is in respect to the Saturday Afternoon Agreement as it relates to Saturday afternoon situations not in an emergency. It interprets the purpose of that Agreement as to the intent of the parties and as well as to the payments (penalty, if it needs thus to be identified) imposed upon the Carrier for time not worked, i. e., time off, Saturday afternoons unless the Carrier took advantage of the provision for equalizing such payments by requiring overtime work within the limited period of a month.

Here, incidentally, it should be observed that if there is an emergency, there is no occasion for reference to compensation other than that stipulated by the schedule agreement, for the Saturday Afternoon Agreement, quite con-

sistent with the above interpretation of that agreement in respect to cases not in emergency, provides only for straight time pay for which the schedule agreement had already provided. Such pay at straight time rate as is specified by the schedule agreement is the only rate that is in any manner referred to in the Saturday Afternoon Agreement, and is thus proven to be the only rate stipulated by that Agreement, whether in case of emergency or not in case of emergency.

That Saturday Afternoon Agreement is wholly silent, and may not be fairly interpreted to find that the Carrier agreed upon additional burden of compensation at time and one-half rate if Saturday afternoon is required to be worked. To find as does this Award that a rate of time and one-half is required when Saturday afternoon is worked is to read into the Agreement an implication,—one which is not justified.

It is respectfully submitted that where the intent of the parties is as plain as it appears from the evidence of things as they prevailed at the time of negotiation of the Saturday Afternoon Agreement, also from the evidence of non-payment of the time and one-half rate for Saturday Afternoon work for a period of more than 20 years following the negotiation of the Agreement, and from the absolute refrainment from specification of one and a half time rate in the Agreement itself, an interpretation of that Agreement and a consequent finding that a time and one-half rate was intended and meant is one that is not warranted.

The construction of the Saturday Afternoon Agreement here involved by the Opinion of Board is contradictory of the very provisions of the wording of that Agreement, and hence has resulted here in an erroneous Award.

(s) C. C. Cook
(s) R. H. Allison
(s) C. P. Dugan
(s) R. F. Ray
(s) A. H. Jones

CONCURRING DISSENT—AWARD NO. 2349, DOCKET CL-2271

This concurrence, as supplementary to the dissent showing the error of the Award, is for the purpose of expressing in the abstract the true intent of the Saturday Afternoon Agreement as it is revealed by its direct and clear provisions:

First: The opening sentence of the 2nd paragraph provides that where it had been the practice to allow clerks to be off on Saturday afternoon, the practice would be continued except in cases of emergency.

Second: The second and concluding sentence of that 2nd paragraph, exclusive of its ending proviso, stipulates that (a) an employe or employes who are allowed time off on Saturday afternoon will nevertheless be paid for the Saturday afternoons off (pay having already been provided for in the Schedule agreement for 8 hours for Saturday), and (b), that as to an employe or employes receiving such pay for time off on Saturday afternoon the Railroad Company will be entitled to an equivalent in hours of overtime before compensating such employe or employes.

The period of accumulation, both in respect to time off on Saturday afternoons and in respect to the hours of overtime equivalent thereto to which the Railroad Company is entitled, is specified in the 3rd paragraph of the Saturday Afternoon Agreement to be according to an adjustment made monthly, and is thus limited to a period of one month for the employe or employes involved.

There is no limitation as to any certain days of the month within which such employe or employes will work the hours of overtime to which the Railroad Company would be entitled before compensating the employe in addition to the compensation for the time off Saturday afternoon. Hence the Carrier is entitled to hours of overtime work equivalent to the total which the employes had off on Saturday afternoons within the stipulated adjustment period of any one month.

Third: The ending proviso of the second and concluding sentence of that 2nd paragraph provides that in the event the Carrier finds it not necessary to work a number of hours on overtime equivalent to the number of hours which an employe or employes had off with pay therefor, no deduction will be made from such pay received for time not worked on Saturday afternoon.

Fourth: The 3rd paragraph of the Saturday Afternoon Agreement stipulates an "adjustment of overtime account of Saturday afternoons off" and prescribes that such adjustment will be made monthly.

That stipulation definitely shows the purpose of this Agreement to be that within any one month from any employe having hours off on Saturday afternoons, the Carrier is entitled to the equivalent of overtime hours before additional payment for overtime is due. That stipulation necessarily applies to situations not in emergency, because if it is an emergency, there is no situation requiring adjustment; that is, Saturday afternoon is worked and it is fully paid for in the allowed 8 hours' pay for that day whether worked or not.

(s) C. C. Cook