Award No. 3246
Docket No. CL-2898

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Henry J. Tilford, Referee

PARTIES TO DISPUTE:

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

THE WESTERN PACIFIC RAILROAD COMPANY

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood of Railway Clerks that employes under jurisdiction of General Auditor are entitled to and shall be paid at the rate of time and one-half for all work performed after 12:50 PM on Saturday, January 8, 1944; and on any other Saturday afternoons upon which they are, or have been, required to work other than in emergencies.

EMPLOYES' STATEMENT OF FACTS: The established hours of service on Saturdays for employes under jurisdiction of General Auditor are from 8:20 AM to 12:50 PM. A number of these employes were required to work varying amounts of hours on the afternoon of Saturday, January 8, 1944 and on subsequent Saturday afternoons. The employes affected were not paid at the rate of time and one-half for this work.

For many years it has been the practice to compensate the employes referred to above at the rate of time and one-half for work performed on Saturday afternoons. This practice was in effect on December 16, 1943.

POSITION OF EMPLOYES: The following rules are cited from agreement bearing effective date of December 16, 1943:

> "Rule 13. Where it has been the practice to allow General Office employes Saturday afternoons off without loss of pay, this practice shall be continued and these employes shall not be required to work except in case of emergency.
>
> "In Division and Department Offices, past practices shall be continued.
>
> "Other employes will be allowed Saturday afternoons off without loss of pay when it is practicable in the judgment of the employing officer and can be done without detriment to the service."
>
> "Rule 20. Except where changing assignments in the exercise of seniority rights, or where furloughed employes are used on more than one shift, time in excess of 8 hours, exclusive of the meal period, in any 24-hour period, shall be considered overtime and paid on the actual minute basis at the rate of time and one-half.
>
> "Employes shall not be required to suspend work during regular hours to absorb overtime.

The National Agreement, Section 2 provided that all hourly, daily, weekly, monthly, and piece-work rates of pay should be increased effective February 1, 1943 and Section 3 provided supplementary increases as follows:

"Section 3. The graduated scale of wage increases prescribed in Section 2 hereof shall be increased by supplementary increases of these sums which, when added to the said graduated scale, will produce total increases of—

(a) 11 cents per hour for those employes who, under the recommendations of said Board, received an increase of 10 cents per hour.

(b) 10 cents per hour for those employes who, under the recommendations of said Board, received an increase of 9 cents per hour, and

(c) 9 cents per hour for all other employes covered by this agreement.

the said supplementary increases to be applied effective December 27, 1943, in the same manner (except as to the effective date) as set forth in Section 2 hereof."

Section 4 reads:

"Section 4. The supplementary increases provided for in Section 3 hereof shall not be paid as the equivalent of or in lieu of claims for time and one-half pay for time worked over 40 hours per week; and shall be paid until Proclamation by the President of the United States or Declaration by the Congress of the cessation of hostilities and thereafter until changed in accordance with the Railway Labor Act, as amended. This section, agreed to in time of war, shall be without prejudice to the right of either party after the expiration of the date above stated to seek a change in the agreement which is now made with respect to such supplementary increases, in accordance with the provisions of the Railway Labor Act, as amended. Overtime compensation shall continue to be computed and paid in accordance with the provisions of existing agreements and the rules now governing overtime payments shall remain in effect subject to the right of either party to seek any change in or supplement to such rules, provided that no request for overtime penalty pay shall be sought during such period for any hours worked solely because they are worked in excess of 40 per week."

The work performed on Saturday afternoon, January 8, 1944 was time worked over 40 hours in that week, and Section 4 specifically provides that the supplementary increases were paid as the equivalent of, or in lieu of claims for time and one-half for time worked over forty hours per week. To pay the claim of the employes would be superimposing time and one-half upon the supplemental increases allowed as the equivalent of or in lieu of claims for time and one-half and time worked over 40 hours per week. Certainly, no such payment was contemplated either by the schedule or the National Agreement.

Carrier does not agree with the contention of employes that that portion of Section 4 providing that overtime compensation shall continue to be computed and paid in accordance with the provisions of existing agreements, etc. requires the payment of this claim because, as previously shown in the Position of Carrier, the claim is not in accordance with the provisions of the existing agreement of December 16, 1943.

OPINION OF BOARD: The facts in this case are so fully set forth in the Statements of the parties as to obviate any necessity for repeating them here.

The Petitioner denies that an emergency within the meaning of the first paragraph of Rule 13 existed on January 8, 1944, or thereafter, and asserts

that the case is controlled by precedents established by previous awards. The Carrier insists not only that such an emergency existed during the period referred to but that, contrary to the Petitioner's interpretation, Rule 13 does not contemplate payments in excess of the regular 8-hour day's pay when it is "necessary" to work employes in the General Office a part or all of Saturday afternoons, even though the necessity does not arise from an emergency within the narrow definition of that word.

But whether or not the employes have a **contractual** right to receive overtime pay when required to work Saturday afternoons otherwise than as the result of an "emergency", the Carrier expressly contracted not to so require them unless an emergency existed, and it has long been the practice of this Board to compel overtime payments by the carrier as a penalty for its violations of a rule, where such penalty is appropriate to the circumstances and no other is specifically provided. In this view of the case, the fact that Rule 13, interpreted in the light of its historical background and according to the plain import of the language employed, does not constitute a contract for overtime pay for Saturday afternoon work but merely stipulates that the employes shall receive a full day's pay though they are allowed the afternoon off, becomes immaterial except in so far as, in good conscience, it should militate against an unnecessarily strict circumscribing of the category of circumstances which may constitute an "emergency". For the historical background of the rule see Decisions C-133, 416, 459, 491, 614, 794 and 822 of Railway Board of Adjustment No. 3, functioning under the United States Railroad Administration; also Decisions 731, 734 and 1087 of the United States Railroad Labor Board.

While it would be too great a departure from precedent to hold that the granting of Saturday afternoons to employes without deduction from pay so clearly partakes of the nature of a gratuity as to entitle the donor (carrier) to determine what is and what is not an "emergency" without incurring a penalty for arbitrariness or bad faith, we are of the opinion that the definition of that word should not be so restricted as to exclude the greatest man power shortage in the Nation's history resulting from what the President, the nation's legislative bodies, and the public generally have unanimously designated "The National Emergency."

Petitioner cites in opposition to this view Awards 2040, 2073, 2268, 2345, 2349, 2460 and 2721, and insists that manpower shortages resulting from war conditions have never been considered emergencies within the meaning of Rule 13. But the facts involved in most, if not all of the precedents cited are distinguishable from the facts in the confronting case; and we doubt if anyone was possessed of the prescience to foresee the extent of the manpower shortage which would ensue as the war approached its climax. In any event it had become critical so far as the Carrier was concerned by January 8, 1944, as shown by its uncontradicted statement:

> "Because of the resultant increase in work due to the extremely heavy increase in business and the acute shortage of trained personnel incident to the National Emergency, many of our skilled or key employes such as revising clerks have been and are being regularly required to work four hours overtime at time and one-half rate on each Monday, Wednesday and Friday evenings or twelve hours per week, also 8 hours on two Sundays per month. Even by following this procedure and in addition employing more help to the extent available it has been necessary to have some of the employes work on Saturday afternoons. This occurred on Saturday afternoon, January 8, 1944."

To say that such circumstances do not constitute an "emergency" when the ends of justice do not require a narrow definition of that word is to shut our eyes to realities. Furthermore, one of the definitions of an emergency given by Webster is "an unforeseen **combination of circumstances** which calls for immediate action" (emphasis ours).

We are further strengthened in our views by the terms of the Agreement of January 17, 1944 between the Railroads and the fifteen Cooperating Railway Labor Organizations, extensively quoted in the Carrier's submission. Though it would seem to contain nothing which could be said to constitute a legal bar to Petitioner's claim, the fact that it was necessary to execute such an agreement would indicate that the emergency created by the war and its attendant crucial man power shortage was an actual one, especially in railroad operations. However, since the fact that the country is at war is not of itself an emergency within the meaning of Rule 13 as we interpret it and the Carrier's showing of a critical manpower shortage resulting from the war, which does constitute an emergency, is liimted to the shortage of personnel existing on January 8, 1944, this award will not constitute a bar to claims which may be asserted by Employes for overtime pay for work performed on other Saturday afternoons on which the Carrier is unable to show that such an emergency existed. We make this statement in order to avoid any misinterpretation of our finding which might otherwise arise from the fact that the claim as presented is for overtime pay for work performed, not only during the afternoon of Saturday, January 8, 1944, but "on any other Saturday afternoons upon which they are, or have been, required to work other than in emergencies."

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 the Carrier did not violate the Agreement on January 8, 1944.

AWARD

Claim denied as to January 8, 1944, without prejudice to prosecution of claim for overtime on subsequent days.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: H. A. Johnson
Secretary

Dated at Chicago, Illinois, this 17th day of June, 1946.