FIRST DIVISION
NATIONAL RAILROAD ADJUSTMENT BOARD
39 S. LaSalle St., Chicago 3, Illinois

The First Division consisted of the regular members and in addition Referee Robert G. Simmons when award was rendered.

PARTIES TO DISPUTE:

BROTHERHOOD OF LOCOMOTIVE ENGINEERS
BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEERS
ERIE RAILROAD COMPANY

STATEMENT OF CLAIM: Claim of Fireman E. V. Cole, New York Division for allowance of one day and 10 minutes October 12, 1936 on account of not being permitted to operate his regular assignment on this date between Nyack, New York and Jersey City, New Jersey.

JOINT STATEMENT OF FACTS: On October 12, 1936 due to unusual conditions developing which could not be anticipated earlier indicating an unusual decrease in passenger traffic on this date it became necessary to reduce the local passenger service and consequently some of the scheduled passenger trains. Fireman Cole was notified by bulletin October 10, 1936 that his regular assignment, due to re-arrangement effective for one day, October 12, 1936, would be included with assignment of other crews. Runs being re-arranged as follows: Regular assignment Engineer Johnson 1106-1109-1122-1127; Assignment October 12, 1936, 1106-1109-1122-1129; Engineer Robertson Regular assignment 1108-1123-Extra. KD.; Assignment October 12, 1936 1110-1123-Extra. KD. As a result of rearrangement Fireman E. V. Cole was not assigned for above reasons.

POSITION OF EMPLOYEES: From time immemorable on the Erie Railroad the practice has been that after a Fireman was assigned to regular assignment, he is permitted to operate in that assignment as long as the assignment is operated. In accordance with the practice, Fireman Cole was regularly assigned to trains 1110 and 1129 operating between Nyack New York and Jersey City, New Jersey. On October 12, 1936 these two trains were operated by the Railroad putting a new assignment into effect for just one day and in this assignment coupled the trains to which Firemen Cole was assigned up with other assignments thereby defeating the entire principle of regular assigned runs, and permitting somebody else to cover the assignment to which Fireman Cole had been assigned in accordance with the practice in effect since the very institution of suburban passenger service. From the very inception of this particular service as a result of negotiations between the committee and the Management it was understood that the Management would be permitted to make certain re-arrangements on runs to protect the service
on certain holidays. These holidays were very well understood to be New Year’s Day, Washington’s and Lincoln’s birthday, Decoration Day, 4th of July, Labor Day, Thanksgiving Day, and Christmas Day.

The Organizations have always conceded the right to the Management to make the necessary re-arrangements to take care of the service on these holidays. Within the last few years without due process of negotiations the Management is attempting to extend this practice to include Election Day, Columbus Day and Good Friday as well as all of the days preceding all holidays, also the days on which some local celebration may cause a dislocation of suburban passenger traffic.

The Management has never been permitted by the Organizations to assume the authority for re-arrangement on October 12, which authority they unquestionably had for the holidays which were National in character and which have been outlined in this position as New Year’s Day, Washington’s and Lincoln’s birthday, Decoration Day, 4th of July, Labor Day, Thanksgiving Day, and Christmas Day.

It is not difficult to visualize that if this practice is permitted without any hindrances that there is no limit to which the Management may resort in the breaking up of assignments and defeating the very purpose for which arrangements were arranged.

POSITION OF CARRIER: This claim was first filed on the following basis:

“ERIE LODGE NO. 543
B. of L. F. & E.
Jersey City, N. J.

Time Claim Grievance.

November 4, 1936.

Claim: Earnings of regular assignment on account of not being permitted to cover this assignment, October 12, 1936.

Name.—E. V. Cole. . . . . Occupation. . . . . Fireman
Regular Assignment.—Trains 1110-1129.
Assignment on date of claim.—None.
Allowance claimed.—1 day, 1 hour and 10 minutes.
Allowance received.—Nothing.

Facts:—Fireman Cole regularly assigned to trains 1110-1129 was notified on October 10, 1936 that this assignment was split up for one day only (October 12, 1936), and that he had no assignment for this date. He claimed on his time report the equivalent of the compensation earned by the fireman who was assigned to fire the following trains, 1110-1113. This fireman being assigned to fire part of Cole’s assignment.

Position of District Accountant:— ‘Allowance claimed on your time report of Train 1110-1113, Engine 973, on 10/12/36 has been changed from 1 day, 1 hour and 10 minutes, to nothing, on account of the Superintendent has advised not to allow your claim.’

Contention of Committee:—We contend Fireman Cole should have claimed on his time report the equivalent of the earnings of his regular assignment, a total of 1 day, 2 hours and 40 minutes. Our contentions being based on the 8-within-10 hour short-turn around passenger
rule. The rule under which this claim is made. Please refer to Decision, Case No. 27/132, by Railway Board of Adjustment No. 1. Atchison, Topeka & Santa Fe (Coast Lines) versa Engineers and Firemen, herein quoted for ready reference.

Case No. 27/132

Claim that Runs must be bulletin; That Information Furnished at Beginning of Trip Does Not Constitute a Definite Assignment as contemplated in Question 17, Interpretation No. 1 to Supplement 15.

Position of Committee:—

Question 17 and Decision reads:

'Question—Is it permissible to definitely assign crews coming under this section on the basis of a minimum day in each direction. 

'Decision. Yes.'

Committee understands the term 'definitely assigned' to mean that such runs must be bulletin as coming under the turn-around or that they must be bulletin as coming under the straight-away rule, and does not mean information furnished by caller at time crew is called at the beginning of each trip.

Position of Management:

The railroad fully agrees to the committee's understanding of the term 'definitely assigned' but does not understand that the decision to this question also means that only 'definitely assigned' service may come under the provisions of the rule. The decision refers only to a question asked as to assigned service and has no bearing one way or the other as to the other service.

DECISION.

When crews in short turn-around passenger service are placed on a one way basis or operated as described in question 1, Article 111, Supplement No. 15 to General Order No. 27, and a minimum day is allowed in the first instance in each direction or in the second instance for each of the services, such arrangements shall be regular and should be bulletin and not changed from day to day. Crews used in short (unassigned) turn-around passenger service shall be notified when called whether they are to be paid on a turn-around or straight-away basis.

In the opinion of this Committee the question at issue comes within scope of the herein mentioned decision of Railway Board of Adjustment No. 1. We understand from this decision that assignments in short-turnaround passenger service must operate as advertised. Therefore, Fireman Cole should have been permitted to fire trains 1110-1129, on October 12, 1936; or, be compensated the equivalent of earnings of this assignment.

(Sgd.) J. F. McCormack
Local Chairman—548.'

To which the following reply was made:
Claim of Fireman E. V. Cole for allowance of one day and 10 minutes overtime, October 12, 1936, or equivalent of what Fireman earned on trains 1110-1113 between Nyack and Jersey City on the grounds that Fireman Cole’s assignment was annulled on this date; also similar claims for 1 day, 1 hour, 42 minutes overtime, of Engineer J. Frohling and Fireman J. L. Wisner, same date, also on grounds that their assignment was annulled.

Mr. J. F. McCormack,
74 Brinkerhoff St.,
Jersey City, N. J.

Dear Sir:

Referring to your letters November 4 and 7, 1936:

Claim: 1st: Claim of Fireman E. V. Cole for allowance of 1 day and 10 minutes, October 12, or equivalent of what Fireman earned on trains 1110-1113 between Nyack and Jersey City.

2nd: Claim of Engineer J. Frohling and Fireman J. L. Wisner, for allowance of 1 day, 1 hour and 42 minutes, October 12, or equivalent of what they would have earned on their regular assigned run, which was annulled.

Facts: October 12 was Columbus Day. Due to unusual conditions developing which could not be anticipated earlier, indicating an unusual decrease in passenger traffic on this Holiday, it became necessary to reduce local passenger service and, incidentally, annul some of the scheduled passenger trains. This made it also necessary to couple certain runs with others, and the annulment of some assignments. All Engineers and Firemen affected by annulment of their assignments were duly notified on October 10 by message or bulletin, or revised assignment which was issued for one day only for the reasons outlined above.

Decision: There is no rule that would warrant allowance of these claims which are denied.

Yours very truly,

(Sgd.) A. L. Kline

This claim was then progressed to the General Manager at Jersey City and after a conference, the following reply was made:

“ERIE RAILROAD COMPANY

May 12, 1937

Mr. W. B. Hammer,
4055 Buxton Road,
South Euclid, Ohio.

Mr. Wm. Mengerink,
4223 Woburn Avenue,
Cleveland, Ohio.

Gentlemen:

Reanswering your letter March 16th, 1937 concerning time claim of New York Division Fireman E. V. Cole for allowance of one day and ten minutes overtime, October 12th, 1936, or equivalent of what fireman on trains 1110-1115 earned between Nyack and Jersey City on the grounds that Fireman Cole’s assignment was annulled on this date.
As stated at conference in this office on May 7th, there is no rule that would warrant allowance of this claim. On October 12th, 1936, which was Columbus Day, there were unusual conditions which developed, and which could not be anticipated earlier, which made it necessary to reduce local passenger service, also annul some of the scheduled passenger trains, this making it necessary to couple certain runs with others and the annulment of some assignments. However, all engineers and firemen affected by the annulment of their assignment were notified on October 10th by message or bulletin, or revised assignment which was issued for one day only for the reasons outlined above.

Under the circumstances as cited above, we must decline this claim.

Yours very truly,
(Sgd.) R. H. Boykin
Assistant General Manager.”

No subsequent action was taken and the Railroad was of the opinion that after the letter of May 12, 1937 claim was dropped because of the fact that this engineer and fireman had been properly notified in accord with the customary practice on October 10, 1936 and that their assignment as well as others was annulled for one day, October 12, 1936; however, on November 3, 1941, or four years and six months later, the claim was again filed with the Chief Operating Officer designated for handling such matters by Mr. J. J. Margeson, a new General Chairman representing the Firemen, together with a number of other old claims, the particular one being listed as No. 19 and stated by General Chairman Margeson as follows:

“No. 19. Time claim of Fireman E. V. Cole—Earnings of regular assignment on account of not being permitted to cover his assignment, October 12th, 1936.”

After a conference at Cleveland, Ohio, November 25, 1941, the following reply was made:

“ERIE RAILROAD COMPANY

Mr. J. J. Reilly, November 28, 1941
Waldwick, N. J.

Mr. J. J. Margeson,
119 Thacher Street,
Hornell, N. Y.

Gentlemen:

Referring to our conference in this office on Tuesday, November 25, in connection with the various claims listed in Mr. Margeson’s letter of November 3rd, and with particular reference to Item No. 19—claim of Fireman E. V. Cole; earnings of regular assignment on account of not being permitted to cover his assignment, October 12, 1936:

This claim is for service alleged to have been performed in 1936 (over five years ago). Our file indicates that it was handled with former Assistant General Manager Boykin in conference on May 7, 1937, and that he denied the claim in letter dated May 12, 1937.

We believe that you will agree that we cannot fairly be expected to investigate and handle a claim which the organization has allowed to remain dormant for a period of four years.

It is suggested that this file be closed. Will you please advise.

Yours very truly,
(Sgd.) P. W. Johnston
Asst. Vice President.”
The subject was subsequently discussed on various occasions and it was our opinion that the claim was to be withdrawn and the record closed without prejudice; however, the matter has now been progressed to the Board for a decision.

In the suburban territory, commuter service depends entirely upon the availability of the commuting traffic and the customary practice for many years has been to adjust assignments and trains on holidays and days before holidays to meet the commuter requirements. This is always accomplished by bulletin notice to all engineers and firemen who are involved in the necessary rearrangement of the assignments and trains, the same as was done in this case. On October 12, 1936 the assignment of Fireman E. V. Cole did not operate because that assignment was annulled. The two trains operated by him on week days did run but they were run in conjunction with the changed assignments to meet the commuter situation. The same is also true about a number of other changed assignments for which no claims have been presented. The organizations recognize and state that they have always conceded the right to the management to make necessary rearrangement to take care of service on holidays which they state are New Year's Day, Washington's and Lincoln's Birthdays, Decoration Day, Fourth of July, Labor Day, Thanksgiving Day and Christmas; however, they fail to state that this has sometimes been true on other recognized holidays, such as Columbus Day, General Election Day and Armistice Day, always being based on commuter requirements on these days. It is at times necessary to make adjustments in these commuting train assignments to meet conditions on days before holidays, such as Christmas Eve and New Year's Eve.

We believe that this claim should be denied by the First Division for the following reasons:

1. Claim was first presented and progressed with final reply May 12, 1937 and no subsequent action was taken until November 3, 1941 on the basis that this action October 12, 1936 was in accord with customary practice which was recognized by the then General Chairman, Mr. Mengerink, and it was not progressed until a new General Chairman was elected to succeed Mr. Mengerink, who retired because of illness.

2. Because of the peculiarities of the commuter traffic in the New Jersey area, it has always been customary to adjust passenger trains and assignments to meet the requirements of the service and in some cases this means the annulling of some assignments and parts of several others and the combining of the remaining trains to meet the commuter service requirements.

3. Fireman Cole on October 12, 1936 was notified of the change in his assignment according to the customary practice and this is not denied by the employees.

The Railroad will waive oral hearing provided the employes do likewise.

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

The carrier or carriers and the employe or employes involved in this dispute are respectively carrier and employe 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.

The parties to said dispute waived hearing thereon.

This is a joint submission. It presents the question as to whether or not Fireman Cole was entitled to the pay claimed because he was not permitted to operate his regular assignment on the day stated. The committee asserts that he was so entitled. The carrier asserts the claim should be denied on the
grounds that its action in annulling the run was in accord with customary practice; that its decision denying the claim and its reason therefor was accepted for a period of over four years, and that the claim should not now be allowed. The above constitutes the dispute submitted to this Division for decision.

The carrier calls attention to the re-organization proceedings in the United States Court and asserts that “any claims including pay claims, dated prior to January 18, 1938” were subject to those proceedings and order entered therein. It submits the dispute “without prejudice.” We are not called upon to determine what that means.

The dispute here presented is whether or not Fireman Cole was entitled to the pay as of October 1936. Whether or not he has subsequently lost the right to be paid, if so entitled, by the re-organization proceedings, is not before us and is not urged by the carrier here as a defense to this claim. Accordingly, the jurisdiction of this Division to consider that matter and the question it presents is not discussed nor determined. The carrier, subsequent to the re-organization proceedings, comes here and jointly submits a dispute to this Division. That will be determined.

As a general proposition the obligation of the carrier to pay the wage of the assignment, whether run or not, is not disputed. The carrier asserts that it had the right to adjust passenger train assignments and to amend some of them on particular days to meet the commuter service requirements. The employees assert that that right was limited to certain national holidays. The carrier asserts that it had “sometimes” been applied to other holidays such as the one in question. The specific question then is, was Columbus Day within the exception to the rule requiring payment? If there was such a custom establishing the right of the carrier to annul an assignment on Columbus Day, then the carrier’s records would establish that fact, which it asserts and upon which it relies. It has failed to meet the burden of proof of that fact. Its mere assertion, where denied as it is here, is not sufficient. So far as this claim is concerned, that question must be resolved against the carrier.

The carrier next states that it denied this claim on May 12, 1937, and that it was not again presented until November 3, 1941 and asserts in effect that the claim is barred by inaction. It is not shown that there is any time limitation fixed by contract on the presentation of these matters; the Railway Labor Act fixes none applicable here; the carrier does not assert that it has been prejudiced by the failure to prosecute the claim; the facts of the claim are agreed to jointly; the only factual question undetermined is that above discussed of what holidays are within the understanding of the parties, and as to that the carrier makes no contention that its records are not available. Under these circumstances we are unwilling to invoke laches or estoppel against the claim of the employee.

AWARD

Claim sustained.

BY ORDER OF FIRST DIVISION
NATIONAL RAILROAD ADJUSTMENT BOARD

ATTEST: (Sgd.) T. S. McFarland
Secretary

Dated at Chicago, Illinois, this 23rd day of August, 1943.

DISSENT TO AWARD 8362—DOCKET 15703.

In the Findings of the majority herein, it is said:

“The carrier calls attention to the re-organization proceedings in the United States Court and asserts that ‘any claims including pay claims, dated prior to January 18, 1938’ were subject to those pro-
ceedings and order entered therein. It submits the dispute 'without prejudice.' We are not called upon to determine what that means."

"Whether or not he has subsequently lost the right to be paid, if so entitled, by the re-organization proceedings, is not before us and is not urged by the carrier here as a defense to this claim. Accordingly, the jurisdiction of this Division to consider that matter and the question it presents is not discussed nor determined."

The quoted statements are unfair and inaccurate. The question of whether the claim was barred was presented in detail to the Referee. The orders in the re-organization proceeding were before the Division. At no time in the discussion was there the slightest indication by the Referee that he thought there was any doubt about the question being properly before the Division. If he did not understand what was meant by making the submission without prejudice to the Carrier's rights under the re-organization proceedings any of the regular members of the Division could have enlightened him, as they had theretofore, in Award 8178, treated identical language as presenting "carrier's contention that claim must be denied because not filed with the Comptroller in the Bankruptcy proceeding in accordance with court order."

We are forced to the conclusion that the Referee herein could not agree with Award 8178, and for that reason declined to pass upon the question presented. The result is the dispute presented is not determined in spite of the Award "Claim sustained."

Dealing with other aspects of the dispute, it is stated that the Carrier "has failed to meet the burden of proof" of the custom to annul an assignment on Columbus Day, and for this reason the claim is sustained. The Petitioners came here alleging certain facts, one of them being that the admitted custom and right of the Carrier of long standing to annul assignments on holidays did not include Columbus Day. The Carrier's submission asserts that the custom of long standing did include Columbus Day. Neither party submitted proof other than their statements. The claim is made by the Petitioners. The burden was on the Petitioners and not on the Carrier. The Findings herein simply mean that when a party presenting a claim fails to support it with proof, if the one who denies the claim fails to prove that the Petitioner's claim is not correct, an order to pay will be entered. This Division has no authority to make an award without any evidence to support it on the theory that it is respondent's duty to disprove Petitioner's claim, as the majority has done here.

For the reasons stated we dissent to the Findings and Award herein.

T. K. Faherty
R. A. Knoff
E. W. Fowler
L. O. Murdock
L. L. McDonald

Chicago, Illinois,
August 31, 1943.

SUSTAINING OPINION

In the finding, written by me and accepted by the majority, I undertook to determine the issues presented for determination by this record. The dissenting members now charge that a part of that statement of issues is "unfair and inaccurate." They fail to quote the first paragraph beginning with the sentence, "This is a joint submission." and also fail to quote the opening and closing sentence of the third paragraph. I assume that they consider the omitted part as fair and accurate. The burden of their charge is that I "declined to pass upon the question presented" by the re-organization pro-
ceedings; that I did that because I disagreed with award 8178 and also did not understand what was meant by the carrier in the use of the term “without prejudice.”

In the findings to award 6794, written by me as referee, I said: “This is an appellate tribunal. It can decide matters only upon the facts contained in the record.” In their dissent to award 8376, the dissenting members quote this language and state that it was “correctly said.” The direct question then is, was the re-organization proceeding presented here “as a defense to this claim” by this record?

The only reference to the re-organization proceeding “contained in the record” is the following paragraph in the opening statement by the carrier: “Any claims, including pay claims, dated prior to January 18, 1938, were subject to the proceedings for the re-organization of the Railroad in the District Court of the United States for the Northern District of Ohio, Eastern Division, and Order No. 386 dated December 20, 1941 closing the re-organization. The Brotherhood of Locomotive Engineers and Brotherhood of Locomotive Firemen and Enginemen were fully informed concerning requirements in filing claims and the following statements are now being made by us without prejudice.”

The carrier makes no further reference to the re-organization proceedings in its submission. In a letter to the brotherhood dated November 23, 1941, it declined to consider the claim here presented because it had been “allowed to remain dormant for a period of four years” and made no contention that the re-organization proceedings barred the claim, although the letter was written just 22 days prior to the date of the order “closing the re-organization” and almost four years after the “proceedings for the re-organization” appear to have been under way.

In conclusion the carrier stated three reasons why the “claim should be denied.” These reasons were: “1. Claim was first presented and progressed with final reply May 12, 1937 and no subsequent action was taken until November 3, 1941 on the basis that this action October 12, 1936 was in accord with customary practice which was recognized by the then General Chairman, Mr. Mengerink, and it was not progressed until a new General Chairman was elected to succeed Mr. Mengerink, who retired because of illness.

“2. Because of the peculiarities of the commuter traffic in the New Jersey area, it has always been customary to adjust passenger trains and assignments to meet the requirements of the service and in some cases this means the annulling of some assignments and part of several others and the combining of the remaining trains to meet the commuter service requirements.

“3. Fireman Cole on October 12, 1936 was notified of the change in his assignment according to the customary practice and this is not denied by the employees.”

This record does not submit the question which the dissenting members now assert was presented.

The finding does not indicate that I did not “understand” what was meant by the use of the phrase “without prejudice.” The finding was that the division was not called upon to determine what was meant by that language.

The dissenting members state that they are “forced to the conclusion” that I do not agree with award 8178. My views on that award are not material to any question presented by this docket for decision. It is true, as stated in the dissent, that the question of whether the claim was barred by the re-organization proceedings was presented to the referee, but presented by the carrier members of the division and not by the carrier. It was presented in a written memorandum to me as referee. This memorandum recited a statement of facts as to the effect of the re-organization order which is not contained in the carrier’s brief reference to those proceedings in its submission to the division. The memorandum advanced “reasons” for a denial of the
claim, not advanced by the carrier. The question was likewise presented by the carrier members in oral argument, supported, as I remember it, by documents from the re-organization proceedings.

The basis of this dissent is not that the majority failed to decide a dispute submitted by the carrier, but that we failed to decide a dispute submitted by the carrier members of this division.

The joint submission made by the carrier and the Brotherhoods is dated October 28, 1942. On June 28, 1943 the division rendered award 8178 involving the same carrier. This claim was argued orally to me as referee on July 22, 1943. Four days later the carrier members dissented to award 8178. It is obvious that the carrier members have attempted to use this claim as a vehicle by which they hoped to secure a reconsideration of award 8178. That desire does not justify the criticism of the findings and award contained in the dissent.

Section 3 (i) of the Railway Labor Act confers jurisdiction upon this division-over disputes between an employee or group of employees and a carrier or carriers. It makes no reference to disputes presented by carrier members of the division. It further provides that those disputes "shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes" and that an adjustment failing to be reached in that manner, the dispute may be referred to the division. This record does not indicate that the carrier and the employees ever handled the dispute on the property which the carrier members of this division sought to have decided in this claim. In their dissent to award 8376 the same dissenting members say, "This division has no jurisdiction to pass upon a dispute not submitted to the carrier and handled in accordance with the Railway Labor Act."

I submit that the statements quoted by the dissent are neither "unfair" nor "inaccurate."

The dissenting members further challenge the finding with reference to the "burden of proof." Quotes from the submission will be of assistance. The employees stated that "as a result of negotiations * * * it was understood that the Management would be permitted to make certain re-arrangements on runs to protect the service on certain holidays." Those holidays are named and do not include Columbus Day. The carrier did not dispute that statement. The employees further stated that the carrier "Within the last few years without due process of negotiations * * * is attempting to extend this practice to include * * * Columbus day * * * as well as all the days preceding all holidays * * *" and that "The Management has never been permitted by the Organizations to assume the authority for re-arrangement on October 12, which authority they unquestionably had for the holidays which were National in character * * *." The carrier stated that it was the "customary practice for many years * * * to adjust assignments and trains on holidays and days before holidays to meet the commuter requirements." The carrier then referred to the employees' statement regarding certain national holidays and stated that the employees "failed to state that this has sometimes been true on other recognized holidays, such as Columbus Day, * * *." (Emphasis supplied.) In the first of their three reasons (earlier quoted herein) for denying the claim the carrier stated that the "action October 12, 1936 was in accord with customary practice which was recognized by the then General Chairman." In the finding it is stated, "The specific question then is, was Columbus Day within the exception to the rule requiring payment? If there was such a custom establishing the right of the carrier to amend an assignment on Columbus Day, then the carrier's records would establish the fact, which it asserts and upon which it relies. It has failed to meet the burden of proof of that fact." It is this holding that the dissent assails on the ground that, "That burden was on the Petitioners and not on the Carrier."
The finding is not questioned in the dissent that “As a general proposition the obligation of the carrier to pay the wages of the assignment, whether run or not, is not disputed.” The employees were entitled to the “wages of the assignment” unless there was an exception to the rule that relieved the carrier. The employees were entitled to prevail unless the exception asserted by the carrier, affecting among other days Columbus Day, relieved the carrier. The burden rested upon the carrier to bring itself within that exception.

The contention of the dissent seems to be that the employees having asserted a negative, must prove it. I am at a loss to understand what proof they could offer other than a denial that there was such an exception. The carrier asserted that there was such an exception established by customary practice. If that is true, then “the carrier’s records would establish that fact,” and such records were not cited in any way. The rule applicable, as stated by a standard authority, is as follows: “In the administration of justice it is desirable that the burden of producing evidence be placed on the party best able to sustain it, and there is authority for the view that the burden of evidence as to an issue rests on the party having the greater means of knowledge. A narrower formulation is that where the evidence as to an issue is peculiarly within the knowledge or control of a party, the burden of evidence as to such issue rests on him. It is very generally held that, where the party who has not the general burden of proof possesses positive and complete knowledge concerning the existence of facts which the party having that burden is called on to negative, or has peculiar knowledge or control of evidence as to such matters, the burden rests on him to produce the evidence, the negative averment being taken as true unless disproved by the party having such knowledge or control.” 31 C. J. S. 721. See, also, 22 C. J. 81 and 20 Am. Jr. 145.

(Sgd.) Robert G. Simmons