"Time and a Half's the American Way"

A HISTORY OF THE EXCLUSION OF WHITE-COLLAR WORKERS FROM OVERTIME REGULATION, 1868-2004

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Accentuating and Blurring the Distinction Between the Actual and the Basic Eight-Hour Day: Railway Workers, the Adamson Act, and World War I

Many a worker compelled to work 48 hours or more on straight time would at the end of his 40 hours have some kind of ache or pain and go home, whereas that same worker receiving time and a half for overtime would work in spite of that ache or pain to obtain that overtime. I am not speaking of a fancied ailment, but I am speaking of a real ailment. It is just human nature that with the incentive of overtime payments a worker will work more hours than he would under straight time.¹

The 1915 AFL convention may have marked the end of the rhetorical controversy over the statutory eight-hour day between the AFL leadership and the Socialists and their allies, and did in fact coincide with the movement’s failure to use the initiative process to bring about a universal maximum eight-hour day, but it did not at all bring to a conclusion the debate over the equally important question, which had been submerged at the conventions, as to whether the working class and society at large preferred the actual eight-hour day, extendable only by extraordinary emergencies, or merely the basic eight-hour day, to which overtime at time-and-a-half rates could be freely added. “The general public,” as The New York Times, noted, “learned what was meant by the ‘basic eight-hour day’ through discussions in connection with” railway workers’ dispute with the railroad corporations and congressional action to resolve it during 1916.² Government intervention in the economy prompted by the demands of World War I then refamiliarized the country with the same issue in 1917 and 1918.

Railway Workers and the Adamson Act

The recent eight-hour movement began with the railroad brotherhoods in 1916-17. ... The

new day has been termed by the railroad world the basic eight-hour day.\textsuperscript{3}

The railway dispute originated in 1915 over demands by the railroad operating workers unions for a basic eight-hour day plus time and a half for overtime. The railroad companies sought to undermine this demand by arguing that it was not a genuine move for a shorter workday, but merely a ruse to take advantage of the general popularity of the eight-hour day as leverage to pay time and a half to the highest-paid manual workers in the country, who knew that it was physically impossible to limit the average train run to an eight-hour schedule.\textsuperscript{4} Management charged that at $2,500 to $4,000 a year, some engineers were paid more than bank presidents in the smaller towns through which their trains ran\textsuperscript{5}—an accusation designed, no doubt, to produce a frisson of revulsion in the employing class. In response, the unions contended that the trainmen and engineers merely wanted the same time for leisure and to spend with their families that other workers enjoyed, and that the punitive overtime premium was simply designed to make it uneconomic for employers to impose long hours.\textsuperscript{6} As the parties failed to reach a settlement in 1916, President Woodrow Wilson sought to avert the nationwide strike that the unions had announced for Labor Day. Despite the fact that in early August his Secretary of Labor had informed him that a high-ranking official of one of the railway unions had told the Assistant Secretary of Labor that the members were not really interested in a shorter workday but in overtime pay, suggesting that a pay increase could resolve the dispute,\textsuperscript{7} two weeks later Wilson publicly announced that: “The eight-hour day now, undoubtedly, has the sanction of the judgment of society in its favor and should be adopted as a basis for wages even

\textsuperscript{3}Secretary [of Labor], \textit{Memorandum on the Eight-Hour Working Day: For the Members of the National War Labor Board} 7 (July 20, 1918).

\textsuperscript{4}Selig Perlman and Philip Taft, \textit{History of Labor in the United States, 1896-1932}, Vol. 4: \textit{Labor Movements} 374-85 (1935). Even 30 years later, railway management still insisted that “[i]t would be a misunderstanding to suppose that what was intended by this demand was in any sense a limitation of the working day to eight hours. The objective was merely to use eight hours, rather than the existing period of ten hours, as the basis for computing wages.” \textit{Railroad Wages and Labor Relations 1900-1946: An Historical Survey and Summary of Results} 46 (Harry Jones, Exec. Committee of the Bureau of Information of the Eastern Railways, ed. 1947).


\textsuperscript{6}Foner, \textit{On the Eve of America’s Entrance into World War I} at 153.

\textsuperscript{7}Foner, \textit{On the Eve of America’s Entrance into World War I} at 165.
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where the actual work to be done cannot be completed within eight hours."8 Then on August 29, Wilson, in his address to a joint session of Congress requesting prompt action on a bill to resolve the wage and hour dispute, declared that the freight train employees were demanding an eight-hour working day "safeguarded by payment for an hour and a half of service for every hour beyond the eight."9

At the congressional hearings that took place in expedited fashion labor and management continued to trade charges over the real meaning of the demand for the eight-hour day. The president of the Brotherhood of Railroad Trainmen argued that shorter hours were "practically useless...unless the company is penalized in some way for working men after the expiration of eight hours...." If it "does not cost the companies one penny more for working the 10, 11, 12, or 15 hours than it costs them to work these men the first hour, there is really no incentive to stop them or so arrange their business that the eight-hour day will become effective." But if time and a half after 8 hours were attached to the bill, "I will promise you there will be very little overtime made, except in the case of a wreck or something of that kind which cannot be avoided."10 In contrast, the chairman of the executive committee of the Union Pacific Railroad countered: "I understand that if it were proposed by Congress to forbid these men from working more than eight hours a day, they would be up in arms against it. What they really want is an increase in pay.... [If this country ever adopts the rule of time-and-a-half overtime, the train that gets into a terminal on schedule will become such a rare thing that community would turn out to see it. [Laughter.]"

Congressional debate over the eight-hour bill was marked by the same controversy concerning the term’s meaning.12 Whereas some members of Congress insisted that the issue was not hours because the same number of hours would be worked regardless of whether the bill was enacted,13 Progressive Senator George Norris contended that if Congress provided that eight hours shall be the workday,

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11Threatened Strike of Railway Employees at 73, 78 (testimony of R. Lovett).
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and then added that “you can work over eight hours as you and your employer may agree upon,” but that no excess would be paid for the time beyond eight hours, the legislature would have accomplished virtually nothing for the eight-hour day; consequently, it was necessary to penalize the overtime by increasing the pay so that it would not be profitable for companies to work men more than eight hours.\footnote{CR 53: 13634-35.} That some in Congress were skeptical that the law would make the eight-hour day a reality became visible in the proposal made by the other leading Progressive, Senator Robert La Follette, that a provision be inserted insuring that the 1907 federal law requiring at least eight hours of rest after 16 hours of work on interstate railroads\footnote{Act of Mar. 4, 1907, Pub L. No. 274, ch. 2939, 34 Stat. 1415, 1416.} not be repealed. There was general senatorial agreement that under the Adamson bill employers could require any number of hours up to 16.\footnote{CR 53:13651-53.}

In the end, the Adamson Act (An Act to Establish an Eight-Hour Day for Employees of Carriers Engaged in Interstate and Foreign Commerce) provided that beginning on January 1, 1917, “eight hours shall, in contracts for labor and service, be deemed a day’s work and the measure or standard of a day’s work for the purpose of reckoning the compensation for services of all employees....” Pending the report of the commission established by the act, the law specified merely that “for all necessary time in excess of eight hours such employees shall be paid at a rate not less than the pro rata rate for such standard eight-hour day.”\footnote{Pub. L. No. 252, ch. 436, §§ 1, 3, 39 Stat 721, 722 (Sept. 3, 5, 1916). See generally, Edwin Robbins, “The Trainmen’s Eight-Hour Day,” PSQ 31(4):541-57 (Dec. 1916); Edwin Robbins, “The Trainmen’s Eight-Hour Day II,” PSQ 32(3):412-28 (Sept. 1917). Rep. William Adamson, a Georgia Democrat, was the long-time chairman of the House Committee on Interstate and Foreign Commerce.} In a campaign speech three weeks after passage of the Adamson Act, Wilson reinforced the notion that the demand for overtime pay was merely a strategic method for securing the actual eight-hour day: the unions had “alleg[ed] that that was the only way in which they could obtain a genuine eight-hour day, by making the railroads pay more for the time beyond the eight hours....”\footnote{Woodrow Wilson, A Campaign Speech at Shadow Lawn (Sept. 23, 1916), in The Papers of Woodrow Wilson, Vol. 38, at 212-19, at 215.} He then went on to add the cryptic claim that: “The judgment of society, the vote of every legislature in America that has voted upon it, is a verdict in favor of the eight-hour day.”\footnote{Wilson, A Campaign Speech at Shadow Lawn at 216.} At the same time, Walter Lippmann opined that the Adamson Bill was an eight-hour law as truly as any hours legislation is: it offered the railroads the choice of paying...
more for work done on the present schedule or speeding up the schedule to get the
same work done at the old wages but in less time; in other words, the law either
increased wages 20 percent or increased the speed of freight trains 20 percent, thus
giving the companies an incentive to achieve greater efficiency.\textsuperscript{20}

Ironically, Wilson's opponent, Charles Evans Hughes, who had resigned from
the U.S. Supreme Court to become the Republican presidential candidate, attacked
the law on the grounds that he was “not opposed to the principle of the eight-hour
day,” but that the Adamson Act was no eight-hour law, because if it “had been
intended to be an eight-hour bill there would have been attached a penalty against
employing men for longer than that time except in emergency.”\textsuperscript{21} Boasting that
“no one more than I desire to see every opportunity given to every workingman
to escape an undue severity of strain,” Hughes charged that the Adamson Act was
intentionally called an eight-hour measure to confuse the public. He then ac­
curately noted that instead of limiting hours, the law “leaves to railroad companies
the privilege to employ men for just as long a time as they were employed before.
What do we mean by an eight-hour day? It involves the principle of affording
opportunity for recreation, for refreshment, and for education by limiting the hours
of actual work, except in case of emergency.”\textsuperscript{22} (It is noteworthy that neither
opponents nor advocates of the FLSA ever objected to this same shortcoming in
it.) Ex-President Theodore Roosevelt, who was supporting Hughes, was somewhat
less disingenuous in his praise of the actual eight-hour day:

“Eight hours may be the outside limit of proper work time in Mr. Ford's factory,
where the man is all the time working at just one thing intensively and without vacation:
but eight hours that include periods of doing nothing but sit around and also change of oc­
cupation, may not be long enough. Moreover, there are occupations of intermittent activity
where to limit the total hours would be an absurdity, and there are others where excessive
activity on one day is compensated for by complete leisure on the day [after?].”\textsuperscript{23}

The same day that \textit{The New York Times} reported Roosevelt's views it sub
silentio adopted them editorially by asserting that workers who, like railway crews,
worked on watches with the opportunity to rest while not on watch, could work
long days “without hardship, since the pay runs all the time. More will be heard
of this if the attempt is ever made to make the ‘right’ day compulsory and prevent

\textsuperscript{20}Letter from Walter Lippmann to Norman Hapgood (Sept. 22, 1916), in \textit{The Papers
\textsuperscript{21}“Hughes Heckled by Ohio Workmen,” \textit{NYT}, Sept. 27, 1916 (1:4, at 4:5).
the trainmen from getting more than ten hours’ pay for a basic day. They are calculating now on getting overtime every day, and nobody has said that they would be satisfied without it."24

With regard to the subsidiary issue of the railway unions’ and workers’ subjective intent, the Eight-Hour Commission established by the Adamson Act concluded that an immediate increase in wages “was not the primary motive for the movement that resulted in the law’s enactment. The men want first shorter hours, and then they want all the pay they can get afterwards.”25 As to the strategic component, the commission observed that although complete elimination of overtime work was not practicable on railways, an extra overtime penalty would help reduce it.26 Whether the one and one-eighth time overtime premium/penalty that the Council for National Defense awarded the workers on March 19, 191727 would have sufficed to implement that strategy seems improbable.

The upshot of the railway workers’ dispute was ambiguous. Incontestably the controversy did crystallize for public discussion the crucial difference between a maximum hours regime subject only to an exception for extraordinary emergencies and an overtime system, which enforced the eight-hour day by imposing an economic penalty on employers for violating it, regardless of whether the basis was a statute or a collective bargaining agreement. The fact, however, that President Wilson and others publicly certified the unions’ overtime penalty strategy as effectively motivated by and likely to achieve an actual eight-hour day, served to blur the distinction. Nevertheless, despite this confusion, the controversy made clear that not the absorption of unemployment through work-sharing, but increased leisure was the goal and one that could be achieved only by inflicting a sufficiently painful penalty on employers to render overtime work unprofitable. Ironically, railway employers’ accusations that the unions were merely pursuing “a counterfeit eight-hour day” for public consumption to camouflage their real goal of higher wages through overtime premiums28 retained the distinction, but cast doubt on the sincerity of any union or movement that advocated an overtime regime because it had concluded that capital’s intense opposition to the alleged inflexibilities of the actual eight-hour day rendered that approach politically infeasible.

Remarkably, only a few years after the FLSA had gone into effect, what in

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26*Report of the Eight-Hour Commission* at 481-82.
28*Threatened Strike of Railway Employees* at 167-68 (testimony of L. Loree, president, Delaware & Hudson Co.).
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1916 had been decried as a sham was transmogrified into the overtime provision’s openly primary purpose. For example, by 1945, as the frenzied production of World War II was drawing to a close, fears were expressed that if overtime declined in the rush to a peace economy, “millions of workers will lose fat overtime pay returns which means the difference in their income from living in relative luxury, to just making both ends meet.” Indeed, in struggling to ward off congressional efforts to cut back on or eliminate overtime entitlements, liberals and unions have more recently turned the legislative history on its head by asserting that the “FLSA sought to guarantee an adequate standard of living for working Americans by establishing a minimum wage and requiring overtime pay.”

World War I

“[O]vertime...imposes a very serious strain upon the management, the executive staff, and foremen, since they can not take days off, like the ordinary worker....”

The principle of a maximum workday of eight hours has been endorsed by society and officially by the United States Government. The eight-hour workday represents a standard of productivity, of living, and of conservation. By protecting workers against over fatigue and enabling them to sustain their highest degree of productivity and skill, the eight-hour workday not only is an assurance that workers will make their most effective contribution to production, but that they will also be more useful and honorable members of society.

The federal government instituted a maximum eight-hour regime, subject only to emergencies, in 1892, when Congress required that “the service and employment of all laborers and mechanics...employed by the Government of the United


33On the eight-hour law of 1868 and how it became a dead letter, see below ch. 18.
States...or by any contractor or subcontractor upon any of the public works of the United States...is hereby limited and restricted to eight hours in any one calendar day, and it shall be unlawful for any officer of the United States Government...or any such contractor or subcontractor...to require or permit any such laborer or mechanic to work more than eight hours in any calendar day except in case of extraordinary emergency.”

Twenty years later Congress enacted a second statute providing that “every contract...to which the United States...is a party...which may require or involve the employment of laborers or mechanics shall contain a proviso that no laborer or mechanic doing any part of the work contemplated by the contract, in the employ of the contractor or any subcontractor contracting for any part of said work...shall be required or permitted to work more than eight hours in any one calendar day upon such work.” In addition to authorizing the President to waive by executive order the provisions of the act during war or when war was imminent, the law prohibited the imposition of penalties for any violation “due to any extraordinary events or conditions of manufacture, or to any emergency caused by fire, famine, or flood, by danger to life or to property, or by other extraordinary event or conditions on account of which the President shall subsequently declare the violation to have been excusable.”

On the eve of U.S. entry into World War I, the naval appropriation act of March 4, 1917, authorized the president “in case of national emergency...to suspend provisions of law prohibiting more than eight hours of labor in any one day of persons engaged upon work covered by contracts with the United States” subject to the proviso that the wages of those persons “shall be computed upon a basic day rate of eight hours’ work, with overtime rates to be paid for at not less than time and one-half for all hours worked in excess of eight hours.”

This transformation appears to have originated in a Wilson administration-backed initiative introduced by Tennessee Representative Lemuel Padgett, the chairman of the House Naval Affairs Committee, to amend the naval appropriations bill to authorize the president to commandeer shipyards and munitions establishments in time of war or national emergency. The amendment, as it was initially debated in the House on February 3 and 6, empowered the president to “waive all provisions of law restricting the hours of labor of persons in the employ of the United States and of persons in the employ of contractors therewith when employed on work in connection with such ships or war material....” It included other harsh anti-labor

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34 Act of Aug. 1, 1892, ch. 352, § 1, 27 Stat. 340; the law was amended in ways not pertinent to the present discussion by Act of Mar. 3, 1913, ch. 106, 37 Stat. 726.
37 “Move to Take Over Defense Industries,” NYT, Feb. 6, 1917 (4:2).
provisions including a prohibition on inducing anyone "employed in any factory and engaged on work for the United States to leave his employment or to cease such work." Padgett informed the House several times that all the representatives of the private shipbuilding firms who had appeared before his committee had testified that "they would be glad of the opportunity to get the extra time and to pay for it at the excess rate." Although he admitted that he had not heard it directly from the workers themselves, Padgett reported that the employers had stated that "their workmen individually would be glad of an opportunity to work more than eight hours. They say that it is almost unanimous on the part of the workmen. That is one of the limitations upon the capacity to build. The Government can get only enough men for one shift. These private yards can get only enough men for one shift, and they can work them only eight hours."

What one shipbuilding company president, S. Knox of the New York Shipbuilding Company, in fact had said at a Naval Affairs Committee hearing on the cost of preparedness programs in January 1917 was "that there ought to be something done to economize the labor that we have in this country—the labor that is willing to work. We can not work the same man, of course, a double shift...."

When Padgett—who mistakenly believed that the government contractor worked "more than eight hours" on "the basic day"—asked what Knox had meant by "economize," the latter replied: "Let them work as many hours as they want to," and confirmed, in response to Padgett's question, that he meant "[r]egardless of the eight hour day...." In response to another congressman's question as to whether on nongovernmental contracts not subject to the eight-hour law "the men will work for you and other corporations on commercial work 10 and 12 and 14 hours a day," Knox declared: "We have never yet had any trouble getting men to work overtime." Yet none of his interlocutors noticed when, in the course of registering his disapproval over the 1912 law, which "simply nullif[ied] 20 per cent of your labor," Knox let slip that: "Formerly, the day's labor was 10 hours, and we had no

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38 CR 54:2699 (Feb. 6, 1917). Padgett's amendment was introduced as a separate bill, H.R. 20779 (64th Cong., 2d Sess., Feb. 6, 1917).
39 CR 54:3149 (Feb. 12, 1917).
40 CR 54:2587 (Feb. 3, 1917).
41 CR 54:2586 (Feb. 3, 1917).
42 Hearings Before Committee on Naval Affairs of the House of Representatives on Estimates Submitted by the Secretary of the Navy: 1917, No. 20: Cost of Preparedness Programs, 64th Cong., 2d Sess. 1097 (Jan. 17, 1917).
43 Hearings Before Committee on Naval Affairs of the House of Representatives on Estimates Submitted by the Secretary of the Navy: 1917, No. 20: Cost of Preparedness Programs at 1098.
kicks from our men at that time,” implying that the workers wanted an eight-hour day and not overtime premiums. Interestingly, the only demand that Knox made for “help” was for a version of hours-averaging: “Forty-eight hours a week instead of eight hours a day. Under a 48-hour a week arrangement it would be all right. We can not get these men to work 48 hours a week under the 8-hour-a-day plan, because they want Saturday afternoons off. The result of that is that...you only get about 42 hours a week of work. ... We have not a man in the place who would not like to have 48 hours a week.”

Even armed with such employer intelligence from the industrial front, Padgett, as he confided to his colleagues on the House floor, despaired of achieving legislative success: “[Y]ou know, as well as I know, that when you come to tamper with the eight-hour law, there are many Members in this House who would not follow the chairman of the committee.” Those representatives were presumably acting in response to union demands, since Padgett, who had been informed that the labor organizations were opposed to working overtime, spoke of their “extreme sensi­tiveness...with reference to interference with the eight-hour law.” In order to subvert, as House Speaker Champ Clark put it, the “great deal of unwise talk in the United States in the last two or three years about who are the most patriotic,” the very next day AFL president Gompers wrote Clark a letter, which the Speaker read on the House floor, pointing out that there was no need for new legislation since the 1892 law expressly provided for waiver of the eight-hour day during an “extraordinary emergency” and the 1912 law expressly declared that nothing in it was to be construed to repeal or modify the 1892 law. In Gompers’ view, there was, therefore, already “under existing law...ample power...to waive the provisions of the eight-hour workday” with respect to government establishments and private contractors. Gompers appeared to fear outright repeal rather than mere suspension of the law, since he believed that a new eight-hour law would have to be enacted. In any event, boasting that he was “in a position to know as well as any other man in America the feeling and the spirit of America’s workers,” Gompers asserted that there was no need for apprehension “that the working people of the United States

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45CR 54:2586 (Feb. 3, 1917).

46CR 54:2588 (Feb. 3, 1917).

47CR 54:2591 (Feb. 3, 1917).
will fail in the performance of duty...” He did, however, in light of the fact that in an emergency “the destiny of our Nation is dependent upon the creative labor power of men and women,” modestly urge Congress to “give consideration to the conservation of the human rather than to uneconomic utilization of that force...”48

By the time the House voted on February 12, a proviso had been added: “That wages of Government employees shall be computed on a basic day rate of eight hours’ work, with overtime rates to be paid for at not less than time and one-half for all hours worked in excess of eight hours.”49 That Padgett’s move to do away with the actual eight-hour day was not motivated exclusively by conjunctural wartime considerations was revealed by his admission on the House floor that (despite the Clayton Act) labor was just a commodity like any other: “Personally I have always believed that an individual has as much right to sell any amount of his labor as he had to sell any amount of his corn or wheat.”50 Representative Thomas Butler, Republican of Pennsylvania, the ranking minority member of the Naval Affairs Committee, appeared to hold this view literally in contending that if the eight-hour law were suspended, “[t]he men may then work for 10 hours a day, or 12 hours a day, as the workmen may see fit.”51 Although the House approved Padgett’s amendment on commandeering, it deleted the language on hours and time and a half pay.52

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48Letter from Samuel Gompers to Champ Clark (Feb. 4, 1917), printed in CR 54:2701 (Feb. 6, 1917).
49CR 54:3132 (Feb. 12, 1917). When other representatives pointed out the unfairness of waiving the eight-hour provision for private contractors without imposing time-and-a-half compensation, Padgett replied that the workers “do not have to work unless they want to” and that the shipbuilding companies would gladly pay time and a half; moreover, Padgett claimed that the government might lack the power to set wages for private contractors. Id. at 3150. Ultimately the issue was finessed by amending the language to prohibit the president from waiving the eight-hour provision as to government contractors unless they agreed to pay time and a half for all hours above eight. Id. at 3151.
50CR 54:2587.
51CR 54:2589 (Feb. 3, 1917).
52CR 54:3133-52 (Feb. 12, 1917); “Favors Commandeer Bill,” NYT, Feb. 13, 1917 (8:1). On the very same day a strike involving most of the 7,000 workers at the Brooklyn Navy Yard was averted, which “trouble was caused because the men demanded double pay for overtime while the Government paid them time and a half.” They had for some time been working “on an eight-hour a day basis” until the situation between the United States and Germany “became acute” and “orders were issued to work the men ten hours so that repairs...could be speeded up.” The workers decided to strike when they were told they would be paid only time and a half, but called it off when the Navy Department told them that “their demands would be satisfactorily met.” “Navy Yard Strike Averted,” NYT, Feb.
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This provision ultimately reentered the bill on the Senate floor, where it prompted no discussion, let alone debate.53 The House, which had first passed the bill without this provision, receded to the Senate amendment without debate.54 President Wilson inaugurated this wartime overtime regime55 three weeks later when he issued an executive order suspending the 1912 law “with respect to all contracts for ordnance and ordnance stores and other military supplies and material, contracts for building...at the arsenals...and for fortification working during the pending emergency....”56 One month later, after the United States had entered the war, Wilson issued a second executive order suspending the 1912 law with respect to contracts made by the war Department for construction of any military building or public work important for national defense. In addition, declaring that the war constituted an “extraordinary emergency” within the meaning of the statute of 1892, Wilson declared that laborers and mechanics performing work of the aforementioned character, whether employed by Government contractors or agents, “may be required to work in excess of eight hours per day” with wages to be computed in accordance with the proviso of the March 4 law.57 The result was that “[t]he actual eight-hour day has regularly been waived and overtime work required at increased compensation.”58 As far as the AFL was concerned, congressional authorization of the president to suspend the eight-hour law for government contracts and providing for time and a half “maintains the eight-hour principle while at the same time it takes care of any emergency that may necessitate longer hours of work and penalizes overtime in an effective manner that will prevent occurrence without real necessity.”59 Writing as adviser to the Secretary of War on labor

13, 1917 (8:6-7). As government employees, these workers were subject to the “extraordinary emergency” provision of the 1892 eight-hour law. See the remarks of the Brooklyn Congressman John Fitzgerald, in CR 54:2587.

53CR 54:4630 (Mar. 1, 1917). The provision appeared first in the Senate version of H.R. 20632 at 67 (Feb. 20, 1917), but was not discussed in the very brief S. Rep. 1101 on the bill. See also “Big Jump in Naval Bill,” NYT, Feb. 18, 1917 (16:2).


55See generally, Secretary [of Labor], Memorandum on the Eight-Hour Working Day: For the Members of the National War Labor Board 13-29 (July 20, 1918).


57EO No. 2605 (Apr. 28, 1917).

58Secretary [of Labor], Memorandum on the Eight-Hour Working Day: For the Members of the National War Labor Board 5 (July 20, 1918).


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policies, Felix Frankfurter, who was intimately familiar with the difference between the two regimes from his participation in litigation defending various protective statutes, superficially distinguished them, but seemed to suggest that they differed not qualitatively, but merely quantitatively, whereas in fact one is designed to make possible what the other prohibits:

Under the naval act proviso the eight-hour law of June 19, 1912, has been changed in effect from a maximum hours' limitation to a provision necessitating a basic eight-hour-day rate, with time and one-half for overtime. In other words, the spirit of the law is still to encourage the establishment of an eight-hour day, but, due to the present exigency, this is not done as heretofore by an absolute limitation. Instead, work in excess of eight hours is permitted, but only on condition of payment to the workers of time and one-half for such overtime, the intent being thereby to discourage overtime except where required by war-production needs.⁶⁰

A more improbable site of contention over the actual versus the basic eight-hour day during World War I was the “Federal Bureau of Engraving and Printing, where mostly women are employed, [and which] has always been an actual eight-hour establishment, but in periods of rush increased hours have regularly been worked. Only recently was the eight-hour day introduced with time and a half paid for overtime. This has affected approximately 6,600 employees in the bureau.”⁶¹ Less than three months after U.S. entry into the war, the press began reporting that 50 of those female employees who objected to working 10, 12, and 14 hours a day, “even for overtime pay,” on printing the billions of dollars worth of Liberty bonds and Federal Reserve notes to meet the need for advances to the war allies had complained to Representative Jeannette Rankin of Montana, who had recently become the first woman ever elected to Congress. Rankin, who visited the Bureau incognito, determined that the women could not stand the strain of standing at the presses or counting machines for such extended periods. Although Bureau Director Joseph Ralph announced the restoration of the eight-hour day, Rankin’s informants stated that the action would not affect a large proportion of the workers. Whereas Ralph claimed that 99 percent of the women were satisfied and that some want even more overtime work, Rankin said that many women had told her that they did not want overtime work, but were compelled to do it to keep their jobs.⁶²


⁶¹Secretary [of Labor], Memorandum on the Eight-Hour Working Day at 7.

⁶²“Miss Rankin Visits Bureau As a Sleuth,” NYT, July 2, 1917 (7:2).
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Within a week "a sharp and sudden end of the fight" came in the form of Treasury Secretary William McAdoo's placing all the Bureau's male and female workers on an eight-hour basis. The termination of all overtime work was apparently driven in part by the conclusion that it was no longer necessary and in part by the testimony of large numbers of women at a hearing about several consecutive months of 12-hour days; they informed a special Treasury committee that shorter hours and smaller compensation were "immeasurably preferable to" longer hours, increased compensation, and the danger of loss of health.

No sooner had this denouement been announced than 900 Bureau employees attended a mass meeting to protest the order eliminating all overtime work. In the words of one female employee: "'If we don't object to the overtime, why do outsiders object? We object to be [sic] characterized as slaves.'" With nice irony another woman argued: "'The overtime pay that is to be taken away from us...would help us pay for the thousands of dollars of liberty bonds we have obligated ourselves to buy.'" Although the protesters, the majority of whom were also women, claimed that they were more representative of overall employee sentiment than those who had complained to Rankin, their contention that as work had slackened in the previous few weeks none had found it necessary to work more than 12 hours a day was belied by records showing that more than a thousand women had been working 12 to 16 hours a day for several months. Disclaiming selfish motives, the protesters declared that, actuated by a spirit of patriotism, they wanted to help the government by working overtime at a time, as they informed McAdoo, when it was "apparently impossible to procure sufficient skilled help to meet the necessities of the present hour." To be sure, the Times reported that "some of the women said they desired overtime work because of the opportunity for making more money."

The immediate dispute at the Bureau of Engraving and Printing prompted the Washington Post to take a longer and broader view of the whole problem of government overwork. To be sure, the paper framed the controversy oddly as "whether in a time of an emergency employees who want to work overtime to earn additional pay shall be given that privilege." It stressed that the question was hardly confined to the Bureau, but was of vital concern in many government departments "working overtime as never before to meet the demands of the public service." Although it was true that work at the Bureau was physically probably more tiring than at some other government workplaces, it was not more so than at

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63"Victory for Miss Rankin," NYT, July 10, 1917 (7:2).
64"Orders an 8-Hour Day," WP, July 10, 1917 (1:5, 4:2).
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during rush seasons. At the Bureau employees also received extra pay for extra work, but their counterparts at the State, Treasury, War, and Navy departments did not. Even at the Bureau, however, where overtime pay had been a custom “almost from the day of its establishment,” only the regular rate was paid for overtime. This practice was contrary to the policy of the AFL, which was “not against overtime work,” but asked that “the additional pay for overtime shall be at a higher rate than the regular per diem.” The immediate consequence of McAdoo’s order, the Post speculated, was that the skilled plate printers, “who have held to their positions here because of the privilege of earning overtime pay,...may find it to their advantage to seek employment in private concerns” at a time when there was already a shortage of printers and the Bureau had been unable to find enough to establish three shifts. Finally, the newspaper reported, albeit in the anonymous passive voice, that “[i]t was thought yesterday that it may be necessary for Congress to take part in the controversy, and in that event it is not unlikely that government policy with respect to overtime work will be promulgated by law...for the entire public service.” This prediction came true—but not for another quarter-century in the midst of the next world war.

With Schadenfreude The New York Times editorialized that if the Adamson law had familiarized the general public with the meaning of the basic eight-hour day, Representative Rankin was now learning of its complexities through the contradictory reactions to her victory in obtaining shorter hours for the Bureau employees. With an I-told-you-so sense of superiority, the Times doubtless looked back proudly at its editorial five years earlier criticizing the enactment of the actual eight-hour day for employees of government contractors, at which time it had warned that “[e]ight hours’ work and eight hours’ pay are not attractive under the present narrow margins of wages above the cost of living.” In 1917 it waxed more philosophical and sarcastic, basking in unabashed social Darwinism:

The trouble is that the shortening of the day for the weaker and the less important workers shortens the time of the stronger and better-paid printers. They want longer hours and higher pay, but they cannot work if their helpers’ hours are shortened.

The basic eight-hour day does not limit hours, but provides for payment for excess time, often on a punitive scale. This is the sort of eight-hour day which the postal

67"Long Hours in Government Work Becoming a Growing Problem Congress May Have to Solve,” WP, July 12, 1917 (4:2-3).
68See below ch. 20.
70“The Eight-Hour Day,” NYT, July 2, 1912 (10:3) (editorial).
employes are petitioning Representative Rankin to obtain for them. Secretary Flaherty of
the National Federation of Postal Employes asks her aid in procuring legislation...allowing
time and a half or double time when hours are longer than eight. The distinction between
the straight eight-hour day and the basic eight-hour day is the difference between pity for
the weak and overpay for the organized. The straight eight-hour day—no more work, no
more pay—is for the benefit of those substandard in strength at the common cost. The
basic eight-hour day is for excess pay for those whose organization enables them to
enforce the demand. They reject imposing upon them the stint of the weak, with limitation
of pay accordingly. They want superpay for supermen.

It is to be doubted that the country can afford to concede the wishes of either the
weaklings or those overstrong through combination. Hardly 5 or 6 per cent. of workers
have the straight eight-hour day. Much less than 10 per cent. of the workers are organized.
It would be better to pension those not able to work a full day for full pay than to cut down
the hours of those who prefer longer hours for larger pay. There is no demand for
overwork for anybody, but there is urgent need for the product of the strong. The basic
eight-hour day conceals a demand for more pay for the same work, not a plea for the weak
or the overworked. There is a false plea for humanity, as well as true benevolence in
sound utilitarianism.71

The most programmatic account of the distinction between the actual and basic
eight-hour day published during the World War I period stemmed from the
National Industrial Conference Board, which had been founded in 1916 by a group
of employers organizations and trade associations including the National
Association of Manufacturers.72 The foreword to the research report that it issued
in late 1918 observed that it was designed to compare the different senses in which
the term “8-hour day” was used; its particular aim of bringing out “the distinction
between the ‘straight’ 8-hour day as predicated on considerations of health or
public policy, and the ‘basic’ 8-hour day, which is largely a problem in wage
adjustment”73 revealed both its candor and ideological distortion. The NICB

72H. Gitelman, “Management’s Crisis of Confidence and the Origin of the National
To be sure, Colin Gordon, New Deals: Business, Labor, and Politics in America, 1920-
1935, at 152 (1994), emphasized that even the “NICB’s nominal role as the business
community’s economic theorist and statistician was widely ignored even by its own
members, who saw little use for facts and figures that did not support their narrowly self-
interested objectives.” Nevertheless, it was the NICB (along with the AFL) that at the
request of Secretary of Labor William Wilson nominated members for the War Labor
Pt. 2 at 1766.
73NICB, The Eight-Hour Day Defined (n.p.) (Research Rep. No. 11, Dec. 1918
pointed out correctly—except for its odd neglect of the absorption of unemployment as one basis for shorter hours—that:

The 8-hour day in its rigid sense with prohibition of overtime is founded on the theory that such limitation of work-hours is demanded on grounds of health and social advantage. The contention is also often made that the straight 8-hour day is more productive than a longer workday. With these underlying premises for limitation of hours of work, overtime is inconsistent. Clearly, if the health of the worker or his social rights demand that he shall work not more than 8 hours per day, permission of overtime labor, except in extraordinary emergency, is illogical. If the straight 8-hour day is really more productive than a longer workday, overtime is absurd.74

The NICB tried to buttress its claim that the basic eight-hour day was "essentially a wage issue"75 with the following logic:

Increased rates for overtime are obviously designed to discourage employers from resorting to it. To this extent, the provision is related to the problem of health and social relaxation. In practice, however, these penal rates have proved an incentive to overtime work by the employee and thus tend to defeat any desire to promote his health or increase his leisure. Therefore, these rates, though ostensibly a penalty on the employer, are in reality a premium to the employee. So far as such an incentive induces the worker to work a longer day than is justified on the grounds of health, it is clearly warranted only by unusual emergency. In such cases overtime is physically undesirable, and overtime rates mean extra compensation for diminished productivity.76

Without any doubt the premium/penalty overtime system is self-contradictory.77 But it is disingenuous to impute this problematic structure to workers and unions when in fact it is employers that prefer the flexibility of an overtime arrangement to the rigidity of a maximum-hours regime and employers that irrationally prefer to require a fatigued and less productive worker to work additional hours (regardless of whether the pay is higher or not) to hiring an additional fresh worker. It is true that under certain circumstances, as for example during World War II, when the demand for war production was virtually unlimited and the supply of labor had been depleted, overtime compensation could not function to discourage overtime work or to share work; instead, under government cost-plus

[ superseding November ed. ]:
74 NICB, The Eight-Hour Day Defined at 2.
75 NICB, The Eight-Hour Day Defined at 4.
76 NICB, The Eight-Hour Day Defined at 6.
77 Linder, Autocratically Flexible Workplace at 41-55.
contracts, it did serve almost exclusively to reward workers for supra-normal hours of work. The NICB analysis did not even fit developments during World War I, when labor administration policies "undoubtedly caused considerable extension of the practice of paying overtime rates" and the "War and the Navy Departments...ordered the payment of an extra overtime rate on all their construction work." Nevertheless, General Order No. 13 of November 15, 1917, issued originally by the Chief of Ordnance and reiterated by the Quartermaster General, stated: "The theory under which we pay "time and a half" for overtime is a tacit recognition that it is usually unnecessary and always undesirable to have overtime. The excess payment is a penalty and intended to act as a deterrent. There is no industrial abuse which needs closer watching in time of war." 78

To clinch its argument the NICB added:

The basic 8-hour day with premium rates for overtime theoretically and practically violates the principle of the straight 8-hour day. The laborer who demands the 8-hour day on grounds of recreation, home life, and intellectual development, but who welcomes overtime, shows that to him the 8-hour day is in reality a question of earnings. [T]he social need for recreation and home life is made the basis for a provision which, instead of shortening hours, merely increases wages. The straight 8-hour day becomes an artificial means for demanding increased compensation. 79

The NICB believed that it was providing empirical support for its claim that unions "have repeatedly opposed legislative limitation of hours of work on the ground that such legislation would weaken their economic strength" by noting that the AFL at its 1914 and 1915 conventions had defeated resolutions favoring enforcement by law of the straight eight-hour day. 80 In fact, as previously shown, 81 a significant proportion of the AFL delegates had supported those resolutions and the state labor federations in the three West Coast states had supported the eight-hour initiatives. The NICB also overlooked that at its 1918 convention the AFL had unanimously concurred in the recommendation of the Report of the Committee on the Shorter Workday that when war production was no longer necessary, the AFL do all in its power to have all affiliated unions, through concerted action and mutual assistance, establish the eight-hour day without overtime "unless the necessity be extreme." 82

80NICB, The Eight-Hour Day Defined at 8.
81See above ch. 3.
82Report of Proceedings of the Thirty-Eighth Annual Convention of the American
The final illustration of the development of a widespread appreciation of the fundamental difference between maximum-hours and overtime laws during World War I was the system of awards issued by the National War Labor Board. The NWLB had been established as part of the government’s wartime program of achieving “the same purpose as that of the employing interests who clamored for the legal prohibition of strikes,” but “sought to accomplish this not through repressive legislation but through recognition of labor’s rights and redress of its grievances.” President Wilson created the NWLB on April 8, 1918, to “settle by mediation and conciliation controversies arising between employers and workers in fields of production necessary for the effective conduct of the war, or in other fields of national activity, delays and obstructions in which might, in the opinion of the National Board, affect detrimentally such production....” And although Wilson urged on all employers and employees the necessity of using these methods for adjusting all industrial disputes and requested that there be no discontinuance of industrial operations resulting in curtailment of production of war necessities while such mediation or arbitration was pending, the Board had “no real power.” It could arbitrate only if both parties agreed, and even when the Board or the umpire (chosen by the Board where it had failed to settle a controversy) had secured their initial agreement, they could refuse to accept an award. Consequently, the “NWLB’s only power...was the force of moral suasion, and this because the prospect of federal coercion was equally loathsome to businessmen and labor leaders alike.” Those who refused to adhere to this plan would suffer the obloquy, in the words of The New York Times, of being “looked upon as outlaws and obstructionists.”

Especially pertinent here is that among the principles and policies governing the Board and the umpire was that: “The basic eight hour day is recognized as applying in all cases in which existing law requires it. In all other cases the question of hours of labor shall be settled with due regard to governmental necessities and the welfare, health and proper comfort of workers.”

Federation of Labor: Held at Saint Paul, Minn., June 10 to 20, Inclusive 1918, at 220 (1918).


84Proclamation at 1766-67.


86“Strikes Barred During the War,” NYT, Mar. 31, 1918 (15:1).

87“Report of War Labor Conference Board to Secretary of Labor William B. Wilson”
hours principle may have "meant almost anything one wanted it to mean," as far as the employers on the NWLB were concerned, labor's advocacy of the basic eight-hour day was merely an "ill-disguised grab for higher pay." The first eight-hours case to be decided by the Board (in July 1918, involving the Worthington Pump and Machinery Corporation works in East Cambridge, Massachusetts), which was viewed as setting a precedent for all manufacturers of war essentials, was curious in that the Machinists union was not even demanding the eight-hour basic day; instead, its demand was for a 48-hour averaged week consisting of five days of 8 hours and 45 minutes (7:30 a.m. to 12:00 noon and 12:45 p.m. to 5 p.m.) and four hours and 15 minutes on Saturday (7:30 a.m. to 11:45 p.m.). Only time worked in excess of these hours was to be paid at time and a half (with double time on Sundays and holidays). Nevertheless, whereas NWLB joint-chairman Frank Walsh and the labor-members argued that the workers' health and reasonable comfort demanded the basic eight-hour day, the employer-members dismissed that argument on the grounds that the workers were not seeking shorter hours "in order to gain time to spend with their families or to improve their minds. They only wanted higher wages for the same hours that they currently worked." Indeed, Walsh went so far as to support the actual eight-hour day, insisting that employees should be allowed to work longer only in emergencies. In the end, against the backdrop of a one-day strike at a plant that was virtually the only source of pumps for destroyers for the Navy, which pressed the Board to resolve the matter quickly, the NWLB awarded the basic-eight hour day.

The most prominent and programmatic discussion of the difference between the actual and basic eight-hour day emerged from two cases involving the Wheeling Mold and Foundry Company in West Virginia, which, after the NWLB had deadlocked over them, were surrendered to two very high-profile umpires. The first case involved molders, who had demanded the actual eight-hour day. The

(Mar. 29, 1918), appended to Proclamation 1440 at 1767, 1768.

88Conner, National War Labor Board at 89.
90Conner, National War Labor Board at 95 (citing NWLB Minutes, afternoon meeting of July 9, 1918, at 42-67).
91Conner, National War Labor Board at 97 (citing NWLB Minutes, afternoon meeting of July 9, 1918, at 53-54).
92Conner, National War Labor Board at 99-100.
94Conner, National War Labor Board at 105.
umpire was a very unorthodox judge, who wrote an equally unorthodox decision, which was "by far the most comprehensive statement issued by the NWLB on behalf of hours limitation." Walter Clark (1846-1924), who at 17 had become a lieutenant colonel in the Confederate Army, was a North Carolina Supreme Court justice from 1889 to 1924 and Chief Justice from 1903 to 1924. A very outspoken judge who openly accused the judiciary of a pro-capitalist bias, Clark delivered an address at Cooper Union in New York City in 1914—published as a U.S. Senate document—espousing a world view more congenial to Karl Marx than to a high-ranking judge then or now:

All advance toward better conditions has been through a ceaseless combat between those who exploit and those who are exploited; between those who create the wealth of a country and those who take as large a share of it as they can grasp.

In this country, as in all countries, the control of the Government is in the hands of the few.

The following year, when he testified in a similar vein before the U.S. Commission on Industrial Relations (chaired by the future NWLB joint chairman Frank Walsh), the headline of the report in the next day's New York Times bluntly read: "Judge Says Courts Favor Capitalists."

The dispute before Clark had been submitted to the NWLB by the company—which was represented by Walter Drew, one of the founders of the NICB and perhaps the country’s leading anti-union attorney—and Local 364 of the International Molders’ Union with regard to a proposed agreement between the parties. The relevant paragraphs in that agreement provided: "First. That 8 hours constitute a day’s work for all molders and coremakers. Second. That the wage rate be $6.50 for the basic 8-hour working day. Third. That all overtime shall be paid for at the rate of time and one-half." The only controversy involved the...

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95 Conner, National War Labor Board at 106.
97 Walter Clark, "Government by Judges" (address delivered at Cooper Union, Jan. 27, 1914), in S. Doc. No. 610, at 3 (63rd Cong., 2d Sess., 1914).
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meaning of the first paragraph, of which Clark observed that it was clear that, standing alone, it “would mean the 8-hour working day beyond which employees cannot be required or permitted to work.” According to the principle that the whole agreement should be construed together so that no part be invalidated, paragraph 2 could not be regarded as “substituting a basic 8-hour day for the actual 8-hour day provided by” paragraph 1:

It is not reasonable to suppose that the employees having agreed upon an 8-hour day, should by the next rule repeal it by substituting a 10 or 12 hour day for extra compensation.

The basic 8-hour rule is not an 8-hour day at all, but simply a wage agreement. If the 8-hour day is extended to 10 hours, then the 50 per cent added pay for the extra two hours in effect is an agreement to pay 11 hours’ wages for 10 hours’ work. It was doubtless thought that the extra 50 per cent...would discourage requiring extra hours, but this has not been the result in all cases, for in some plants 10 hours from day to day, every day, has been exacted, and in others even 13 hours a day has been known to be required. The object of the 8-hour law is to protect the health and lengthen the lives of the employees, which would be seriously compromised by an excessive length of the day’s work.¹⁰¹

Having turned employers’ argument that the basic eight-hour regime is merely a wage agreement against the company, Clark then refuted the claim that the principles adopted by the NWLB’s deprived it of jurisdiction to enforce the actual eight-hour day by pointing out that the hours principle specified that where existing law did not require the basic eight-hour day, “the question of hours of labor shall be settled with due regard to governmental necessities and the welfare, health and proper comfort of the workers.”¹⁰²

In order to implement this health and welfare standard, Clark observed that:

There is a vast body of experience that a 10-hour day shortens the lives of the employees, injures their health, and that in point of production there is an increase by the substitution of 8 hours for a longer period. Even if this were not true as to one day, the accumulated fatigue of working more than 8 hours for a series of days reduces the production below the quantity produced by strict adherence to that limit.

Especially is this so as to the molder’s occupation, the life of whom, working 9 or 10 hours per day, subject to the heat and noxious fumes, is said to average not more than 14 years. In work of this kind there can be no doubt that greater production will be had by


¹⁰²Award in re Molders v. Wheeling Mold & Foundry Co. at 164.
the working of an 8-hour day than by working 9 or 10 hours.\textsuperscript{103}

Clark’s crucial legal move consisted in arguing that the congressional authorization for the president to substitute the basic for the straight eight-hour day meant that Wilson’s “suspension applies only to the prohibition of working more than 8 hours, and does not require it. It is still open to the employees to decline to work longer than 8 hours, and in [sic] event of a difference with their employers to submit the matter to the National War Labor Board.” Clark conceded that some industries might still need a longer day, “but it does not seem, in consideration of the conditions, that more than 8 hours should be exacted in the work that a molder has to perform.” Employers had received a great increase in profit, while workers who had given up the eight-hour day had contributed longer hours, and merely because whole country had not yet achieved the eight-hour day was no reason to require more than eight hours of molders “whose trade exacts greater fatigue and exposure to noxious and dangerous fumes.”\textsuperscript{104}

Perhaps even bolder and more unorthodox than Clark’s ruling in favor of the actual eight-hour day was his creation of a unique institution of economic democracy for identifying emergencies that would constitute exceptions to the maximum eight-hour regime. Conceding that, despite paragraph 1 of the agreement, emergencies were likely to occur permitting the eight-hour limit to be exceeded “for a brief period,” Clark nevertheless concluded that

the protection of the 8-hour day will amount to nothing if it rests with the employer alone to declare the emergency. The 50 per cent allowed for overtime is too small a penalty in view of great profits that may arise. ... Such emergencies can ordinarily be met by the adoption of the three-shift system or an increase in machinery. It is better that the machinery should be worn out than the bodies of the employees. Man passes through this world but once, and he is entitled, in the words of the great Declaration, to some “enjoyment of life, liberty, and the pursuit of happiness.”\textsuperscript{105}

Rejecting suggestions that some protection against employer abuse of the emergency exception could be provided by limiting extra-hour days to three per week on the grounds that such overwork would affect workers all week long, Clark instead opted for a plan under which the employer and the employees each appointed two-member standing committees; since “the burden of establishing an emergency is upon those who assert it,” at least three of the four members would

\begin{itemize}
  \item \textsuperscript{103} Award in re Molders v. Wheeling Mold & Foundry Co. at 165.
  \item \textsuperscript{104} Award in re Molders v. Wheeling Mold & Foundry Co. at 165.
  \item \textsuperscript{105} Award in re Molders v. Wheeling Mold & Foundry Co. at 166.
\end{itemize}
have to agree on the existence of an emergency justifying overtime work. Having in effect conferred a veto power on the workers, Clark sought to evade any such accusation by asserting that the four-member plan avoided the objection that if there were only one member on each side, "fictious opposition by the representative of labor might prevent operation even when there was an emergency requiring it." Under his remarkable award, the committee determined not only whether an emergency existed, but also the length of time over which it might extend and the number of extra hours per day.

AWARE of the significance of his decision, Clark, in order to enlighten the "reactionary" legal profession, asked the NWLB to mail 235 copies of the award to all U.S. Supreme Court justices, state and territorial chief justices and attorneys general, and 120 law school deans. NWLB joint chairman Walsh deeply appreciated Clark's decision, in particular its contribution to industrial democracy. The president of the Plumbers union, John Alpine, who was the acting president of the AFL and editor of its magazine while Gompers was in Europe, published and praised Clark's decision, adding strong support for the actual eight-hour day:

A great part of the industrial directorate appears to feel today that the demand for an eight-hour day has been met when the basic eight hour day has been installed. That is not the case. .... Under a lessened demand for industrial output the overtime charge may serve as a sufficient deterrent for work beyond the eight-hour limit, but conditions are such today that emergencies are found readily for exacting ten and more hours of work.

In the second case, decided in October 1918, machinists working on a nine-hour basis to prepare tools for unskilled laborers who worked a eight-hour basic day, demanded the same terms. The umpire was none other than Henry Ford

106 Award in re Molders v. Wheeling Mold & Foundry Co. at 166.
107 Award in re Molders v. Wheeling Mold & Foundry Co. at 167.
108 In rejecting Wheeling Mold & Foundry's petition for rehearing, Clark mentioned that: "Soon after this opinion and decision of the board had been rendered, and possibly in consequence of it, the great United States Steel Corporation, with 300,000 employees, adopted the 8-hour law, and other companies are doing the same." Ruling of Umpire on Petition to Rehear (Oct. 5, 1918), in National War Labor Board: A History of Its Formation and Activities at 167, 168
110 John Alpine, "For a Real Eight-Hour Day," AF 25(11):999-1004, at 1004 (Nov. 1918) (editorial). This editorial casts doubt on the claim that by backing the actual eight-hour day, Walsh had "freed himself from the cause of organized labor...." Conner, National War Labor Board at 97.
111 Conner, National War Labor Board at 104-105.
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himself, who rendered a one-word answer of Yes in response to the question as to whether the Board should render a decision granting the machinists’s demand for a basic eight-hour day. Although Ford did not deem it necessary to give his reasons unless the Board requested them, he broke with the vast majority of his fellow capitalists in offering his very deep conviction that the straight 8-hour day is much better practice than the so-called “8-hour basic day” where the latter is continually and almost uniformly being practically exceeded in the number of working hours.

My experience, and also my reason, teaches me that very few emergencies ever exist in a manufacturing business justifying the practice of exceeding 8 working hours per day. The strain of 8 hours is enough, and the hours should never be increased except under the most extraordinary circumstances. I can not dwell too much on this. For the good of the men, for the good of the employer, and for the general results, I would admonish those interested to adhere to the straight 8-hour day.112

The personal experience to which Ford referred was presumably the eight-hour day that he had introduced at his Highland Park plant in January 1914, when he raised wages to $5.00 per day in connection with the increase in capacity utilization that he achieved from switching from two nine-hour shifts to three eight-hour shifts (and hiring an additional 4,000 workers).113 Although the eight-hour shift system, as the NICB pointed out, “is in accord with the motive of a straight 8-hour day...it is an arrangement for securing greater efficiency in production...by offsetting the burden of idle machinery and other overhead expense.”114

Although it may not have been the case that “the whole world was startled” by Ford’s remarks accompanying his umpire decision as it had been by his five dollar a day announcement four years earlier,115 they were nevertheless far beyond the mainstream, especially since he did not condition the eight-hour maximum on use of the three-shift system. The New York Times quoted a delighted NWLB co-chairman Walsh as commenting that “the straight eight-hour day was being generally recognized as more satisfactory than the basic eight-hour day, and...that Mr. Ford’s decision would give impetus to the tendency for its adoption.”116


113“Gives $10,000,000 to 26,000 Employees,” NYT, Jan. 6, 1914 (1:6).

114NICB, The Eight-Hour Day Defined at 3.

115“Henry Ford Explains Why He Gives Away $10,000,000,” NYT, Jan. 11, 1914 (sect. 5, 1: 1).

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details about his decision did not give impetus to, however, was Ford's candidacy for U.S. Senator from Michigan: the very next week he lost the election.\footnote{117}{"Ford Defeated for Senate Seat," \textit{NYT}, Nov. 6, 1918 (1:5).}

The Clark and Ford awards represented the high points of NWLB adjudication in support of the superiority of the actual eight-hour day, but they were not the only ones to recognize it. In a post-armistice case involving New York harbor workers, the umpire, V. Everit Macy, a millionaire banker,\footnote{118}{On the complex circumstances of the case, see Conner, \textit{National War Labor Board} at 167-72; "Decision Rendered in Harbor Dispute," \textit{NYT}, Feb. 26, 1919 (6:1-2).} acknowledged that the “Nation has come to realize that its security demands that its citizens have a reasonable opportunity for family life, a reasonable amount of leisure, and a proper standard of maintenance.” Just as some industries exposing workers to unusual physical dangers should compensate them for this greater risk in the form of higher wage rates, “excessive hours are as dangerous to good citizenship as are noxious fumes to the health of workers. There may be certain occupations in which the basic straight 8-hour day is inherently impossible; if so, the basic 8-hour day should be the standard and the pay for overtime regarded as a legitimate expense and a just charge to be borne by the public.”\footnote{119}{Award of the National War Labor Board in the Case of Marine Workers' Affiliation of the Port of New York v. The Railroad Administration, Shipping Board, Navy Department, War Department, and Red Star Towing & Transportation Co., [Docket No.] 10 and 1036 (Feb. 25, 1919), in \textit{National War Labor Board: A History of Its Formation and Activities} at 126, 127.} At the same time, Macy distinguished instances in which punitive overtime rates were not effective in deterring the imposition of overtime work, without explaining whether the compensation for such normal and predictable overtime work should be determined on other grounds: “There is nothing gained by limiting the working day without a punitive provision for overtime. On the other hand, in fixing the basic working day and scale, it is necessary to know approximately whether overtime will be the exception or the rule. If it is known beforehand that overtime will of necessity be the normal condition, then the punitive provision for overtime is merely another method of securing a higher wage scale in compensation for excessive hours and loses its punitive purpose. Such a condition requires special regulations for overtime work.”\footnote{120}{Umpire Macy in the New York Harbor Case 10, Feb. 25, 1919, in US DOL, National War Labor Board, \textit{Report of the Secretary of the National War Labor Board to the Secretary of Labor for the Twelve Months Ending May 31, 1919}, at 73 (1920). It is unclear why this language appears in this source, which published only extracts from the award, whereas it is lacking in \textit{National War Labor Board: A History of Its Formation and Activities}, which appears to have published a complete text.}