Award No. 6570
Docket No. TE-6464

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Hubert Wyckoff, Referee

PARTIES TO DISPUTE:

THE ORDER OF RAILROAD TELEGRAPHERS

HUDSON & MANHATTAN RAILROAD COMPANY

STATEMENT OF CLAIM: Claim of the General Committee of The Order of Railroad Telegraphers on the Hudson & Manhattan Railroad Company that J. J. Neville shall be paid while on vacation from March 30 to April 12, 1952, what he would have earned had he worked his regular position.

EMPLOYES' STATEMENT OF FACTS: An Agreement bearing effective date of November 7, 1948, by and between the parties, and referred to herein as the Telegraphers' Agreement, is in evidence; copies thereof are on file with the National Railroad Adjustment Board.

Prior and subsequent to his vacation period (March 30 to April 12, 1952) J. J. Neville owned and occupied a train clerk position at Journal Square, assigned hours 11:00 P. M. to 7:00 A. M., rest days Mondays and Tuesdays.

During the period of Mr. Neville's vacation, his position worked, in addition to the regular 8-hour working days, the following hours for which the time and one-half rate is applicable:

March 30	4 hours	Overtime
March 31	8 hours	Rest day service
April 1	8 hours	Rest day service
April 5	4 hours	Overtime
April 7	8 hours	Rest day services
April 7	4 hours	Overtime
April 8	8 hours	Rest day service

a total of 44 hours.

Claims were timely made by Mr. Neville, progressed by the Organization, and denied by the Carrier.

POSITION OF EMPLOYES: As briefly indicated by the Organization in its Statement of Facts, J. J. Neville owned and occupied a train clerk position at Journal Square, assigned hours 11:00 P. M. to 7:00 A. M., rest days Mondays and Tuesdays. Mr. Neville's vacation period was March 30 to April 12, 1952, and his relief was John Lane.

Mr. Lane, after having worked 11:00 P. M. March 29 to 7:00 A. M. March 30, was required to remain on duty an additional four hours, or until 11:00 A. M. to protect one-half of an 8-hour vacancy.

CONCLUSION

The overtime claimed by Train Clerk Neville as part of his vacation pay for the year 1952 was casual overtime, was not part of his "regular position," and is not to be included in vacation pay. The claim should be dismissed.

(Exhibits not reproduced.)

OPINION OF BOARD: This claim involves the proper amount of compensation to be paid an employe while on vacation, whether his straight time daily rate or what he would have "earned" had he worked his regular position.

Ordinarily Claimant worked no regularly assigned overtime and was regularly relieved on his two rest days. During his vacation, however, an unusual shortage of Train Clerks developed with the result that his Vacation Relief worked twelve hours overtime on tours left open by other employes and also three of the position's rest days; and another employe worked the fourth rest day. The service performed, both on overtime and on the rest days, was work which under the Rules the Carrier had the right to require of the incumbent of the position and the incumbent had the right to demand.

The Carrier calculated the vacation pay of Claimant by multiplying the daily rate of his regular assignment by the number of vacation days entitled. Claim is made for the twelve hours overtime and the four days rest day service.

The Carrier never was a party to the National Vacation Agreement of December 17, 1941. The parties had previously executed a vacation rule of their own on May 24, 1938, the effectiveness of which, however, was suspended pending the effectiveness of certain rate increases proposed by the Carrier. Before these rate increases ever became effective, the parties signed an agreement dated April 22, 1941, which read:

> "Hudson & Manhattan Railroad Company hereby expresses its willingness to enter into an agreement granting vacations to Towermen and Train Clerks covered by agreement between the Company and your organization at such time as the majority of the hourly rated Towermen represented by your organization in the Eastern Region of the United States shall be granted vacations with pay by the carriers and on the same principle adopted by them, subject, however, to such modifications of that principle as may be necessary to permit application of it which will be consistent with the need for maintaining the Company's service."

Thus, the 1938 vacation rule never became effective. After the adoption of the National Vacation Agreement, the parties met and signed an amended vacation rule on April 16, 1942. This vacation rule was again amended on November 7, 1948, as part of a new agreement between the parties which superseded all prior agreements.

The National Vacation Agreement rule, and the various rules adopted by these parties, for the calculation of vacation pay read:

1938 Rule (Article VII (b)):

> "The amount to be paid an employe while on vacation hereunder shall be two (2) weeks' pay at the average weekly earnings of such employe for a period of six (6) months ending March 1st prior to such vacation. * * *"

1941 National Vacation Agreement Rule (Article 7 (a)):

> "An employe having a regular assignment will be paid while on vacation the daily compensation paid by the carrier for such assignment." (Interpreted June 10, 1942, as follows: "This con-

templates that an employe having a regular assignment will not be any better or worse off, while on vacation, as to the daily compensation paid by the carrier than if he had remained at work on such asignment, this not to include casual or unassigned overtime or amounts received from others than the employing carrier.")

1942 Amended Rule (Article VII A):

"The amount to be paid to each employe while on vacation for each day he is entitled to a vacation with pay shall be the daily compensation which such employe would have received had he worked each such day his regular scheduled or assigned tour of duty."

The 1948 Amended Rule (Article XII (e)):

"For each day an employe is on vacation, pursuant to the provisions of this Article, he shall be paid what he would have earned had he worked his regular position."

First. There is nothing uncertain or ambiguous about the 1948 vacation rule; and if there be any doubt about this, the doubt is readily dispelled by reading the rule in the setting of its prototypes and the national rule as interpreted.

To determine vacation pay, the parties started in 1938 by averaging "earnings" over a 6 month period, which would of course have included any casual or unassigned overtime and any compensation for rest days worked. When the National Vacation Agreement was adopted, the parties conformed to its Article VII (a), but with an ambiguous addition. And they wound up in 1948 with a reversion to the 1938 earnings theory of vacation pay, substituting however actual for averaged earnings.

We are unable to conclude that daily compensation paid for a regular assignment is simply another way of saying what would have been earned had the employe worked his regular position. The 1948 Rule speaks of earnings without any qualification, whereas the national rule speaks only of compensation paid for a regular assignment as distinguished from irregularly assigned or unassigned work.

In this view none of the interpretations of the National Vacation Agreement and none of the awards made on it have any bearing here.

Second. The Carrier argues that the interpretation contended for by the Organization is "completely unreasonable" and "violative of the intent and spirit of the Vacation Agreement to provide for the employe a vacation with pay—the equivalent of his ordinary and usual earnings."

The Rule as now written affords no basis for excluding either casual or highly unusual overtime earned by the vacationer's position during his vacation.

If the parties had intended to exclude highly unusual overtime, they could easily have said so or they could have reverted to the 1938 method of averaging the highly unusual weeks with the subnormal ones. Or if they had intended to exclude casual overtime and rest day service altogether, they could simply have conformed Article XII (e) to the literal terms of the National Vacation Agreement, which by 1948 had a settled and notorious meaning.

Moreover, the 1948 Rule was adopted, not in isolation, but as part and parcel of a new agreement. Therefore, we have no way of knowing whether what may appear to be surely an unusual or, to some, an unreasonable rule here may not have been gained by some equally unusual concession given elsewhere by the Organization in the negotiations.

It is our function to interpret agreements as written. If a rule is fairly susceptible of two interpretations, the more reasonable interpretation is usually adopted. But where, as here, the parties select plain language of their own and reject equally plain national language, it is not for us to impose our notions of what is reasonable or usual.

Third. The Carrier shows a consistent practice on the property since 1946, and asserts that it existed before that, whereby no claims have ever before been presented by vacationers on this property for casual overtime earned by the Vacation Relief.

It may well be that under the 1942 Rule which was in effect until 1948, such claims were groundless. In any event, the 1948 Rule is inconsistent with the practice and we find the Rule to be certain and unambiguous. An intention to change a prior practice becomes plain, when the parties deal directly with the subject of the practice and adopt an amendment or new agreement which is inconsistent with it (Awards 4513, 3979, 3890, 3603, 2926, 2812, 1671, 1518, 1492, 1456 and 422); and while practice may serve to resolve ambiguities or uncertainties in an agreement, practice cannot prevail over clear language (Awards 5100, 4664, 4513, 4070, 3979, 3890, 3696, 3603, 2926, 2812, 2550, 2281, 1671, 1518, 1492, 1456 and 422) although acquiescence may bar specific claims (Awards 3518, 3231, 2623, 2576, 2261, 2146, 2137, 2126, 1645 and 1289).

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

That the Carrier and the Employes involved in this dispute are respectively Carrier and Employes within the meaning of the Railway Labor Act, as approved June 21, 1934;

That this Division of the Adjustment Board has jurisdiction over the dispute involved herein; and

Article XII (e) of the Agreement was violated.

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: (Sgd.) A. Ivan Tummon
Secretary

Dated at Chicago, Illinois, this 26th day of April, 1954.