C 6238

ARBITRATION AWARD

June 9, 1986

UNITED STATES POSTAL SERVICE

-and

NATIONAL ASSOCIATION OF LETTER CARRIERS

Case Nos.
H4N-NA-C-21 (4th issue)
H4C-NA-C-27

-and-

AMERICAN POSTAL WORKERS UNION

Subject: Arbitrability - Remedy for Violation of 12-Hour Daily or 60-Hour Weekly Work Limitation

Statement of the Issues: Whether the Unions' claims in this case are arbitrable? Whether a violation of Article 8, Section 5G2, i.e., working an employee more than 12 hours in a day or 60 hours in a service week, justifies a remedy apart from or beyond the penalty overtime pay provided by Article 8, Section 4C and D? If so, what should the remedy be?

Contract Provisions Involved: Article 8, Sections 4 and 5 and Article 15, Section 4 of the July 21, 1984 National Agreement.

Appearances: For the Postal Service, J. K. Hellquist, General Manager, Labor Relations Division, Central Region; for NALC, Keith E. Secular, Attorney (Cohen Weiss & Simon); for APWU, Darryl J. Anderson, Attorney (O'Donnell Schwartz & Anderson).

Statement of the Award: The grievances are arbitrable and are granted to the extent set forth in the foregoing opinion.

BACKGROUND

These grievances concern the appropriate remedy for a violation of the work ceilings stated in Article 8, Section 5G2, namely, 12 hours in a day and 60 hours in a service week. The Unions urge that any hours worked beyond these limitations should be paid for at two and one-half times the straight time rate. The Postal Service claims that the negotiated remedy is two times the straight time rate and that anything beyond such double time cannot be justified under the terms of the National Agreement. It believes the Unions are seeking to add a new penalty overtime pay clause to Article 8 and are thus seeking to modify the National Agreement. For this reason, it maintains the grievances are not arbitrable.

The relevant provisions of Article 8 should be quoted:

Section 4 - Overtime Work

"A. Overtime pay is to be paid at the rate of one and one-half (1½) times the base hourly straight time rate.

"B. Overtime shall be paid to employees for work performed only after eight (8) hours on duty in any one service day or forty (40) hours in any one service week. Nothing in this Section shall be construed by the parties or any reviewing authority to deny the payment of overtime to employees for time worked outside of their regularly scheduled work week at the request of the Employer.

"C. Penalty overtime pay is to be paid at the rate of two (2) times the base hourly straight time rate. Penalty overtime pay will not be paid for any hours worked in the month of December.

"D. Effective January 19, 1985, penalty overtime pay will be paid to full-time regular employees for any overtime work in contravention of the restrictions in Section 5.F.

"F. Wherever two or more overtime or premium rates may appear applicable to the same hour or hours worked by an employee, there shall be no pyramiding or adding together of such overtime or premium rates and only the higher of the employee's applicable rates shall apply." (Emphasis added)

Section 5 - Overtime Assignments

"F. ...excluding December, no full-time regular employee will be required to work overtime on more than four (4) of the employee's five (5) scheduled days in a service week or work over ten (10) hours on a regularly scheduled day, over eight (8) hours on a non-scheduled day, or over six (6) days in a service week.

"G. ...full-time employees not on the 'Overtime Desired' list may be required to work overtime only if all available employees on the 'Overtime Desired' list have worked up to twelve (12) hours in a day or sixty (60) hours in a service week. Employees on the 'Overtime Desired' list:

1. may be required to work up to twelve (12) hours in a day and sixty (60) hours in a service week (subject to payment of penalty overtime pay set forth in Section 4.D for contravention of Section 5.F); and

2. excluding December, shall be limited to no more than twelve (12) hours of work in a day and no more than sixty (60) hours of work in a service week..." (Emphasis added)

In Case Nos. H4N-NA-C-21 (3rd issue) and H4C-NA-C-27, it was held that the underscored words in Section 5G2 constituted "an absolute bar to employees working more than 60 hours in a week." These words obviously are also an absolute bar to employees working more than 12 hours in a day. The 12-hour and 60-hour language in Section 5G2 establishes ceilings on the number of hours an employee may work. These ceilings, however, do not apply to work performed in the month of December.

The present case concerns the consequences of Management working an employee beyond 12 hours in a day or 60 hours in a week, the consequences of a violation of Section 5G2.

The Postal Service believes there should be no special consequences, at least none other than those already provided for in Article 8. It argues that no one can work more than

12 hours in a day or 60 hours in a week "without having contravened the limitations in Section 5.F." It says work over 12 or 60 therefore calls for penalty overtime pay, double time, pursuant to Section 4C and D. It stresses the broad reach of penalty overtime pay to "any overtime work in contravention of the restrictions in Section 5.F." It claims that payment of some further penalty for work over 12 or 60, as requested by the Unions, would violate the "no pyramiding" language in Section 4F and would improperly create a new penalty overtime pay rate by arbitral fiat.

The Unions contend that working someone beyond the 12 or 60 limitations is a violation of Section 5G2 and that such a violation should not go unremedied. They urge that mere payment of penalty overtime pay is not sufficient to deter Management from ignoring the work limitations imposed by 5G2. They view penalty overtime pay as simply a negotiated rate of pay for certain overtime work, not as a remedy for Management's failure to honor the 12 or 60 ceiling. They emphasize the parties' "pattern...of using an additional one-half of straight time pay increment as appropriate compensation for each successive layer of obligation and responsibility involving extended working hours." Specifically, they note that typical overtime work is paid for at one and one-half times the straight time rate and that penalty overtime work is paid for at two times the straight time rate. They see the "next step" in this "logical progression" as an "additional one-half of straight time pay." They ask, accordingly, that a violation of the 12 or 60 ceiling be paid for at two and one-half times the straight time rate.

DISCUSSION AND FINDINGS

The Postal Service claims, at the outset, that these grievances are not arbitrable. It notes that the parties have carefully written into Article 8 several overtime pay provisions, one and one-half times straight time for certain overtime work and two times straight time for other overtime work. It believes the Unions seek in this case to establish "an additional category of wage payment", two and one-half times straight time for work beyond 12 hours in a day or 60 hours in a week. It insists, however, that the parties have already created a rate for such work in Article 8, namely, two times straight time, and that the Unions' request for something more conflicts with this part of the National Agreement. It sees the grievances as a means of imposing a new

penalty overtime pay clause on the Postal Service, a means of "creat[ing] a general remedy, to be applied generally by other arbitrators, as well as the parties themselves." It urges that a ruling in the Unions' favor would modify Article 8 and thus go beyond the terms of the National Agreement. Such a result is, in its opinion, expressly forbidden by Article 15.

This argument is not persuasive. When Management works someone more than 12 hours in a day or 60 hours in a week, it has violated Section 5G2. Contract violations should, where possible, be remedied. The Postal Service claim that the parties have already provided a remedy for this violation in Sections 4D and 5F, namely, double time, is plainly incorrect. That will be made clear later in my discussion of the merits of the dispute. No remedy for a Management violation of the Section 5G2 work ceilings was written into Article 8. But the parties' silence does not mean that I am without power to fashion an appropriate remedy. One of the inherent powers of an arbitrator is to construct a remedy for a breach of a collective bargaining agreement.* The U. S. Supreme Court recognized this reality in the Enterprise Wheel case:

> "...When an arbitrator is commissioned to interpret and apply the collective bargaining agreement, he is to bring his informed judgment to bear in order to reach a fair solution of a problem. This is especially true when it comes to formulating remedies. There the need is for flexibility in meeting a wide variety of situations. The draftsmen may never have thought of what specific remedy should be awarded to meet a particular contingency."**

* As Arbitrator Gamser observed in Case No. NC-S-5426, "...to provide for an appropriate remedy for breaches of the terms of an agreement, even where no specific provision defining the nature of such remedy is to be found in the agreement, certainly is found within the inherent powers of the arbitrator."

** United Steelworkers of America v. Enterprise Wheel & Car Corp., 80 S. Ct. 1358, 1361 (1960).

The Unions propose a single, uniform remedy for each and every violation of Section 5G2. The Postal Service disagrees with this approach. It considers the Unions' position to be tantamount to an effort to place a new penalty overtime pay clause in Article 8. This argument, however, misconstrues the thrust of the Unions' case. Once a contract violation is held to have occurred, the parties are free to urge whatever remedy they believe would be appropriate. A single, uniform remedy, if adopted here, would not modify the terms of the National Agreement. It would merely announce in advance the money consequences of Management violating Section 5G2 by working an employee beyond the 12 or 60 limits. It would not constitute another form of "penalty overtime pay" because that concept deals with permissible overtime under Section 5F, overtime contemplated by the parties. Work beyond the 12 or 60 limits involves impermissible overtime under Section 5G2, overtime expressly prohibited by the parties. The fact is that the Postal Service itself seeks a single, uniform remedy, namely, double time, for each and every violation of Section 5G2.

Thus, this case involves nothing more than a quarrel over the appropriate remedy for a Section 5G2 violation. That quarrel raises "interpretive issues" under the National Agreement. The remedy set forth later in this opinion does not modify Article 8 or otherwise ignore the terms of this Agreement. The dispute is arbitrable.

The Postal Service contends that the remedy for this contract violation is expressly stated in Article 8 and that no other remedy is warranted. It relies on Section 4D which calls for "penalty overtime pay", two times straight time, "for any overtime work in contravention of the restrictions in Section 5.F." It asserts that work beyond the 12 or 60 limits contravenes these restrictions and hence must be paid for at double time, nothing more.

This argument fails for several reasons. First, the Postal Service gives Section 5F a breadth that provision simply does not possess. Not all work beyond 60 hours contravenes the Section 5F restrictions.* These restrictions relate

* All work beyond 12 hours in a day, on the other hand, does contravene the Section 5F restrictions.

to number of hours of work in a day, number of days of work in a week, and number of overtime days in a week. They do not cover the number of hours of work in a week. Hence, Section 5F does not automatically apply to hours worked beyond 60. Those hours do not necessarily generate penalty overtime pay. For instance, if the hours beyond 60 fall within one of the employee's regularly scheduled tours, he would receive straight time for such work.* In these circumstances, Section 5F would offer no remedy whatever for Management's failure to honor the Section 5G2 prohibition of work beyond 60 hours.

Second, work beyond 12 or 60 may often be a "contravention of the restrictions in Section 5.F." But such work has another effect as well. It is a contravention of the restrictions in Section 5G2, a violation of the work ceilings erected by Section 5G2. The penalty overtime pay provisions in Sections 4D and 5F have nothing to do with these work ceilings. They certainly cannot be read to excuse a violation of Section 5G2. It follows that Sections 4D and 5F do not provide a remedy for a violation of Section 5G2.

Third, the same point can be made more forcefully by examining the purpose of these provisions. Sections 4D and 5F are a means of discouraging certain overtime work by making the Postal Service pay a higher premium, double time, for such work. Section 5G2 has an entirely different goal, the prohibition of any work beyond the 12 or 60 limits. The Unions' complaint here is not with the rate of pay for work over 12 or 60. It is not seeking to discourage penalty overtime pay situations. Rather, its position is that Management may not work anyone over 12 or 60. It requests a remedy which will enforce the Section 5G2 prohibition.

The Postal Service further contends that the remedy sought by the Unions, two and one-half times straight time for work beyond 12 or 60, conflicts with the "no pyramiding" ban in Section 4F. That provision says, "Wherever two or more overtime or premium rates may appear applicable to the same...hours worked..., there shall be no pyramiding...and only the higher of the applicable rates shall apply." This

* See, in this connection, the hypothetical example constructed in Case Nos. H4N-NA-C-21 (3rd issue) and H4C-NA-C-27. There, the employee's regular schedule was Monday through Friday on day tour. He worked 8 hours Sunday, 12 hours Monday through Thursday, and 8 hours Friday. His final 4 hours on Friday were over the 60-hour ceiling. But these hours, being part of his regularly scheduled tour, would be compensated at straight time rather than penalty overtime (or overtime).

argument is without merit. For the "no pyramiding" principle only addresses the "overtime or premium rates" set forth in the National Agreement. The money sought by the Unions here is not such an "overtime or premium rate." It is a suggested remedy for a violation of Section 5G2. A "premium rate" and a remedy (even when expressed in terms of some multiple of straight time pay) are different concepts. Hence, the fact that the Postal Service pays double time for most work over 12 or 60 does not preclude, in appropriate circumstances, a remedy which would require a further payment beyond double time. Section 4F cannot be read as a device for limiting the amount of a money remedy for a violation of Section 5G2.

For these reasons, I find that the remedy for a violation of Section 5G2 is not necessarily limited to double time. It could be a larger sum notwithstanding the provisions of Sections 4D, 4F and 5F.

This does not mean, however, that the single, uniform remedy proposed by the Unions, two and one-half times straight time, must be embraced. For not all violations of Section 5G2 are likely to be the same. Some may involve a willful disregard of the 12 or 60 work ceilings; others may be an innocent failure to appreciate the significance of these ceilings. Some may be a response to an emergency situation; others may simply occur in the normal course of postal operations. Some may be induced by the employee's own request; others may be strictly the product of supervision's wishes. The point is that there are likely to be varying degrees of culpability in violations of Section 5G2. The arbitrator should consider these kinds of matters in fashioning a proper remedy. That is precisely what the Supreme Court must have had in mind when it referred to the arbitrator's "need...for flexibility" in formulating remedies to "meet...a wide variety of situations." I therefore will not grant the single, uniform remedy requested by the Unions. The remedy will depend on the facts of each case as it comes along.

AWARD

The grievances are arbitrable and are granted to the extent set forth in the foregoing opinion.

Richard Mittenthal, Arbitrator