

C# 13181
A+B

REGIONAL ARBITRATION PANEL

In the Matter of the Arbitration	)	GRIEVANT:	F. Dickerson/M. Payne
<i>between</i>	(	POST OFFICE:	Hyattsville, Maryland
UNITED STATES POSTAL SERVICE	(	USPS CASE NO:	E90N-2C-C
<i>and</i>	(	USPS CASE NO:	92021627/93000229/92021628
NATIONAL ASSOCIATION OF LETTER CARRIERS, AFL-CIO	)	NALC CASE NO:	142-HY-121-1/124-1/122-1
	(
)		

BEFORE: Raymond L. Britton, *Arbitrator*

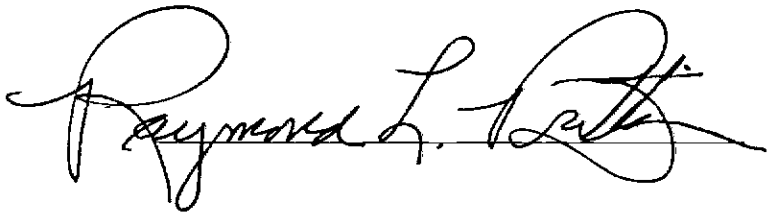
APPEARANCES:

<i>For the U.S. Postal Service:</i>	Thelma Cartledge
<i>For the Union:</i>	A. P. Martinez
<i>Place of Hearing:</i>	U.S. Post Office
<i>Date of Hearing:</i>	June 25, 1993

AWARD:

For the reasons given, the grievances are sustained and the relief requested by the Union granted.

Date of Award: September 6, 1993



ISSUE

Did the Postal Service violate Article 8, Section 5 of the National Agreement? If so, what is the appropriate remedy?

The parties failed to reach agreement on these matters, and they were submitted to arbitration for resolution. Pursuant to the contractual procedures of the parties, the undersigned was appointed as Arbitrator to hear and decide the matters in dispute.

At the commencement of the Hearing, it was stipulated by the parties that these matters were properly before the Arbitrator for decision and that all steps of the arbitration procedure had been followed and that the Arbitrator had the authority to render the decision in these matters. After the Hearing, it was agreed that the United States Postal Service (hereinafter referred to as "Employer") and the National Association of Letter Carriers, AFL-CIO (hereinafter referred to as "Union") would present oral closing arguments in support of their respective positions.

SUMMARY STATEMENT OF THE CASE

On Friday, November 29, 1991, the day after Thanksgiving, non-overtime desired ("Non-ODL") Carriers Myron Payne and Francis O. Dickerson, who were non-scheduled on that day, were pre-scheduled to work at the Hyattsville Post Office. Identical grievances were filed and Step 1 meetings were held and decisions rendered on December 11, 1991. Pursuant to Article XV, the grievances were appealed to Step 2 alleging a violation of Article 8, Section 5.G and stating in relevant part as follows (Joint Exhibit No. 2):

FACTS: What Happened On 11-29-91, non-OTDL carrier Francis Dickerson was pre-scheduled to work over-time on his non-scheduled day, while available OTDL's were not utilized up to 12 hours.

UNION CONTENTIONS: Reasons For Grievance Non-OTDL carrier was required to work overtime contrary o Article 8, Section 5.G.

CORRECTIVE ACTION REQUESTED: The Union requests that non-OTDL carrier Francis Dickerson be paid an additional 50% (4 hours) for all overtime work performed on 11-29-91.

On March 5, 1992, Frank Gallub, Manager, Customer Services in a letter to Robert Williams, Step 2 Representative, Capitol Branch #142 NALC, Re: HY-10-1-142, HY-11-1-142, HY-12-1-142, HY-13-1-142, HY-14-1-142, HY-15-1-142, HY-16-1-142, HY-17-1-142, HY-18-1-142, HY-19-1-142, HY-20-1-142, HY-37-1-142, HY-38-1-142, HY-54-1-142, HY-57-1-142, HY-58-1-142, HY-89-1-142, HY-90-1-142, HY-104-1-142, HY-105-1-142, HY-106-1-142, HY-107-1-142, HY-121-1-142, HY-122-1-142, HY-124-1-142, HY-127-1-142, HY-129-1-142, HY-130-1-142, HY-133-1-142, HY-134-1-142, HY-11-2-142, HY-14-2-142, HY-16-2-142, HY-20-2-142, HY-38-2-142 stated in relevant part as follows:

* * *

Reference your Step (2) appeal which pertained to the above captioned grievance. The matters presented by you concerning this grievance, as well as applicable contractual provisions, have been reviewed and given careful consideration.

Prior to discussing these grievances, it was agreed between union and Management that a generic Step 2 denial decision would be sufficient for all the above cited companion grievances.

It is Management's understanding that the Union believes "Simultaneous Scheduling" is not in accordance with the National Agreement and that Management is not using the OTDL as prescribed by Article 8 of the National Agreement.

It is Management's position that in every case cited under Article 8, Management scheduled accordingly considering all valid operational constraints. In none of the grievances referring to Article 8 did Managers call in or schedule non-overtime desired list employees without first maximizing the people on the overtime desired list. To cover vacant routes as well as attempt to have all mail delivered prior to 1700 hours, it was necessary to use non-overtime desired list employees, (volunteers first), to work their day off along with overtime desired list employees. The Unions contention that overtime desired list carriers should work up to twelve (12) hours before using non-overtime desired list carriers would cause letter carriers to be delivering mail up to 7:30 PM, which is unsafe and detrimental to the image of the Postal Service. Management also feels that simultaneous scheduling is applied not only to the APWU (as per attached Arbitration Awards dated January 29, 1990 and January 14, 1991, by Mr. Richard Mittenthal), but also to the NALC, being the National Agreement encompasses both parties. After a review of the Arbitration Awards, it is evident that the need to use simultaneous scheduling, as in past practice, is a necessary tool used by Management to move the mail in an efficient manner.

Due to the fact that Management found it necessary to schedule non-overtime desired list employees where there was not sufficient overtime desired list employees for operational needs; all available overtime desired list employees were afforded the opportunity to work; and that Mr. Mittenthal denied the APWU Grievances pertaining to Article 8, this grievance is denied.

On March 16, 1992, Robert D. Williams, Step 2 Designee submitted a Letter of Corrections and Additions, Re: Step 2 Decision Letter Dated March 5, 1992 For: HY-10-1-142, HY-11-1-142, HY-12-1-142, HY-13-1-142, HY-14-1-142, HY-15-1-142, HY-16-1-142, HY-17-1-142, HY-18-1-142, HY-19-1-142, HY-20-1-142, HY-37-1-142, HY-38-1-142, HY-54-1-142, HY-57-1-142, HY-58-1-142, HY-89-1-142, HY-90-1-142, HY-104-1-142, HY-105-1-142, HY-106-1-142, HY-107-1-142, HY-121-1-142, HY-122-1-142, HY-124-1-142, HY-127-1-142, HY-129-1-142, HY-130-1-142, HY-133-1-142, HY-134-1-142, HY-11-2-142, HY-14-2-142, HY-16-2-142, HY-20-2-142, HY-38-2-142, stating in relevant part as follows (Joint Exhibit No. 2):

Pursuant to Article 15, Step 2(G), the Union submits the following corrections and or additions relative to the above numbered grievances:

Correction/Additions #2:

Page 1, paragraph 2; it is the Unions understanding that Management believes that all the cited grievances are "Simultaneous Scheduling." The Union did not put forth the argument that all the cited grievances are "Simultaneous Scheduling", each grievance was to be presented on it's own merit.

Correction/Additions #3:

Page 1, paragraph 4; when the above grievances were presented, Management did not put forth at any time, the argument that simultaneous scheduling was based on "... valid operational constraints". Management, did in fact schedule carriers not on the OTDL prior to maximizing the carriers on the OTDL. Also, management has now presented matters concerning a "operational window" (valid operational constraints) in order to "... have all mail delivered prior to 1700 hours. . .". That was not presented then and has never before been articulated to the Union. Furthermore, the Unions contentions concerning the applicability of the APWU arbitration awards case number H4C-NA-C 30, dated January 29, 1990 and January 14, 1991, is reflected simply in that the arbitration was relative to the parties (USPS and APWU only) disagreements concerning the meaning of their Article 8 Memorandum executed via a series of meetings between December 10 and 17.

On March 25, 1992, the grievances were appealed to Step 3 of the grievance procedure alleging a violation of Article 8, Section 5G and stating in relevant part as follows:

REASONS FOR APPEAL: On 11-29-91, non-OTDL carrier F. Dickerson was pre-scheduled to work 8 hours overtime on his day off, while available jOTDL carriers were not utilized up o 12 hours. The Union and management had previously agreed in joint training that this was a violation to which management had agreed to cease and desist.

CORRECTIVE ACTION REQUESTED: The Union requests that carrier F, Dickerson be paid an additional 50% (50 x 8hrs. = 4hrs.) at his base hourly rate for the 8 hours over-time performed on 11-29-91.

On October 5, 1992, Linda Young, Labor Relations in a letter to Mr. Jerry Kerner, Regional Administrative Assistant, stated in relevant part as follows (Joint Exhibit No. 2):

On 08/05/92, the above referenced grievance was discussed at Step 3 of our contractual grievance procedure. The matters presented by the union concerning this grievance, as well as the applicable contractual provisions, have been reviewed and given careful consideration.

Management has established a legitimate business reason to have the mail delivered timely and sufficiently. Based on the fact that simultaneous scheduling was utilized and is authorized and confirmed by a National Arbitration Award, there is no evidence of any other contractual violation of Article 8. Therefore, the corrective action requested will not be granted, and the grievance is denied.

In the opinion of the Postal Service, this grievance does not involve any interpretive issue(s) pertaining to the National Agreement or any supplement thereto which may be of general application. Therefore, this case may be appealed directly to regional arbitration in accordance with the provisions of Article 15 of the National Agreement.

The grievance filed by Myron Payne is identical to that filed by Francis Dickerson except for stating that he was "required to work" rather than "pre-scheduled to work." On October 23, 1992, the grievances were appealed to arbitration.

The parties entered into stipulations of fact as to the matter of Francis Dickerson, E90N-2C-C92021627, 142-Hy-121-1, Myron Payne, E90N-2C-C9200229, 142-HY-124-1, and Class, E90N-2C-C92021628, 142-HY-122-1, as follows:

A. *In accordance with letter carrier overtime, scheduling the parties agree that overtime desired list employees must be maximized (per Art. 8: Section 5 (g)), prior to working employees not listed on an overtime desired list. It is recognized that valid operational reasons may occur necessitating the simultaneous scheduling of non-overtime desired (non odl) list employees and overtime desired list employees (odl). However, the parties dispute that this was the case in the instant grievance.*

B. *Non-odl carriers Payne and Dickerson were solicited to work prior to and worked their non-scheduled day (11-29-91), the day after the Thanksgiving holiday.*

C. *The ODL carriers referenced in 142-HY-122-1 above worked on 11-29-91, and had they been paid per the union's requested remedy, would not have been compensated more than 10 hrs. for 11-29-91.*

D. *This type of dispute has been the subject of several grievances in the Hyattsville office.*

E. *The parties also stipulate that the issue to be resolved by the arbitrator in today's hearing is:*

Did the Postal Service violate the National Agreement, Article 8, Sect. 5, and if so, what is the appropriate remedy?

Provisions of the National Agreement effective June 12, 1991, to remain in full force and effect to and including 12 midnight November 20, 1994, (hereinafter referred to as "National Agreement") (Joint Exhibit No. 1) considered pertinent to this dispute by the parties are as follows:

ARTICLE 8
HOURS OF WORK

Section 1. Work Week

The work week for full-time regulars shall be forty (40) hours per week, eight (8) hours per day within ten (10) consecutive hours, provided, however, that in all offices with more than 100 full-time employees in the bargaining units the normal week for full-time regular employees will be forty hours per week, eight hours per day within nine (9) consecutive hours. Shorter work weeks will, however, exist as needed for part-time regulars.

Section 2. Work Schedules

A. *The Employee's service week shall be a regular week beginning at 12:01 a.m. Saturday and ending at 12 midnight the following Friday.*

B. The employee's service day is the calendar day on which the majority of work is scheduled. Where the work schedule is distributed evenly over two calendar days, the service day is the calendar day on which such work schedule begins.

C. The employee's normal work week is five (5) service days, each consisting of eight (8) hours, within ten (10) consecutive hours, except as provided in Section 1 of this Article. As far as practicable the five days shall be consecutive days within the service week.

Section 3. Exceptions

The above shall not apply to part-time employees.

Part-time employees will be scheduled for less than eight (8) hours per service day and less than forty (40) hours per normal work week.

Section 4. Overtime Work

A. Overtime pay is to be paid at the rate of one and one-half (1-1/2) 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.

Section 5. Overtime Assignments

When needed, overtime work for regular full-time employees shall be scheduled among qualified employees doing similar work in the work location where the employees regularly work in accordance with the following:

A. Two weeks prior to the start of each calendar quarter, full-time regular employees desiring to work overtime during that quarter shall place their names on an "Overtime Desired" list.

B. Lists will be established by craft, section, or tour in accordance with Article 30, Local Implementation.

C. 1. o. Except in the letter carrier craft, when during the quarter the need for overtime arises, employees with the necessary skills having listed their names will be selected in order of their seniority on a rotating basis.

b. Those absent, on leave or on light duty shall be passed over.

2. a. Only in the letter carrier craft, when during the quarter the need for overtime arises, employees with the necessary skills having listed their names will be selected from the list.

b. During the quarter every effort will be made to distribute equitably the opportunities for overtime among those on the list.

c. In order to insure equitable opportunities for overtime, overtime hours worked and opportunities offered will be posted and updated quarterly.

d. Recourse to the "Overtime Desired" list is not necessary in the case of a letter carrier working on the employee's own route on one of the employee's regularly scheduled days.

D. If the voluntary "Overtime Desired" list does not provide sufficient qualified people, qualified full-time regular employees not on the list may be required to work overtime on a rotating basis with the first opportunity assigned to the junior employee.

E. Exceptions to C and D above if requested by the employee may be approved by local management in exceptional cases based on equity (e.g., anniversaries, birthdays, illness, deaths).

F. Effective January 19, 1985, 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. Effective January 19, 1985, 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.

However, the Employer is not required to utilize employees on the "Overtime Desired" list at the penalty overtime rate if qualified employees on the "Overtime Desired" list who are not yet entitled to penalty overtime are available for the overtime assignment.

**MEMORANDUM OF UNDERSTANDING
BETWEEN THE
THE UNITED STATES POSTAL SERVICE AND
JOINT BARGAINING COMMITTEE(
American Postal Workers Union, AFL-CIO, and
National Association of Letter Carriers, AFL-CIO)**

Re: Article 8

Recognizing that excessive use of overtime is inconsistent with the best interests of postal employees and the Postal Service, it is the intent of the parties in adopting changes to Article 8 to limit overtime, to avoid excessive mandatory overtime, and to protect the interests of employees who do not wish to work overtime, while recognizing that bona fide operational requirements do exist that necessitate the use of overtime from time to time. The parties have agreed to certain additional restrictions on overtime work, while agreeing to continue the use of overtime desired lists to protect the interests of those employees who do not want to work overtime, and the interests of those who seek to work limited overtime. The parties agree this memorandum does not give rise to any contractual commitment beyond the provisions of Article 8, but is intended to set forth the underlying principles which brought the parties to agreement.

The new provisions of Article 8 contain different restrictions than the old language. However, the new language is not intended to change existing practices relating to use of employees not on the overtime desired list when there are insufficient employees on the list available to meet the

overtime needs. For example, if there are five available employees on the overtime desired list and five not on it, and if 10 workhours are needed to get the mail out within the next hour, all ten employees may be required to work overtime. But if there are 2 hours within which to get the mail out, then only the five on the overtime desired list may be required to work.

* * *

POSITION OF THE PARTIES

The Position of the Union

It is the position of the Union that the action of management here in question violates Article 8, Section 5 of the National Agreement and constitutes an improper interpretation and application of an APWU case and a belated claim of a non-existent operational window.

The Position of the Employer

The Employer takes the position that the overtime used on November 29, 1991 was in accordance with Article 8 and the Memorandum of Understanding of the National Agreement. The Employer contends that there has been a past practice at the Hyattsville Post Office for many years that all mail must be delivered and the carriers back in the office by 5:00 o'clock p.m. in order to avoid the delivery of mail after dark. The Employer requests that the APWU case referenced by the Union be followed in the instant case.

OPINION

Determinative of this matter, is whether the overtime used on November 29, 1991 was in accordance with Article 8 and the Memorandum of Understanding in the National Agreement. Specifically applicable hereto is the language of Article 8, Section 5.G of the National Agreement. Therein, it is expressly provided that full-time employees not on the "Overtime Desired" list may be required to work overtime "... only if all available employees on the ... "list have worked up to twelve (12) hours in a day or sixty (60) hours in a service week." In adopting this language, the parties have clearly expressed their intent to condition the working by Non-ODL employees on overtime on ODL employees working up to twelve (12) hours, and avoiding, as much as possible, requiring that employees perform overtime service contrary to their indicated desires.

It is urged by the Employer that Non-ODL carriers and ODL carriers worked simultaneously for eight (8) hours on November 29, 1991, as it was necessary to cover vacant routes and have all mail delivered prior to 5:00 o'clock p.m. Management, in every instance, is said to have acted in accordance with Article 8 and in consideration of all valid operational constraints. Supportive of the validity of its action, according to the Employer, is the existence of an operational window, and Case No. H4C-NA-C 30.

The record submitted reflects that carriers at the Hyattsville Station begin work at 7:00 o'clock a.m. and work until 3:30 o'clock p.m. The mail of all business customers is delivered prior to or as near as possible to 12:00 o'clock noon. There is testimony of management witnesses that early darkness occurs around 4:30 to 5:00 o'clock p.m. during the period of time in question and that such creates a safety problem. In this regard, the Employer maintains that it is the responsibility of management to provide safety to all its employees and as the delivery of mail after 5:00 o'clock p.m. in the dark constitutes a safety hazard, it should be avoided as not in the best interest or welfare of its employees. Moreover, the Employer maintains that the delivery of mail at that time is detrimental to the Postal Service as it does not convey good business practice. As a result, the Employer contends that a past

practice has existed the Hyattsville Station for many years that all mail must be delivered and carriers back in the office by 5:00 o'clock p.m. before dark. As justification for its action, reference is made by the Employer to the language contained in the Memorandum of Understanding between the United States Postal Service and Joint Bargaining Committee (American Postal Workers Union, AFL-CIO, and National Association of Letter Carriers, AFL-CIO) with respect to Article 8 that "... the new language is not intended to change existing practices relating to use of employees not on the overtime desired list when there are insufficient employees on the list available to meet the overtime needs. . . ."

The difficulty with according the Employer's argument as to the existence of a 5:00 o'clock operational window persuasive force is that it is not convincingly demonstrated by the evidence presented that such an operational window exists at the Hyattsville Station. Not only does contrary testimony indicate that in the past management was not concerned with whether carriers delivered mail in the dark, but there is testimony that the alleged 5:00 o'clock operational window simply did not exist. Shown to be strongly indicative of the latter is a memorandum from Barry A. Swinehart, Field Director, Human Resources, Southern Maryland Division, dated November 25, 1987, Subject: Article 8 to all Division Directors, Postmasters, and designated Managers and Supervisors (Union Exhibit No. 6). Clearly stated at page 4 thereof is the following:

* * *

4. *If and when an "operational window" is established, Postal Manager's must make it known to all Managers, Union Officials and employees in written form. This will eliminate all questions concerning any change in policy or practice.*

Despite this express written mandate, it is uncontroverted that the Union was never informed in writing of the existence of an operational window at the Hyattsville Post Office. Indeed, Lawrence Joseph Welling, Manager at Hyattsville in charge of the entire Hyattsville Process and Delivery at the time of the grievances, is shown to have admitted in his testimony that he never notified the Union in writing of an operational window at Hyattsville. Thus, it would appear from the evidence that management at the Hyattsville Post Office ignored its own policy and guidelines set forth in the above described memorandum of Mr. Barry A. Swinehart. Such evidence negates the existence of an essential element of past practice and strongly militates against a finding that a practice has existed at the Hyattsville Station for many years that all mail must be delivered and carriers back in the office by 5:00 o'clock p.m. before the advent of darkness.

Nor does the Arbitrator find the position of the Employer to be materially advanced by its reliance on Case No. H4C-NA-C 30. In this regard, the Employer points out that the arbitrator therein alluded to standards or criteria for simultaneous scheduling such as "bona fide operational requirements", "existing practices", and the "need to get out the mail," and denied the APWU grievances pertaining to Article 8. That reliance by the Employer on the referenced award is misplaced, it seems to the Arbitrator, is demonstrated by the language in such award construing the Memorandum as to when simultaneous scheduling was justified. After reciting the new language in the Memorandum, the words therein were construed by the arbitrator as not creating a new criterion for simultaneous scheduling, but as having merely embraced "existing practices." As stated by the arbitrator, ". . . , the parties agreed that whatever ' . . . practices' were in existence on this subject before December 1984 would continue in effect after December 1984." Thus, such award is not applicable hereto in the absence of persuasive evidence of the existence of the past practice adverted to by the Employer. Moreover, the nonexistence in such award of any explicit reference to the maximization of overtime desired list employees in accordance with Article 8, Section 5.G substantially diminishes its precedential value in the instant case.

The Employer argues that its prime concern and reason for being in business is to provide service to its customers, and to provide this service, it must meet certain standards and reasonable hours of delivery. Based on management's knowledge of the operational requirements on the date after Veterans Day, i.e., November 12, 1991,

the Employer contends that it would have been unreasonable to schedule six routes vacant and risk a chance of operational failure. To ensure that all mail is delivered and operational standards are achieved, the rule of reason, according to the Employer, dictates that it is necessary to schedule a minimum of two (2) employees on the day after Thanksgiving, i.e., November 29, 1991. To do otherwise, the Employer contends, would have risked not getting all mail delivered and failing to provide service to its customers. While the Arbitrator is fully cognizant of the concerns of the Employer in this regard, he, nonetheless, cannot rightfully agree that these objectives can properly be achieved by unilaterally ignoring the language of Article 8, Section 5.G of the National Agreement.

Finally, it appears to the Arbitrator that early scheduling, and or pivoting the routes of employees Dickerson and Payne among the available ODL's, offered management a viable alternative to the action taken. In this connection, the Employer explains that it could not have brought the carriers in early because of the language of the M-39 (Management Exhibit No. 10) which states that "At least 80 percent of the carriers daily delivery workload should be on or at their cases when they report for work." This could not be done, according to the Employer, because the clerks would be in the process of spreading the mail and carriers would experience non-productive time. This, it seems to the Arbitrator, is not a fully satisfactory explanation of management's failure to utilize the available option of pivoting Payne's and Dickerson's routes among the available ODL's in order to avoid the action made the basis of these grievances.