

C-26675

REGULAR ARBITRATION PANEL

<p>In the Matter of the Arbitration</p> <p>between</p> <p>UNITED STATES POSTAL SERVICE</p> <p>and</p> <p>NATIONAL ASSOCIATION OF LETTER CARRIERS, AFL-CIO</p>
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GRIEVANT: Class Action

POST OFFICE: James Crews Station,  
Kansas City, Missouri

USPS CASE NO: E01N-4E C 06042723

NALC CASE NO: DRT 05-042334

BEFORE: David A. Dilts, Arbitrator

APPEARANCES:

For the U.S. Postal Service:	Scott Sutton
For the Union:	David Teegarden
Place of Hearing:	U.S. Postal Service Facility, 1700 Cleveland Ave., Kansas City, Missouri
Date of Hearing:	July 12, 2006 (Record Closed, upon receipt of briefs August 16, 2006)
Date of Award:	September 3, 2006
Relevant Contract Provision:	Article 8
Contract Year:	2001
Type of Grievance:	Contract Interpretation

AWARD SUMMARY

The grievance is sustained. The Union showed that Article 8 was violated. Management did not demonstrate with a preponderance of credible evidence that its violations of Article 8 were consistent with the legitimate and valid standards enunciated in the Mittenhal award H4C-NA-C 30 for the simultaneous scheduling of OTDL and non-OTDL carriers. Without such a showing Management must abide by the requirements of Article 8. The OTDL employees are entitled to the remedy requested by the Union, limited to 12 hours per day or 60 hours in a week that they were not offered overtime in the relevant time period. No remedy is due to non-OTDL employees under these facts and circumstances.

David A. Dilts, Arbitrator

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## **ISSUE**

The Step B Team framed the issue in this matter as:

Did Management violate Article 8.5 and the overtime memorandums contained in Article 8 when non-OTDL employees were forced to work overtime when OTDL employees were available?

## **BACKGROUND**

The facts in this matter are not in substantial dispute concerning the employees who worked overtime during the relevant period. The issues in this case arise out of the James Crews Station in Kansas City, Missouri and involve overtime assignments between December 13, 2005 and December 17, 2005. Management established a Window of Operations which was applicable during the time frame covered by this grievance. The Window of Operations, according to Management, was necessary for the efficient operation of the sorting and dispatch operations at the Mail Processing Plant in Kansas City, Missouri.

The Union's grievance alleges that letter carriers not on the Overtime Desired List (herein sometimes called OTDL) were forced to work overtime, when individuals on the Overtime Desired List were available to work the overtime at James Crews Station. The controversy centers on when these employees were available respective to the legitimate and valid timing reason associated with the Window of Operations established by Management.

The Union's grievance was timely filed, and denied at the Informal Step A, Formal Step A, and declared at Impasse by the Dispute Resolution Team at Step B of the parties' negotiated grievance procedure. The National Business Agent timely filed for arbitration, and the grievance was heard on July 12, 2006 at the Mail Processing Facility at 1700 Cleveland Avenue in Kansas City, Missouri. The Postal Service requested closing by post-hearing briefs, to be post-marked on, or before July 29, 2006. Approximately two weeks after the receipt of the parties' post-hearing briefs, the Postal Service communicated objections to elements of the Union's briefs to this Arbitrator. The communication indicated that a copy was transmitted to the Union. No agreement existed between the parties concerning response briefs. It is the considered opinion of this Arbitrator that the record is closed upon receipt of the communication from the Postal Service on August 17, 2006, since no response was received from the Union concerning the objections raised by the Service, nor was an objection raised by the Union concerning the Postal Services reply to the Union's brief.

#### **UNION'S POSITION**

The Union contends that Management has violated the 2001 National Agreement and the Memorandums of Understanding when they forced non-OTDL carriers to work mandatory overtime when OTDL carriers were available to carry mail. The Union points out that Kansas City Management is again attempting to allege an operational need to justify violation the provisions of assigning additional work in contravention to Article 8.5 of the National Agreement. Local Management has attempted this tactic several times before and each one has

been resolved by higher management determining that local management violated the National Agreement.

The Union provided the applicable settlement agreements and requests that the Arbitrator enforce what Management had agreed to in previous instances where they violated National Agreement by forcing non-OTDL employees to work overtime when OTDL employees were available to work the overtime.

There is really no dispute that non-OTDL carriers were being required to work overtime before all OTDL carriers were offered the overtime to bring them to the 12 hours per day and 60 hours in a service week in accordance with the provisions of Article 8.5.G of the National Agreement. The parties have agreed that the Overtime Alert Reports accurately reflect the hours in dispute. The violations being cited by the Union are extensive, as detailed in the Informal Step A Steward's handwritten assessment of the hours on each of the five days in question.

The Union has presented numerous arguments, detailing the nature and extent of Management's contractual obligations and their blatant violations of those obligations. Those arguments, and corresponding documentation, were detailed in the grievance file during the processing of this dispute and further explored during the testimony of the Union's witnesses at the hearing. The Union has provided the history of the parties' negotiations on overtime issues, and the history of how Management freely entered into agreements which provided protections for carriers from unwanted mandatory overtime and, ultimately, narrowed the circumstances in which Management could simultaneously schedule a non-OTDL carrier to work mandatory overtime.

The Union examined the nature and application of operational windows and, in particular,

the legitimacy of the one that is central to this case. The Union demonstrated that creating a window, in and of itself, does not give Management the right to violate the provisions of Article 8.5 of the National Agreement. In fact, while Management may establish a window, they must do so in conformance with the various provisions of the 2001 National Agreement. In particular, the simultaneous scheduling associated with operational windows cannot be implemented in such a way that the application of Article 8.5.D (mandatory overtime) becomes the rule, rather than the exceptional and the provisions of Article 8.5.G. become meaningless. This is the approach that Management took in this instant case. Furthermore, there was no consistency in the application of the window, which further undermines the legitimacy of Management's actions in this case.

Several alternatives to Management's Article 8.5 violations in conjunction with establishing a delivery window were offered by the Union. These included: proper staffing (hiring), reassigning current PTF's from other offices, earlier starting times, earlier dispatch times from the Plant to the offices, casing bulk mail in the afternoon, etc. Management made no attempt to explore any of these options. Additionally, the close proximity of the Plant, the existence of collection boxes with late evening pickup times, the small number of OTDL carriers involved and the small amount of collection mail being generated were cited to point up the weakness in Management's claim regarding Plant processing delays. Management did not address these arguments during the grievance procedure, or any other Union contentions for that matter.

In fact, Management completely failed to carry their burden of proof in this instant case. Their argument is, essentially, that by establishing a Window of Operations, they can no longer

be held to the provisions of the National Agreement. This is an affirmative defense and, as such, shifts the burden of proof to them to show they have no reasonable alternative to meeting the window than to violate Article 8.5. They have failed to provide any legitimate arguments in support of such a position, in the grievance file or at the arbitration hearing. Their reliance on Arbitrator Mittenthal's 1991 award is misplaced. It certainly does not give them an unfettered right to establish an operational window in violation of the National Agreement. In fact, the arbitrator's assertion that the Memorandum in question does not change existing practices regarding simultaneous scheduling further undercuts their position, given the historical record regarding the parties' negotiations on mandatory overtime and the existing practices at James Crews, and throughout the Kansas City, Missouri installation, of working OTDL carriers 12 hours in a day and 60 hours in a week prior to requiring non-OTDL carriers to work overtime. This Memorandum was, essentially, negotiated between APWU and USPS. The language regarding an example of when simultaneous scheduling might occur was most certainly the result of time pressures within the clerk craft for getting the mail out to the delivery units to be sorted and delivered by the carriers.

Instead of trying to support what little argument they provided during the grievance procedure, Management resorted to providing new argument and new testimony at the hearing. This is a violation of the spirit and intent of Article 15, and the Union respectfully requests that, as such, it be excluded from consideration in reaching a decision on this case. Arbitration by ambush is not permitted under Article 15 of the 2001 National Agreement, and this is precisely what Management attempted in this case.

Finally, the Union argued the principle of *res judicata* with regard to a Step B decision

which was issued on an on-going violation of Article 8.5 in conjunction with an operational window at the James Crews Station. In accordance with Article 15, this decision established a precedent within the Kansas City, Missouri installation. It is clear, therefore, that this issue has already been adjudicated. Management should not now be allowed to have a second bite of the apple on this issue. Furthermore, the numerous cease and desist settlements and monetary payments on previous Article 8.5 issues demonstrates that Management has been attempting to circumvent their contractual obligations for a considerable period of time, and the current window of operations is simply another manifestation of that effort.

The provisions of Article 8 are intended to protect the interests of two groups of carriers, those who want overtime and those who do not. Management's establishment of an artificial window of operations and their application of it in flagrant disregard for their obligations under the National Agreement has caused considerable harm to both non-OTDL and OTDL carriers. Their actions were arbitrary, the window was contrived and their contractual violations were egregious.

Therefore, given the clear violations of Article 8 in this case, and the fact that these kinds of violations have occurred numerous times in the past, and have already resulted in cease and desist settlements with monetary remedies only for the OTDL carriers, the Union respectfully submits that providing non-OTDL carriers with administrative leave equivalent to the amount of time they were forced to work is an appropriate, compensatory remedy. If the Arbitrator finds that administrative leave is not warranted, the Union respectfully requests that a suitable monetary remedy for the non-OTDL carriers be provided instead. Finally, the Union respectfully requests that the OTDL carriers be compensated up to 12 hours per day at the overtime rate of



pay for not being provided with the work hours that were rightfully theirs.

### POSTAL SERVICE'S POSITION

The Service maintains simultaneous scheduling of carriers to meet the operational window, which provided for the James Crews Station to adhere to the final dispatch, was a sound business decision. Further, Management operated within its contractual rights while doing so in this particular case.

Articles 3 and 8.5.D of the 2001 National Agreement provide Management with the right to mandate non-OTDL carriers to work overtime when there is not sufficient auxiliary assistance available. During the week at issue, OTDL, PTF (part-time flexible) and casual carriers were not available because they were carrying other assignments to meet the deadlines necessary to meet the final dispatch.

The Step B representative argues Management's Article 3 rights on page 1 of Joint Exhibit 2. During direct examination, NALC Formal A Representative Troy Smith testified to Article 3 of the National Agreement. Mr. Smith testified he recognized management's rights. He then claimed Management must work within the confines of the National Agreement. This is exactly what Management did in this matter.

The James Crews Station was operating in an inefficient manner. Carriers were on the street at all hours of the evening and the mail the carriers collected during the day was not being returned to the station until the carrier returned. Subsequently, the mail was not being processed until late in the evening. Senior Plant Manager Vincent Jackson testified to the adverse effect of

receiving originating mail outside of the dispatch schedule. He testified the "originating mail" is mail received from Kansas City, Missouri and is so postmarked. Mr. Jackson testified this mail is brought to the Kansas City P&DC to be processed on a dispatch schedule. He testified when originating mail is brought to the P&DC later than scheduled it can "bottleneck" the operation. Further, Mr. Jackson testified under cross examination when unexpected originating mail is brought to the P&DC the operation must be "pulled-down" and the machines which process the originating mail must be put back on line. Mr. Jackson testified the distance between where the station is from the P&DC does not matter. What matters is that the projected mail volume and that the originating mail is received when scheduled. The Management Step A Representative discussed this in his decision on page 230 of Joint Exhibit 2.

Further, the Management Step A Representative discusses, on page 232 of Joint Exhibit 2, the concern for the carriers' safety. Management points to the fact carriers had been bringing undelivered mail back to the station, due to darkness and their concern for their own safety. After which, the Union position was the carriers should not receive discipline. As the Management Step A Representative maintained: *"You can't have it both ways. Utilize the 12 hour list and keep carriers out past dark, but allow them to bring back mail when they deem safety as an issue. We are in the delivery business. By working within the Window of Operation we are able to get all mail delivered safely and in a timely manner and all collection mail dispatched to the plant for timely processing."*

During the processing of this grievance, the Union has addressed the collection box outside of the P&DC as an example of mail arriving at the plant as late as 8:00 p.m. Under cross examination, Mr. Jackson explained this box is scheduled for collection every half hour and the

volume is such that it can be processed manually. This was also discussed in the Step A Representative's decision on page 230 of Joint Exhibit 2.

In addition, the Union attempted to show the dispatch schedule (Joint Exhibit 2, p. 103). This document shows Management receives mail to process at all times during the day. However, Mr. Jackson gave un rebutted testimony the dispatches on this profile include many things. These things entail all types of mail and equipment. Mr. Jackson also testified this profile does not list what is on the truck identified. Clearly, this profile does not conflict with the necessity to have all originating mail dispatched from the stations as scheduled.

Clearly, there is an operational necessity to have all of the originating mail to the P&DC no later than the final dispatch from each of the stations. The Management Step B Representative articulates the negative impact to the Postal Service when the originating mail is not received by the P&DC as scheduled (Joint Exhibit 2, p. 1).

The negative impact was one of the factors which contributed to the inefficient service being provided to our customers. Station Manager Schroer testified to the complaints he had received from customers. Mr. Schroer explained the External First Class (EXFC) is an index which gauges the Postal Service's performance. He testified the EXFC index was below 95. Mr. Schroer explained this score was low and results in a loss of revenue, consistency, and customer satisfaction. The Step B Representative also addressed this problem on the bottom paragraph of Joint Exhibit 2, page one.

Therefore, Management had an obligation and a right to address this deficiency. In doing so, Management contact the Union and invited the Union representatives to a meeting to discuss this matter, prior to Management's anticipated adherence to the final dispatch (Joint Exhibit 2, p.

230). In fact, NALC Regional Administrative Assistant Dan Pittman was in attendance. Mr. Pittman testified he had no problem with Management implementing a window of operation, as long as it did not violation the National Agreement.

Therefore, the Postal Service was addressing a matter which contributed to inefficient service to out Postal customers. Again, the NALC agreed the Service could adhere to a window of operation as long as the Service operated within the confines of the National Agreement.

On December 13, 2005, Management at Kansas City began to ensure all "originating" mail was on the final dispatch from each of the stations. Unfortunately, it was necessary to simultaneously schedule overtime in order to adhere to the final dispatch. This was contrary to how Management scheduled carriers in the past which led to poor customer service. Despite Management's efforts to avoid having to mandate non-OTDL employees by assigning additional PTF and casual carriers to the James Crews Station, it was necessary to mandate non-OTDL carriers to adhere to the final dispatch. Station Manager Schroer gave unrebutted testimony that the carriers were scheduled to return to the office prior to the final dispatch.

Clearly, Management was not in violation of the National Agreement, applicable Memorandums of Understanding, and Step 4 decisions when non-OTDL carriers were required to work beyond eight hours during the week of December 13, 2005, at the James Crews Station.

The Postal Service therefore respectfully requests that the instant grievance be denied in its entirety as being without merit.

## ARBITRATOR'S OPINION

Before proceeding to an examination of the merits of this matter, there are preliminary matters which must be addressed and resolved. The Arbitrator will examine the parties' respective objections to evidence and citations proffered by their respective opponents before proceeding to examination of the merits of the case.

### **Preliminary Matters**

Both parties objected to new evidence and argument introduced into this hearing. The Service objected to citations introduced by the Union to grievance settlements outside of the Kansas City installation in a letter addressed to this Arbitrator, dated August 11, 2006, with a copy to the Union. The Union objected to issues raised at hearing which the Union claimed were not before the Dispute Resolution Team.

### **Service's Objections**

The Service objected to the Union's inclusion of Step B settlements of grievances which arose outside of the Kansas City installation. These settlements were included in the Union's citations which accompanied the Union's post-hearing brief in this case.

Article 15 of the parties' 2001 National Agreement, and the JCAM make clear that Step B decisions are precedential only in the installation in which the grievance arose. In this case,

the Union, as is the Service, free to cite what ever reasoning they believe supports their case. Reasoning of regional arbitrators and Dispute Resolution Teams are often cited by the parties as illustrative of what they believe is appropriate reasoning in deciding the case they are arguing. From this perspective the parties are free to liberally cite whatever reasoning they wish. As the Postal Service aptly points out, however, decisions concerning grievances obtained at Step B are binding only in the installation in which they arose.

The Arbitrator will consider the arguments and authorities offered by either party, if that argument was made in the grievance chain as required by Article 15 of the 2001 National Agreement. The parties, at the National level, have made clear what is binding precedent (i.e., National Level awards, and Step B decisions arising out the same installation). While consideration will be given to the reasoning, the Step B decisions arising out of other installations have no value as precedent in this matter, as the Service contends in the August 11, 2006 letter.

#### Union Objections

The Union objects to the testimony entered into this record by Mr. Jackson, Senior Plant Manager of the P&DC Plant in Kansas City, Missouri which extends beyond the evidence and arguments contended in the steps of the grievance procedure. Further, the Union contends that specific information contained in the testimony of Mr. Schroer concerning staffing levels at James Crews was also not contained in the grievance file offered by the parties from Formal Step A. Further, the Union contends that the evidence proffered through the testimony of Mr. Schroer

concerning various personal issues carriers had, vehicle troubles, and the problems faced by dispatch clerks in making the last dispatch were not included in the case file at the Formal Step A level. Finally, the Union contends that the testimony by Mr. Schroer concerning customer satisfaction surveys is also new evidence, and new argument. The Union alleges this evidence is essentially arbitration by ambush and must be excluded. If this information was important to the Service's case, argues the Union, it should have been developed long before the arbitration hearing, and in Formal Step A where the parties contemplated that the record would be completed for presentation to the Dispute Resolution Team.

Management argued vehemently that the testimony of Mr. Jackson and Mr. Schroer, in every respect, was proper and that the Arbitrator cannot limit this testimony and should give it full credit. The Service contends that the record before the Dispute Resolution Team makes reference to the needs of Plant, and to customer satisfaction. Management contends that these general references makes this evidence clearly admissible, and the Service contends the Union's objections should be summarily dismissed.

The Arbitrator's responsibility is to the parties' National Agreement, and by implication to the parties' jointly. It has long been the parties' position under Article 15 of their National Agreement, that the record of evidence must be fully developed at Formal Step A for presentation to the Dispute Resolution Team at Step B of their grievance procedure. If the Dispute Resolution Team believes there is a deficiency in the record, these Teams have not hesitated to remand case files for the record to be "fleshed-out." The description of the requirement to fully develop the record at Formal Step A is unambiguous and straightforward. The parties are to fully develop the record of evidence upon which the Dispute Resolution Team

is to decide the case, and it is this record that is admissible in Arbitration. For the Arbitrator to permit evidence or testimony not specifically addressed by the Dispute Resolution Team or fully developed at Formal Step A is to fail in his obligations under Article 15 of the parties' 2001 National Agreement. In this Arbitrator's considered opinion, Mr. Jackson's testimony concerning specifics of the Plant's needs not specifically developed at Formal Step A and therefore is, in the main, not admissible here. Clearly the contentions concerning the drop box was discussed and evidence reviewed in the process, but this Arbitrator is not persuaded that much of the technical aspects of the plant testified to by Mr. Jackson is developed through the grievance procedure. Further, the Union contends that much of Mr. Schroer's testimony was not at present in the parties' case file at Formal Step A, and only general expressions of the issues addressed by Mr. Schroer are to be found in the case file. While it is true, as with Mr. Jackson, there are generalities mentioned in the arguments of the Formal A and Step B Management representatives, these vague generalities do not suffice to demonstrate this evidence was appropriately and fully developed as the parties' contemplated when they negotiated the requirements of Article 15. It is therefore this Arbitrator's considered opinion, that customer satisfaction surveys, staffing levels, and the clerks activities with respect to the dispatch are not found in any detail in the evidence or arguments of the parties in Formal Step A, nor in Step B.

It is the record of evidence, as considered by the Dispute Resolution Team and developed at Formal Step A, that must be considered by the Arbitrator, and nothing more. If the Arbitrator is to err, it must be in favor of requiring the parties to develop their evidence and arguments in the grievance procedure. Therefore, the Union's objections to the evidence not specifically developed by the parties' in Formal Step A is sustained and will not be considered by the



Arbitrator.

### **Merits of the Case**

Before proceeding to the specific contract language, facts, and circumstances which are controlling in this matter, this Arbitrator notes that both parties provided numerous regional arbitration citations. Two National level awards were entered into this record. One of the awards, a decision by Carlton Snow in HOC-NAC-12 involves a matter of substantive arbitrability that is only tangentially related to the facts and circumstances of this case, and is therefore not particularly instructive to this Arbitrator. The decision of Arbitrator Mittenthal in H4C-NA-C 30 concerning simultaneous scheduling of OTDL and non-OTDL employees for overtime is instructive. Further, the reasoning of Arbitrator Mittenthal in that matter is also persuasive concerning the issues raised here, particularly in light of a subsequent regional decision by Arbitrator DiLeone Klein.

In that case, the APWU argues that in the 1984 negotiations new obligations were placed upon Management to justify the simultaneous scheduling of OTDL and non-OTDL employees for overtime. Arbitrator Mittenthal rejected this union contention, reasoning that whatever the parties practices were concerning the simultaneous scheduling of employees prior to the negotiations of 1984 would remain their practices under the new contract language. Even though this cited case involves a memorandum of understanding between the Service and the APWU, This Arbitrator is persuaded that Arbitrator Mittenthal's decision in that matter provides guidance which is applicable here, (p. 4):

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The parties acknowledge that simultaneous scheduling must be supported by "legitimate" or "valid" reasons. Their quarrel is whether the Memorandum negotiations, specifically, the examples discussed in those December 1984 negotiations, resulted in an agreement that simultaneous scheduling was warranted only where ". . . necessary to meet the dispatch schedules, service standards, and other time critical requirements identified in the facility operating plan." APWU alleges there was such an agreement. The Postal Service says there was not.

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Arbitrator Mittenthal's delineation of the of the minimum standards for simultaneous scheduling includes the items argued by Management in the arbitration of this grievance. However, without specifically stating that the simultaneous scheduling of OTDL and non-OTDL employees is an exception to Article 8 Arbitrator Mittenthal places a burden on Management to demonstrate that the reasons for the simultaneous scheduling are *legitimate* or *valid* reasons.

Management argues at both Formal Step A and Step B that the Union has not shouldered its burden of proof in this matter to show that the reasons for the simultaneous scheduling are lacking in validity or legitimacy. As Arbitrator DiLeone Klein opined in her decision in the Fargo, North Dakota case, I94N-4I-C 97122042 (p. 22):

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Article 8.5 and the Article 8 Memorandum balance the needs of Management to meet delivery standards through the assignment of overtime with the wishes of employees who want to work overtime and those who do not. Article 3 gives Management the right to establish a window of operations for

pick-up and delivery of mail, however, the implementation of such a window must be accomplished in accordance with the provisions of Article 8.5 in its entirety. The implementation of a Window of Operations cannot by that factor alone establish an insufficient number of qualified ODL employees and thereby justify forcing non-ODL employees to work overtime when there are ODL carriers who have not been utilized to the fullest extent. The carriers are entitled to the protections of Article 8.5.

The Arbitrator finds from the evidence that Management was unable to show that there was no reasonable alternative to meeting the 4:30 p.m. Window of Operations other than “a course of action which contravened Article 8.5.G.”

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Of the Regional Arbitration Awards entered by the respective parties, it is this decision of Arbitrator DiLeone Klein, that this Arbitrator finds most persuasive.<sup>1</sup>

Management bears the burden to show that their actions in this matter were, as Arbitrator Mittenthal required, *legitimate* and *valid*. The burden of proof is discharged by the Union when it is demonstrated that Article 8 is violated, Management is then obliged to offer the affirmative defense contemplated in the National Level Award by Arbitrator Mittenthal, and contemplated in the Regional Level Award by Arbitrator DiLeone Klein.<sup>2</sup>

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<sup>1</sup> The Union entered eight other regional decisions, and among those it is this decision which is closest to the facts and circumstances of the case before this Arbitrator. The more than a dozen regional decisions entered by Management shows conclusively that Arbitrators have been asked to decide these matters on a case-by-case basis and whether the Window of Operations resulted in a valid and/or legitimate cause for simultaneous scheduling, see for example: Nicholas Duda J98N-4J-C 02185762 and Mark Lurie C98N-4C-C 00120294 – much the same as was evident in the above cited matter by Arbitrator DiLeone Klein.

<sup>2</sup> See Elkouri and Elkouri, *How Arbitration Works, sixth edition*, Washington: D.C.: Bureau of National Affairs, Inc., 2003, pp. 424, to wit: *It may be noted that the burden of going forward with the evidence may shift during the course of the hearing; after the party having the burden of persuasion presents sufficient evidence to justify a finding in its favor on the issue, the other party had the burden of producing evidence in rebuttal.*

Management has addressed the Union's complaints concerning the violation of Article 8 of the 2001 National Agreement. Management's Formal Step A position (Joint exhibit 2, p. 25-26) states:

Due to numerous vacancies experienced at the James Crews Station because of sick calls, military leave, limited and light duty it is sometimes necessary to simultaneously schedule OTDL and non-OTDL, a situation that otherwise would result in violation of Article 8.5, in order to meet the final DOV. The final DOV at James [sic] is 6:00 p.m. Management has established 5:30 as the time carriers need to be back in order to meet the final DOV. This is a relist [sic] expectation and since implementation has been the normal delivery standard and has been consistently enforced as shown in the accompanying TACs reports (Management exhibits 1, 2, & 3)

Management has made an attempt to comply with Article 8. First every effort is made to maximize the OTDL within the window including allowing early start times by OTDL when mail volume is available. OTDL carriers are permitted to work past 5:30 p.m. as long as they return prior to dispatch at 6:00 p.m. With 66 routes it would not be feasible to have all the carriers return just prior to dispatch. They are also allowed to stay and perform other duties if available. All OTDL carriers are scheduled prior to scheduling non-OTDL carrier and then they are scheduled on a rotating basis by juniority [sic].

There was no realistic alternative in order to meet the window of operation . . . .

What is seemingly missed in this contention is the specific language of Article 8. Article 8, Section 5, Paragraph D specifically states:

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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.

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Specifically, Management is authorized to force carriers not on the OTDL to work overtime, but only in the case where "Overtime Desired list does not provide sufficient qualified people, . . ." It is clear that Management recognizes that there are staffing problems at James Crews. Sick leave, limited duty and light duty may be things which are difficult to plan, however, no evidence was proffered in this record to show the nature of the limited or light duty assignments and whether planning was possible for these employees' situations. "Military leave" is specifically identified, and is a longer-term issue and in December of the year, National Guard Summer Camps are not the sort of problem that results in this sort of grievance. Military leave is or should be a predictable need which could be reasonably anticipated by Management.<sup>3</sup> If Management is to rely on such issues as cause for implementing the exception in Article 8, Section 5, Paragraph D it is incumbent upon Management to demonstrate those issues with a preponderance of the credible evidence.

In careful examination of the record made at Formal Step A and Step B there is nothing in the record except broad generalities concerning the Plant's requirements, and without specific

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<sup>3</sup> The Position of USPS at the Step B level also mentions these issues, except military leave, but there is no specific evidence which would allow this Arbitrator to apply a rule of reason to determine if Management is justified in its assertion that insufficient qualified employees are available to cover the required overtime assignments, and if this is a problem of such standing as to determine the staffing levels are contributing to Management's inability to abide by the requirements of Article 8, rather than a legitimate or valid reason excusing Management from those Article 8 obligations.

data showing the Plant's requirements and how abiding by Article 8 could or could not be accommodated, which was not even addressed in Mr. Jackson's testimony, this Arbitrator is left with little upon which to base a favorable ruling for the Postal Service.

As was the case in the matter before Arbitrator Dileone Klein, the record in this matter shows a rather arbitrary cut-off point of 5:30 p.m. to meet the Operational Window. Without the development of such clear evidence during the grievance procedure no arbitrator operating under the language of Article 15 of the National Agreement could provide the relief from Article 8 that the Service seeks here. That does not mean that there is not good cause for the 5:30 p.m. cut off and that earlier begin tour times or greater staffing in the carrier craft are not reasonably possible. What it means is that the proof of those contentions are not found in the record developed at Formal Step A or Step B of the grievance procedure.

Frankly, in this Arbitrator's considered opinion, the evidence entered into the record by Mr. Jackson and Mr. Schroer which was excluded as new argument or new evidence would have also fallen short of meeting Management's obligation to persuade this Arbitrator that their not complying with Article 8's requirements were based on valid or legitimate needs of the Service, as provided-for under Article 3 of the 2001 National Agreement.

Further, supporting the record of evidence reviewed to this point, is the fact that it appears that the practices of Management concerning simultaneous scheduling of the OTDL with non-OTDL carriers has rather consistently resulted in grievance. Further, the record shows that these grievances have been resolved, in the main, by granting the Union's grievances. This evidence alone is not convincing, but it is certainly indicative of an ongoing problem in this installation.

### **Union's Contention That 12 Hours and 60 Hours Are Absolutes**

Management, at Step B complains, that the Union has taken the position that the 12 hour and 60 hour mandates in Article 8, Section 5, Paragraph G are absolutes and Management violates the requirements of Article 8 if OTDL employees are not offered these hours. This Arbitrator is not persuaded that the Union has taken this position, but clearly, Management has the right to schedule simultaneously, but in so doing Management assumes the burden to show that it scheduled simultaneously for "legitimate" or "valid" reasons as identified in the Mittenthal award. In this case, Management simply did not prove the legitimacy or validity of its reasons for the aggrieved simultaneous scheduling.

It is true, as Management alleges, that there is no absolute requirement that OTDL carriers must be offered 12 hours a day, or 60 hours per week before non-OTDL employees are assigned overtime. Management must prove, pursuant to the Mittenthal award, that it had "legitimate" or "valid" reasons for scheduling the non-OTDL carriers to overtime assignments before exhausting the resources provided for on the Overtime Desired List. It is also true that the existence of a Window of Operations does not give Management license to simultaneously schedule OTDL and non-OTDL employees to overtime. Management must show the legitimacy of the Window of Operations, and it must provide those arguments, with supporting evidence in the appropriate place in the grievance process so as to make it admissible at arbitration, if Management is to prevail in arbitration.

It is therefore this Arbitrator's considered opinion, that this grievance must be sustained on its merits.

## **Remedy**

The OTDL employees who did not receive their 12 hours per day or 60 hours in the week, are to be made whole for any hours they were available to work overtime in which no overtime was offered. The Union requested that the non-OTDL employees receive administrative leave for the hours they were forced to work during the relevant time frame. Upon careful consideration of this Union request, the Arbitrator is not persuaded that any remedy is due these employees. Article 8 makes plain that overtime assignments may be required of non-OTDL employees. Further, even if those hours were wrongfully required, those employees were properly compensated for the work they performed, at a premium rate of pay as required by the National Agreement. It is therefore this Arbitrator's considered opinion that no further remedy is due the non-OTDL carriers who were required to work overtime assignments, beyond a cease and desist order to comply with Article 8, or that Management must have demonstrable legitimate and valid reasons for the simultaneous scheduling of OTDL and non-OTDL employees as contemplated in the Mittenthal award (cited above).