C# 07049

USPS-NALC ARBITRATION PANEL
SOUTHERN REGION
WILLIAM J. LeWINTER, ARBITRATOR

IN THE MATTER OF ARBITRATION BETWEEN UNITED STATES POSTAL SERVICE (Houston, Texas) -AND- NATIONAL ASSOCIATION OF LETTER CARRIERS (Branch No. 283)	Case No. S4N-3U-C 1272 Record Closed: February 11, 1987 Arbitrator File No. 1210B

OPINION AND AWARD

Representing the Employer:
Robert Eugene
Labor Relations Representative

Representing the Union:
Theophilus Groves
Local Business Agent

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Preliminary Statement

On January 30, 1985, the Union filed a written grievance on behalf of Richard Frick, Carrier, alleging the Employer violated the parties' collective bargaining agreement by failing to assign him to his 11th and 12th hours of overtime work while assigning other employees to overtime work who were not on the Overtime Desired List. The parties, being unable to resolve the matter, assigned it to arbitration. Hearing was held before William J. LeWinter, Panel Arbitrator, at Houston, Texas, on February 11, 1987, at which time the parties were accorded full opportunity to present witnesses for direct and cross examination and such other evidence as was deemed pertinent to the proceedings.

From the evidence adduced at the hearing, the arbitra-

tor makes the following:

Findings of Fact

The grievant has been employed for 20 years, at least 19 of which were at Genoa Station, the location of the within grievance. Grievant has signed the Overtime Desired List (ODL) since it was first introduced in the National Agreement.

On January 29, 1985, while being signatory to the ODL as a 12 hour volunteer, grievant was not allowed to work past 10 hours. On the same date, at least three carriers not on the ODL were required to work overtime on their own routes. When grievant questioned management concerning his not being allowed to work the additional two hours of overtime, he was informed that management would not permit it in order to save money.

On January 30, 1985, the Union filed the following grievance:

> Management did not allow Mr. Frick to work up to 12 hrs even though he is on the "12 hr O.T. list." They force people not on the list.
>
> (Management) violated Article 8 Sect. 5.G. by not allowing Mr. Frick to work his full 12 hrs,
>
> That Mr. Frick be paid 4 hrs at triple time because of management continuously violating the national contract.

The Employer responded as follows:

> I find no violation of the N.A. Those non-volunteers who worked OT on 1-29-85, worked OT in accordance with Art. 8, Sec. 5C(2)d. The grievant, due to their reporting schedule worked up to an operational constraint (darkness). Additionally, there is no monetary obligation for an alleged violation of Article 8 in accordance with the MOU,

nor are there provisions contained in Chapter 519 of the ELM to grant administrative leave.

Contract Provisions

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 work 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.

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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.

***

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.

Section 5. Overtime Assignments

When needed, overtime work for regular full-time employees shall be scheduled among qualified em-

ployees 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. 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.

***

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 supply 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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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 18, 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

***

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.

Issue

Did the Employer violate the National Agreement by failing to assign grievant two hours work on OT on January 29, 1985, while it worked carriers on overtime who were not on the ODL? If so, what is the remedy?

Discussion

This case is a corrolary of the decision rendered by me on Cases Nos. S4N-3U-C 1273, 1274 and 1275. That prior decision related to the three carriers who had not signed the ODL and were required to work overtime on January 29, 1985. The basis for working the carriers, who were non-ODL, was to avoid penalty overtime that would have accrued if grievant or other ODL employees who were V12 had been fully utilized. Such assignment also met the requirements of the "operations window", to be hereinafter discussed.

On the basis of the National Level Award at Case No. H4N-NA-C-21 (Issue 5), I ruled that the Employer had violated the National Agreement. Essentially, that decision held that while the language in Article 8, Section 5.C.2, Clause d. was incorporated in the contract without any change from

the previous agreement, the effectiveness of management's rights in utilizing the clause was changed by the new language in Article 8 and the new Memorandum of Agreement incorporated in the 1984 National Agreement, whereby management could not utilize the non-ODL carriers, even on their own routes, until they had attempted other alternatives, such as full utilization of the V12 ODL list.

In addition to Article 85C2d, management relies here on the "operating window" as a defense. The window is a policy whereby management sets an area of time, the window, in which delivery operations must take place. Due to the winter season, the window, which requires the deliveries take place during daylight hours, closed down at 5:00 p.m. Therefore, management argues that to use grievant during the last two hours of overtime work to complete the route work performed by the assigned carriers already on the street, would require work to be completed beyond the operating window.

From the explanation given at the hearing, I must conclude that the window is a management policy that is unilaterally generated. There is no question that the carriers agree that they do not like working in the dark hours which, at the time of these grievances in January, comes early in the evening. However, I have not been given any reference to the window as a part of the collective bargaining agreement. The only contractual connection provided by the Employer arises from an arbitration opinion by Arbitrator Marlatt in Cases Nos. S4C-3U-C 7824 and S4C-3U-C 8101 (1987)

where it is stated:

> Finally, the Postal Service argues that it was necessary to spread some of the overtime to non-ODL employees because of the 'window' constraints, that is to say, if there were not enough volunteers to get the work out by a recognized deadline, then other employees would have to be utilized or the deadline would be missed. This argument is valid and the 'window' exception is recognized. ...

Arbitrator Mariatt then goes on to state that the Employer has the burden of proof of the existence of the window. At no time, however, is there a definition of any contractual status of the window. I would assume "is recognized" refers to a past practice approach; however, the operations window appears to remain a unilateral policy decision of management.

The matter here is not whether the window is desirable, nor whether it is the best approach for the parties. I have no jurisdiction to make such decisions. My authority is derived from the collective bargaining relationship as it defines the enforceable contract obligations of that relationship. When, as here, a party claims that the contract is violated, any practice which contravenes the contract must fall before it. A practice may affect a decision as to remedy, but it cannot vary the terms of the contractual obligations. Therefore, if the Union's claims as to the contractual requirements of Article 8 conflict with the window, the window policy must fall before the contract.

It is the duty of the Employer to operate in as efficient a manner as possible. That will not permit, how-

ever, a violation of its agreements. If the Employer desires to avoid penalty overtime by not working V12 ODl employees their last two hours, it must have available the manpower which permits that avoidance as provided for in the National Agreement in Article 85G. If I were to permit the use of non-ODL carriers on their own routes under 85C2d, it would be tantamount to writing out the newly negotiated language in Sections 5 F and G.

It therefore follows that the Mittenthal Award defines the limitations on the use of 85C2d and will not permit the use of non-ODL carriers, even on their own routes on scheduled workdays if there are available V12 ODL employees to work.

Remedy in this case again presents a problem. The grievant asks for triple time wages. The only basis for such a request is to be punitive. I held in the companion cases that the Employer was not shown to be acting with evil intent. As explained in the Mittenthal Award, the retention of the clause, combined with the new language in Article 8 and the Memorandum of Agreement created an extensive ambiguity. Accordingly, it was common to find management directing the carriers to continue working overtime on their own routes as in the past in the mistaken belief that it retained the same rights in the new contract it had in the prior contract which utilized the same language. For this reason, Arbitrator Mittenthal held that it was "patently unfair" to award monetary damages until after the Employer had the benefit of the contractual interpretation. There-

after, monetary damages might be warranted.

This case occurred before the Mittenthal Award was promulgated on June 26, 1986. The Union argues that to fail to assign overtime properly results in monetary damages because giving the overtime work to non-ODL employees destroys the overtime opportunity and monetary damages are the only recourse. The failure to assign grievant to his last two hours of overtime rather than the non-ODL carriers occurred because the Employer had reason to believe it retained the right to do as it did, especially with the language of 8,5G. I believe I am bound to follow the Mittenthal Award and deny monetary damages until after that Award was promulgated.

AWARD

The grievance is sustained. Monetary damages will not be awarded in accord with the ruling in National Level Case No. H4N-NA-C-21 (5th Issue) whereby monetary damages should not be retroactive to that Award. The Employer shall, however, cease and desist from violation of Article 8, Section 5C2d and Section 5G in accord with the interpretation of the said Mittenthal Award.

Respectfully submitted,

William J. LeWinter, Arbitrator
Dated: May 13, 1987