

C# 10615

REGULAR ARBITRATION PANEL

IN THE MATTER OF THE ARBITRATION)
between) RICHARD LEWIS
UNITED STATES POSTAL SERVICE) OMAHA, NEBRASKA
and) C7T-4R-C 20150
AMERICAN POSTAL WORKERS UNION)

BEFORE: James P. Martin

APPEARANCES: Joan T. Marshall
For the U.S. POSTAL SERVICE:
For the UNION James Wheeler
Place of Hearing: Omaha, Nebraska
Date of Hearing: March 13, 1990

AWARD:

That the grievance shall be allowed, that the grievant is entitled to the travel time which would have been incurred had he taken public transportation, namely, 14 hours and 10 minutes, at the overtime rate.

July 9, 1990


James P. Martin
Impartial Arbitrator

ISSUE

Did Management violate the Agreement when it refused to pay the grievant for time spent in traveling to and from training at Norman, Oklahoma? If so, what is the remedy?

NATURE OF CASE

The grievant, an ET9, was assigned to training at Norman, Oklahoma. He left from Omaha for Norman at 4:30 p.m. on Tuesday, July 4th, a holiday, arriving at the Training Center at 1:15 a.m. (Management submitted a time stamped registration which indicated the grievant arrived at 5:56 a.m. on July 5th, but it is of no consequence in this matter). Coming home, the grievant left at 4:30 p.m. on August 25th, a Friday, and arrived home at 1:30 a.m. on August 26th, a Saturday.

The grievant was scheduled to take commercial transportation but chose to drive his personal vehicle. Public transportation would have required him to leave home approximately 1:30 p.m., and arrive at the Training Center at 10:00 p.m., which the Union calculated to be seven hours

and five minutes in travel status. There was no dispute but that the return home would take approximately the same amount of time.

The grievant's normal schedule was 10:30 p.m. to 7:00 a.m., Saturday and Sunday non-scheduled. The grievant's schedule at the Training Center was not set out in the record.

It was agreed at the Hearing that the claim could not exceed the amount of time which the grievant would have spent on commercial transportation, which is the time claimed by the Union to be appropriate. Management claimed that no pay was due, since the public transportation would have placed the grievant's traveling all out of his normal schedule, and therefore not compensable under the ELM, Section 438.134. For its part, the Union urges that Section 444.22 of the ELM is in conflict with Section 438.134, and since Section 444.22 is based upon a re-statement of a Federal Statute, the FLSA, it controls.

APPLICABLE CONTRACT PROVISIONS

438.134 Travel Away from Home Overnight. The following applies:

a. **Rule.** Travel time spent by an eligible employee in travel on Postal Service business to and from a postal facility or other work or training site which is outside the local commuting area and at which the employee remains overnight is compensable if it coincides with the normal work hours for a bargaining-unit employee's regular bid job or for a nonbargaining employee's schedule in effect while traveling, whether on a scheduled or a nonscheduled day, and regardless of his or her schedule while away from the home installation, subject to 438.141 and 438.142. For instance, an eligible employee with a normal workhours of 7:00 p.m. to 3:30 a.m. Saturday through Wednesday is scheduled for training at another location from 8:00 a.m. to 4:30 p.m., Monday through Friday. If the employee travels from 6:00 p.m. to 8:00 p.m. on any day of the week, 1.0 travel hours would be compensable. If the same employee travels from 5:00 p.m. to 7:00 p.m. on any day of the week, no travel hours would be compensable. Compensable travel time includes the time spent in going to and from an airport, bus terminal, or railroad station.

b. **Eligibility.** This type of travel time is compensable for all employees on their scheduled workdays. On nonscheduled days, this type of travel time is compensable only for nonexempt employees.

c. **Intermediate Travel Home.** Employees who are on an extended assignment away from home may be given the opportunity during the assignment to return home for personal convenience. Although the cost of the round trip is a reimbursable travel expense, the travel time involved is not compensable when it falls outside of the scheduled service week given to the employee during the temporary assignment.

d. **Scheduling of Travel.** Travel away from home overnight is to be scheduled by management on a reasonable basis without a purpose either to avoid compensation for the travel time or to make the travel time compensable.

438.14 Special Travel Provisions.

438.141 Use of Private Automobile for Personal Convenience. If an eligible employee, who is traveling under the provisions of 438.132, .133, or .134, is offered public transportation but utilizes a personally owned conveyance for personal convenience, only the lesser of the time spent actually driving or those creditable hours which would have been spent in travel by public transportation will be compensated.

438.142 Required Use of an Automobile. All time spent actually driving an automobile while traveling away from home overnight because no public transportation is available is compensable travel time for an eligible employee whether the time occurs within or outside of the employee's established hours of service.

444 Overtime Pay

444.1 Policy

The FLSA provides that the USPS must pay an employee covered by the overtime provisions of the Act (an FLSA nonexempt employee) at one and one-half times the employee's regular rate for all hours of actual work in excess of 40 hours in any FLSA work week. See 445 for special provision covering rural letter carriers.

444.22 Actual Work

444.221 Definition. Actual work is defined as all time which management suffers or permits an employee to work.

444.222 Exclusions. Actual work does not include any paid time off, but does include steward's duty time, travel time (438.1), meeting time, training time (438.223), and time off authorized for a city letter carrier under the 7:01 rule (432.53).

444.223 Unauthorized Time. The reason for an employee continuing to work, with specific approval or disapproval, is immaterial. It is the duty of supervisors to exercise control over the working hours of their subordinates by making sure that employees complete their duties and clock out promptly at the completion of their tour if additional work is not desired or authorized. See 432.7 for disallowed time.

DISCUSSION

The parties each referred me to two prior Regional Arbitration Awards, concerning the same general subject. Management cited the Award of Arbitrator Bothwell, issued March 1985, C1T-4H-C 31760, which I find not pertinent because he did not cite nor discuss Section 444.22, and issued his Award based upon an interpretation of Section 438.134 only. Management also referred me to the Arbitrator Zumas Award of April, 1986, E1-2M-C 10288 et al. Arbitrator Zumas found that Section 438.134 controlled.

The Union referred me to two Awards, the first by Arbitrator Caraway, issued October 1986, S4C-3U-C 13305, which found Section 444.22 controlled over Section 438.134, in a situation precisely like the instance grievance, and to the Award of Arbitrator Foster, issued November 1989, E7T-4H-C 21607, in which Arbitrator Foster quoted from the Caraway Award, and concurred with it. Arbitrator Foster disagreed with the Zumas Award on the basis that it did not give adequate credit to a National Policy expressed by the Fair Labor Standards Act. He also found that equitable considerations would favor the interpretation given by Arbitrator Caraway, since the employee involved was traveling at

Postal Service request and on Postal Service duties, not on his own business.

I agree with Arbitrators Caraway and Foster, who found that there was an inherent conflict between the relevant Section of the ELM, that they were inconsistent and contradictory, and that Section 444.22, reflecting a National Policy, was controlling. I also agree with their "equitable considerations", which found that it was inequitable to expect an employee to travel on his own time for Postal Service business, and on Postal Service directions, with pay depending upon the vagaries of scheduled work time. Additionally, Section 438.142, Required Use Of An Automobile, makes time spent actually driving an automobile when no public transportation is available compensable travel time, whether that time occurs within or outside of the employees established hours of service. The suggestion is certainly raised that the employee who is driving a car is working, whereas one who is sitting on an airplane is loafing, and doing nothing of particular benefit to the Postal Service. This interpretation is totally contradictory to the FLSA Standard, which sets out, in its definition of actual work, travel time in conjunction with meeting time, training time, Steward's duty time, and some Letter Carrier time.

The conclusion to be drawn from Section 438.142 reinforces my conviction that the Postal Service is violating in Section 438.134 the intent of the FLSA Statute in Section 444.22. Therefore, along with Arbitrators Caraway and Foster, I align myself with the proposition that travel time is actual work time, regardless of where it falls in relation to the employee's normal schedule.