

C-26297

**REGULAR ARBITRATION PANEL
NORTHEASTERN REGION**

In the Matter of the Arbitration between

UNITED STATES POSTAL SERVICE

- and -

**Grievant:
Post Office:
USPS Case No:**

**Class Action
Hamburg, NY
B01N-4B-C 05090671**

**NATIONAL ASSOCIATION OF LETTER
CARRIERS, AFL-CIO**

BEFORE: Stephen P. LaLonde, Arbitrator

APPEARANCES:

FOR THE U.S. POSTAL SERVICE: Francis McNarmara, Advocate
Ross A. Pfaff, Jr., Postmaster, Witness

FOR THE UNION: Lawrence Kania, Advocate
Kim Fitzgerald, Non-Participating Observer
Gary M. Meyer, Steward, Witness

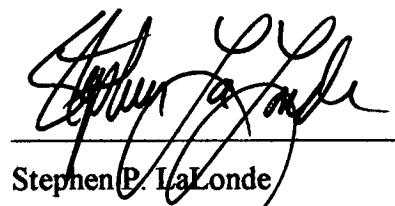
PLACE OF HEARING: Hamburg, New York

DATE OF HEARING: October 13, 2005

AWARD:

Management violated Article 8 of the National Agreement by mandating Non-Overtime Desired List (OTDL) personnel to work overtime prior to maximizing the OTDL. The Service shall pay carrier Manka an additional 50% for the forced overtime required to be worked. The Service shall pay 1.92 hours of overtime to be divided equally among the applicable ODL employee who could have worked the overtime in question.

DATE OF AWARD: December 13, 2005

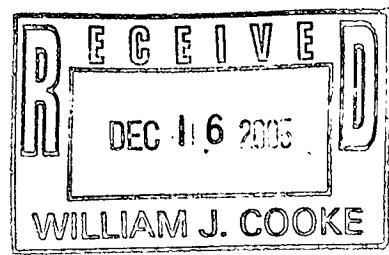


Stephen P. LaLonde
Arbitrator

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VICE PRESIDENT'S
OFFICE
NALC HEADQUARTERS



ISSUE

Did Management violate Article 8 of the National Agreement by mandating Non-Overtime Desired List (OTDL) personnel to work overtime prior to maximizing the OTDL and, if so, what shall the remedy be?

RELEVANT CONTRACT PROVISIONS

ARTICLE 3 MANAGEMENT RIGHTS

The Employer shall have the exclusive right, subject to the provisions of this Agreement and consistent with applicable laws and regulations:

- A. To direct employees of the Employer in the performance of official duties;
- B. To hire, promote, transfer, assign, and retain employees in positions within the Postal Service and to suspend, demote, discharge, or take other disciplinary action against such employees;
- C. To maintain the efficiency of the operations entrusted to it;
- D. To determine the methods, means, and personnel by which such operations are to be conducted;
- E. To prescribe a uniform dress to be worn by letter carriers and other designated employees; and
- F. To take whatever actions may be necessary to carry out its mission in emergency situations, i.e., an unforeseen circumstance or a combination of circumstances which calls for immediate action in a situation which is not expected to be of a recurring nature. (The preceding Article, Article 3, shall apply to Transitional Employees.)

ARTICLE 8 HOURS OF WORK

Section 5: Overtime Assignments

When needed, overtime work for 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. Employees desiring to work overtime shall place their names on either the "Overtime Desired" list or the "Work Assignment" list during the two weeks prior to the start of the calendar quarter, and their names shall remain on the list until such time as they remove their names from the list. Employees may switch from one list to the other during the two weeks prior to the start of the calendar quarter, and the change will be effective beginning that new calendar quarter.
- B. "Overtime Desired" lists will be established by craft, section or tour in accordance with Article 30, Local Implementation.
- C.1.(RESERVED)
- C.2.a. When during the quarter the need for overtime arises, employees with the necessary skills having listed their names will be selected from the "Overtime Desired" list.
 - b. During the quarter every effort will be made to distribute equitably the opportunities for overtime among those on the "Overtime Desired" 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. 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.

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. [See Memo, pages 160-164]

**MEMORANDUM OF UNDERSTANDING
BETWEEN THE
UNITED STATES POSTAL SERVICE
AND THE
NATIONAL ASSOCIATION OF LETTER CARRIERS,
AFL-CIO**

This Memorandum of Understanding represents the parties' consensus on clarification of interpretation and issues pending national arbitration regarding letter carrier overtime as set forth herein. In many places in the country there has been continued misunderstanding of the provisions of Article 8 of the National Agreement; particularly as it relates to the proper assignment of overtime to letter carriers. It appears as if some representatives of both labor and management do not understand what types of overtime scheduling situations would constitute contract violations and which situations would not. This Memorandum is designed to eliminate these misunderstandings.

1. If a carrier is not on the Overtime Desired List (ODL) or has not signed up for Work Assignment overtime, management must not assign overtime to that carrier without first fulfilling the obligation outlined in the "letter carrier paragraph" of the Article 8 Memorandum. The Article 8

Memorandum provides that ". . . where management determines that overtime or auxiliary assistance is needed on an employee's route on one of the employee's regularly scheduled days and the employee is not on the overtime desired list, the employer will seek to utilize auxiliary assistance, when available, rather than requiring the employee to work mandatory overtime." Such assistance includes utilizing someone from the ODL when someone from the ODL is available.

2. The determination of whether management must use a carrier from the ODL to provide auxiliary assistance under the letter carrier paragraph must be made on the basis of the rule of reason. For example, it is reasonable to require a letter carrier on the ODL to travel for five minutes in order to provide one hour of auxiliary assistance. Therefore, in such a case, management must use the letter carrier on the ODL to provide auxiliary assistance. However, it would not be reasonable to require a letter carrier on the ODL to travel 20 minutes to provide one hour of auxiliary assistance. Accordingly, in that case, management is not required to use the letter carrier on the ODL to provide auxiliary assistance under the letter carrier paragraph.
3. It is agreed that the letter carrier paragraph does not require management to use a letter carrier on the ODL to provide auxiliary assistance if that letter carrier would be in penalty overtime status.
4. It is further agreed that the agreement dated July 12, 1976, signed by Assistant Postmaster General James C. Gildea and NALC President James H. Rademacher, is not in effect. In cases where management violates the letter carrier paragraph by failing to utilize an available letter carrier on the ODL to provide auxiliary assistance, the letter carrier on the ODL will receive as a remedy compensation for the lost work opportunity at the overtime rate.
5. There is normally no monetary remedy for a carrier improperly required to work overtime on his own route. However, on a one-time, nonprecedential basis, the Postal Service will pay \$7 for each hour of overtime worked to each carrier who has a timely grievance pending at Step 2 or 3 as of the date of this agreement. In order to recover, the grievant must establish that he/she was not on the ODL or work assignment list and was required to work overtime in violation of the principles set forth above.

Date: December 20, 1988 ***

**LETTER OF INTENT BETWEEN
THE UNITED STATES POSTAL SERVICE
AND THE
NATIONAL ASSOCIATION OF LETTER CARRIERS,
AFL-CIO**

Re: Work Assignment Overtime

- A. The Postal Service will provide the opportunity, on a quarterly basis, for full-time letter carriers to indicate a desire for available overtime on their work assignment on their regularly scheduled days.
- B. All full-time letter carriers are eligible to indicate their desire for "work assignment" overtime and by doing so are to work the overtime as specified on their regularly scheduled days.

T-6 or utility letter carriers would be considered available for overtime on any of the routes in their string.

Reserve Letter Carriers and unassigned regulars desiring "work assignment" overtime would be eligible for overtime on the assignment on which they are working on a given day.

- C. An annotation on the overtime desired list (ODL) may be used to identify employees desiring "work assignment" overtime .
- D. The ODL provided for in Article 8, Section 5, would continue to function.
E. "Work assignment" overtime will not be considered in the application of Article 8, Section 5.C.2.b.
- F. Once management determines that overtime is necessary for full-time letter carriers, if the carrier has signed up for "work assignment" overtime, the carrier is to work the overtime as assigned by management.
- G. Full-time carriers signing up for "work assignment" overtime are to be considered available for up to 12 hours per day on regularly scheduled days. However, the parties recognize that it is normally in their best interests not to require employees to work beyond 10 hours per day, and managers should not require "work assignment" volunteers to work beyond 10 hours unless there is no equally prompt and efficient way in which to have the work performed.
- H. Penalty pay would be due for work in excess of 10 hours per day on 4 of 5 regularly scheduled days.

Penalty pay would be due for overtime work on more than 4 of the employee's 5 scheduled days.

- I. Management could schedule employees from the ODL to avoid paying penalty pay to the carrier on his/her own work assignment.
- J. With respect to overtime work opportunities for employees on the fifth regularly scheduled day, the parties recognize a dispute exists concerning scheduling obligations which would involve hours in excess of the limitations in Article 8, Section 5.F, i.e., the fifth day in this case.

This issue is one of those we identified to be placed expeditiously before an Arbitrator.

- K. Implementation of such a scheduling approach should occur July 1, 1985.
- L. Grievances presently within the system which deal with the issue of "overtime on a carrier's own assignment" should be released from their current "on hold" status, and processed within the system with a concerted effort by the parties toward settlement.

Date: May 28, 1985. ***

* * *

POSITIONS OF THE PARTIES

UNION POSITION

The Union does not contest that the Service has the right to maintain the efficiency of the operations for which the Service is responsible. The Union points out however, that the right of management in this or any other situation is constrained by the provisions of the National Agreement specifically Article 8 regarding the use and implementation of overtime.

The Union asserts that Article 8.5.G must govern the assignment of overtime. Basically, that provision states that a carrier not on the ODL will not be required to work overtime in another route unless all available carriers on the ODL have worked up to 12 hours in a day. The Union

rejects the Service contention that carriers on the ODL are only available to work to 5 p.m. because of the establishment of a Window of Opportunity ("WOO") by the Service for the delivery of mail to its customers. The Union contends that the Service is using the WOO and the operational window of 5 p.m. as an artificial means to allow them to simultaneously schedule non-ODL carriers into forced overtime situations.

The Union concedes that WOOS are not a violation of the National Agreement but point out that the real question before the Arbitrator is whether or not simultaneous scheduling of both overtime desired was carriers and overtime desired was carriers follows the principles contained in the National Agreement specifically in regard to Article 8 dealing with overtime work.

The issue involves the scheduling of carrier Manka on March 5, 2005 who is scheduled and forced to work overtime in route 18 on that morning. The Union points out that 13 carriers around the ODL list and were present on that date. The Union further indicated through the testimony as steward Garry Meyer ("Meyer") that the DSSA staffing requirements and defense of the day indicated that this was a normal day of operation for the Hamburg branch. Specifically, and importantly, there were no emergencies or on for seen circumstances that would allow the Service to utilize non-ODL carriers for forced overtime situations. A review of the staffing in scheduling for that day indicates, according to the Union, and could have split the hour of overtime that carrier Manka was forced into. By their calculation, the Union contends that splitting the overtime would have eliminated the drive time that Manka had to use. The Union also points out that while the two carriers who could have split the overtime would have worked past 5 p.m. it would have been for a period of only 15 minutes which has no significance in regard to the WOO 5 p.m. target time. The Union also points out that the 5 p.m. time target has never been an absolute as there have been many circumstances where the Service has had carriers work beyond that time.

The Union refers to the 2001 Memorandum issued by Postmaster Derrick ("Derrick") in which the window of operation policy was reaffirmed. The Union points out that the WOO policy was motivated by customer Service considerations in that the Service wanted all mail delivered to customers no later than 5 p.m. the Union stresses the point that this memo establish that customer

Service was the only reason the policy was established and points out that this is in contradiction of the Services stepped the representatives position claiming that I'm canceled mail needs to be coordinated to arrive at the Buffalo installation as a reason for the 5 p.m. target. The Union asserts that this issue was never raised at any of the earlier steps in the grievance process. Steward Meyer testified that the only reason given to him for the WOO policy was for customer Service and customer Service alone. The Union contends that Postmaster Pfaff ("Pfaff") offered no rebuttal of disposition during his testimony.

The Union further challenges the legitimacy of simultaneous scheduling in reference to the WOO by pointing out that in 2005 Postmaster Mary Neddy ("Neddy") announced that the supposed customer service reason for the 5 p.m. last delivery to customers was now changing to a 5 p.m. "back in the office deadline". The Union contends that this scheduling change not only deviated from the stated premise of customer service but also resulted in a reduction of the amount of available overtime on the ODL by almost 7 hours on any particular day. As a result, the Union contends that this creates a situation in which carriers are regularly forced into overtime. This situation has been compounded by the reduction in PTF employees as illustrated in two previous CILO cases (Miller B98N4BC01234506 and this Arbitrator's Award in B01N4BC05038439). Both Arbitrators found the Service in violation of the hiring of casuals in place of PTFs. The Union concludes that the facility is understaffed and points out that the testimony of Postmaster Pfaff indicated that no PTFs would be hired to replace these casuals. This, combined with the Service refusal to staff for carriers off on various duties such as light or limited duty, extended sick leave, 204B detail, creates a situation where more overtime is needed than what would be necessary and proper staffing been implemented. The Service is now using the excuse of a WOO and it's 5 p.m. cutoff time as an excuse to force non-ODL carriers into overtime situations in order to meet their goals.

The Union asserts that if the target of customer Service is as important as a Service contends, then the Service needs to staff properly in order to avoid violating Article 8. They also point out that the forcing of overtime for non-ODL carriers is something that the parties have agreed, and Arbitrators have upheld, should only happen for good cause based on legitimate and valid reasons and should only occur where there are emergency or unforeseen circumstances that

occur. In the case of Hamburg, the Service was fully aware of its staffing and staffing deficiencies, had 13 carriers on the ODL were available for overtime work, and even anticipated their need by informing carriers to come in early on the day in question. All these facts, do not meet the test for forcing in non-ODL carriers; there was no "operational necessity", there was no good cause shown to force non-ODL, there was inconsistent adherence to the 5 p.m. WOO deadline, and there certainly was no emergency or other on for seen circumstance that would allow for an exception to the requirement to use ODL carriers.

As such, and for all of the above reasons, the Union request that the Arbitrator find the Service in violation of Article 8 of the National Agreement and make whole those employees so affected.

SERVICE POSITION

The Service asserts that this particular grievance is not strictly or merely a matter of a situation relating to a window of opportunity ("WOO") and its impact on the scheduling of overtime work. The Service contends that simultaneous scheduling of ODL and non-ODL employees is clearly permitted by the National Agreement and has been sustained in a number of Arbitrations as well as reflected in Memoranda of Understanding entered into between the parties.

Fundamentally, the Service asserts that it is the sole management prerogative to establish business hours for the purpose of maintaining efficiency and accomplishing the vital needs of the delivery of mail to its customers. This prerogative, as well as others, is contained within Article 3 of the National Agreement dealing with management rights. The establishment of a WOO is within their right to direct the work of employees including their assignments and the hours within which their work is to be accomplished. In addition, Article 3 reserves to the Service the right to take whatever actions it may deem necessary in situations with unforeseen circumstances or other similar emergency situations that are not expected to be ongoing in nature.

The Service points out that as far back as 1984 the Parties recognized that there may not be enough individuals on an ODL to cover the need in a limited period of time. The Service claims

that negotiation history demonstrates that a WOO was considered an exception to ODL requirements when language was drafted in the National Agreement and subsequent Memoranda of Understanding. The Service asserts that the discussions between the Parties in 1985 over new Article 8 language identified examples of valid reasons where simultaneous scheduling of ODL and non-ODL personnel would be permitted: failure to meet dispatch schedules; failure to meet Service standards; and other time critical needs, for example.

Article 8.5 must be applied to the specific facts of the given day and situation. As such, the Service believes it was well within its managerial authority to force overtime from the non-ODL list. The Service contends that the Arbitrator has no authority to rule on the legitimacy of the use of a WOO for that has clearly been established in practice between the Parties, has been upheld by Arbitrators (notably Arbitrator Franklin), and has been recognized in the Memorandum of Understanding of December 20, 1998.

To prove a violation the Union must demonstrate two points. First, that the Service forced a non-ODL carrier to overtime when another carrier was available. And second, the WOO was an unreasonable use of Article 3 prerogatives or some type of ruse to avoid using the ODL.

The Service further asserts that the language of Article 8.5 G. is permissive giving the Service managerial leeway in its utilization of the ODL. The Service draws the Arbitrator's attention to some keywords in that section of the Article. First it deals with "available" employees. Second, it indicates that ODL individuals can work "up to" 12 hours. These two elements of the Article give the Service discretion in their utilization of this provision.

The Union is fundamentally in error when it contends that available time equates to availability of a particular carrier. The Service contends that working all available ODL employees defies logic. This would result in the delivery of mail past the last dispatch of record collecting of outgoing mail. It would not be received by some customers until after the supper and deliveries would be made in the dark resulting in a number of safety issues as well. The Service further asserts that the ODL is not otherwise available if the overtime in question would put the Service outside its established hours or if employees have been brought in early where there was no

actual work for them to perform. The Service also contends that the WOO is not an absolute but a goal to strive for whenever possible. Conditions can change the staffing and times available for the WOO.

The Service also asserts that there are other factors regarding staffing and staffing availability that have to be taken into consideration. For example, the Service points out that excessive travel time for a carrier to get to the overtime assignment has been shown to be one factor that would allow the Service to use simultaneous scheduling (Sickles, 96071595).

The Service states again that the WOO has been properly established over the years and while the Arbitrator may find that the application of the WOO in a particular set of circumstances was done in violation of the National Agreement, the Arbitrator cannot declare that the WOO is improper or otherwise violative of the National Agreement. The Service points out that Arbitrator Franklin's Award, supporting the legitimacy of WOOs, did not provide *carte blanche* to the Service in the use of a WOO but did indicate that it was a legitimate management prerogative under Article 3 of the National Agreement. This is further supported in the decision by Arbitrator Marx (03212060) that upheld management's right in establishing a WOO but also indicating that it could not be used as a device to deny employees their contractual rights. Arbitrator Marx further suggested the following guidelines:

... these are: 1. The window policy (while legitimate) does not, by itself, invalidate Article 8.5.G and 2. The agreement requires the Postal Service to provide reasonable and convincing evidence of lack of "availability" after making the best advance scheduling decisions, before non-OTDL employees may be involuntarily assigned overtime on other than their own groups.

The Service asserts that each time an alleged violation occurs, a thorough analysis of the particular facts circumstances has to be done to see if management had done everything in its power, and within a rule of reasonableness, to insure compliance with contractual obligations prior to forcing overtime. In this particular case, the Service did not act in an arbitrary, capricious, or violative manner when it forced overtime in this particular situation. Regarding the specifics of the Hamburg situation on March 5, 2005:

- a. There was preparation done before delivery in order to be ready for delivery
- b. The branch received three sick calls

- c. To deliver the mail, the Service only had to force two hours of overtime so that the Service took all steps necessary to minimize the impact of the simultaneous scheduling
- d. Union has failed to specify how any other carrier could have effectively worked the overtime
- e. The Union could not demonstrate ODL availability without a carrier working beyond the WOO 5 p.m. deadline.

In order for the Union to prevail, it must show that there was a deliberate intent on the part of the Service to avoid calling individuals on the ODL and demonstrate that the simultaneous scheduling of overtime was a ruse to avoid contractual obligations. The Union has failed to do so in this specific case and the grievance should be denied in its entirety.

* * *

DISCUSSION AND OPINION

The first issue that bears discussion is the concept of the WOO and its legitimacy under the terms of the National Agreement and other Memoranda of Understanding signed between the Parties. All the evidence presented in this matter clearly demonstrates that the creation and use a WOO by the Service is legitimate and sanctioned under the terms of the collective bargaining agreement. The Union concedes as much in its case presentation and brief. To this extent, the Service is correct in his view that the Arbitrator cannot rule on the validity of a WOO but is restricted to ruling on whether or not the WOO and its application have been properly carried out.

The Service contention that it has very wide authority under the management rights provisions of Article 3 when it comes to the application of a WOO is an overly broad claim that is not supported on the record or within the language of Article 3 itself. The significant aspect of Article 3 that cannot be ignored is the requirement that the exercise of management rights must be subject to and constrained by the provisions of the National Agreement.

The issues surrounding the use of a WOO rest on its application by the Service and the conditions under which a WOO does or does not give authority to the Service to force overtime for non-ODL carriers. Related to this is the degree to which a 5 p.m. delivery deadline built into a WOO creates a situation that gives the Service authority to force non-ODL carriers into overtime situations because to use ODL carriers for the overtime would place these individuals beyond the 5 p.m. return cut off.

The Service contends that the establishment of a WOO meets the Service's obligation to provide improved customer service especially in the delivery of mail to its consumers. The WOO, with its last delivery time of 5 p.m., was established to ensure that its customers would not receive mail deliveries later than 5 p.m. thus addressing customer service needs for timely delivery of the mail. However, the Service itself admitted that the WOO is not an absolute but a target or goal to be striven for whenever possible. In reality what this means is that there have been situations when mail was delivered after the 5 p.m. cutoff for delivery established in the WOO. On one hand, the Service argues that the 5 p.m. cutoff for delivery is an absolute in the sense that the Service interprets that to mean that most if not all ODL carriers would simply not be "available" to take overtime where it would involve extending mail delivery beyond 5 p.m. but at the same time admits that 5 p.m. is not a "bright line" dividing point but merely a goal. This contradiction weakens the Service's position on the question of non-ODL forced overtime and reinforces the Union's position relative to the controlling nature of Article 8.5 on overtime rights and protections. The Service contends that it has additional authority under article 8.5 when one looks at the word "available" and the phrase "up to" 12 hours. The Service asserts that if ODL carriers would be taking overtime that would put them beyond the 5 p.m. window of delivery, then they would not be "available" to take the overtime and the Service would be perfectly justified in forcing non-ODL carriers to take that overtime. The Service refers to Arbitrator Marx's Award (03212060) in further support of the absolute management right to establish a WOO and relies on Arbitrator Marx's inclusion of the word "availability" in his suggestion for how the Parties should address overtime issues in the future.

- . . . 1. The window policy (legitimate) does not, I itself, invalidate article 8.5.G
- and 2. The agreement requires the Postal Service to provide reasonable and convincing evidence of lack of "availability" after making the best advance

scheduling decisions, before non-OTDL employees may be involuntarily assigned overtime on other than their own groups.

This Arbitrator does not read "availability" as loosely as the Service does in the above quoted reference as it is coupled with the requirement to provide "reasonable and convincing evidence" for lack of availability. In the matter before this Arbitrator, it is clear that ODL carriers were available to do the overtime assignment and the Service's definition is not persuasive.

Further, the Service argues that the phrase "up to" is permissive in that the Service is not required to max at 12 hours but can utilize ODL carriers at less than the max and then fill the remaining overtime needs from a non-ODL carriers. This line of reasoning must be rejected as inconsistent with the history and intent of Article 8.5 and the proper interpretation and application of ODL list requirements. Likewise, the interpretation that the Service can somehow not max ODL carriers because of the interpretation of "up to" allowing the Service to deliberately schedule short of 12 hours of overtime where overtime is needed and then fill the gap with non-ODL carriers also flies in the face of the history and intent of providing overtime to those individuals who desire it and protecting the rights of carriers who do not desire overtime opportunities (as much as possible and outside the limited exceptions). It should also be noted that the National Agreement is instructive on this definitional matter. It states:

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. (National Agreement, Article 8.5.D)

It is significant to note that the language calls for "qualified" people. To be qualified, an individual must have the proper classification to allow them to be on the ODL and they must have made that known by indicating their desire to do overtime following the procedures outlined in Article 8.5.A. This further undermines the Service's contention on the definition of "available" (Article 8.5.G).

The National Agreement is clear that the bias is to the use of ODL carriers in overtime situations except for a very few specific exceptions. Where overtime opportunities exist, carriers on the ODL list are to be utilized to cover that overtime.

Another aspect of the application of the WOO to overtime situations is that the overriding customer service concern appears not to be the prime motivation for the WOO as the Service made a point of claiming. In un-refuted testimony, the Union pointed out that a subsequent directive at the Hamburg office now informed carriers that there was to be a 5 p.m. (or earlier) time set not for mail delivery for customer service needs but to have carriers "back in the facility". The malleable nature of what a WOO is designed for and where the walls are moving, concerning its application, gives credence to the Union's concern that the cumulative and ongoing effects are to continue to reduce the authority of Article 8.5 ODL protections particularly as it applies to the protections against forced overtime.

The Service points to Arbitrator Mittenthal's Award (H4C-NA-C 30) legitimizing the use of simultaneous scheduling. What is important to note in this case is that Arbitrator Mittenthal made a point to emphasize that any such simultaneous scheduling must be based on legitimate and valid reasons of operational necessity. Arbitrator Aaron (H8N-5B-C 17682) indicated that the use of non-ODL carriers must be for "good cause". The Service interprets these requirements to allow it to claim that good cause and operational necessity can be met basically whenever the Service unilaterally determines it to be so. Based on the record and the submissions contained within the respective briefs of the Parties, this would represent a one-sided right to interpret Article 8.5 utilizing a self-serving definition of what the requirements mean. The record before this Arbitrator and the clear and unambiguous language of the National Agreement do not support such an interpretation.

The decision of Arbitrator McConnell (N4N-1R-C 3367), referenced by the Union and occurring shortly after the 1984 Memorandum, is instructive in this matter and one for which this Arbitrator finds much to concur. Arbitrator McConnell noted that management rights provisions of Article 3 did not apply in the overtime situations presented because:

These situations were not an unforeseen circumstance or a combination of circumstances which calls for immediate action in a situation which is not expected to be of a recurring nature.

...
And it is Management's responsibility to meet its manpower needs without violating the agreement.

...
Protection of the right of employees not to work overtime is a guarantee under the agreement.

What is critical here is the reinforcement of the understanding that the utilization of non-ODL carriers should be in situations where there are "unforeseen circumstances" or circumstances that call for "immediate action" all of which are premised in the fact that these would be none recurring situations.

The more recent decision of Arbitrator Campagna (B01N-4B-C 04104119) elucidates some understandings regarding WOOs and overtime assignments to which this Arbitrator can subscribe.

However, once the Service establishes its Operational Window, it must be prepared to provide the necessary resources to carry out its mission, and the manner and method it chooses to do so cannot violate the terms of the National Agreement (p. 6)

...
The operative word "available" has particular significance in this case, for if they can be shown that OTDL employees were or reasonably could have been "available", then the use of non-OTDL employees is in violation of Article 8.5(G) (p. 7)

...
Reading section 8.5 (G) and the MOU together, the following guidelines are apparent:

... as noted by Arbitration (*sic*) Mittenthal in Case No. H4C-NA-C 19 & 21, absent emergency or unforeseen circumstances, employees on the ODL list must be assigned to work overtime to the full extent of their obligation under Article 8.5(G): ... (p. 8)

... in keeping with its obligation to exhaust all reasonable efforts to avoid mandating overtime for Carriers not on the OTDL Arbitrator Aaron in Case H8N5BC17682 provided that management has an obligation, where not inconsistent with their obligations under Article 8, "[t]o split up a route to be carried by[employees on the OTDL] . ." (p. 8)

In sum, the Service has the right to establish a WOO but then has the obligation to allow it to operate effectively without violating terms and conditions of the National Agreement. Also, if it is not a matter of exhausting all the individuals on the ODL list, or it is not an unforeseen circumstance or emergency, or ODL carriers are reasonably available to take the overtime, then failure to provide the overtime opportunities to the ODL carriers while forcing non-ODL carriers into overtime situations, clearly violates the National Agreement.

Reduction or elimination of PTFs and decisions not to hire PTFs in the future in Hamburg have impact on the availability of carriers to handle overtime. However, the Service decision not to hire PTFs in this facility (or any other) does not then create a situation whereby the Service is compelled to force overtime to non-ODL carriers. This is a conscious staffing decision by the Service and is not the result of emergency or unforeseen circumstances (for example, loss of power to a processing facility requiring maxing ODL and forcing in non-ODL employees for manual sorting). Arbitrator Klein (I94N4IC97122042) is helpful on this question of the impact of staffing choices and what constitutes a legitimate utilization of non-ODL carriers.

... Although simultaneous scheduling of overtime for ODL in non-ODL employees is permitted under certain circumstances, the 4:30 Window was implemented in a manner whereby the application of article 8.5.D. became the rule rather than the exception. The use of non-ODL employees should be limited to legitimate and/or time critical situations where the ODL does not provide sufficient qualified employees. In this case, it cannot be held that the 4:30 Window was a time critical situation on such a regular, continuous, routine basis.

Conscious staffing decisions on the part of the Service have implications for the number of individuals handling overtime assignments when coupled with the creation of WOOs. Neither of these actions negate the inherent contractual rights under article 8.5 regarding the utilization of ODL and non-ODL carriers. The use of non-ODL carriers for forced overtime in situations that

are not unforeseen or not of an emergency nature clearly violates the language and intent of the National Agreement.

For all of the above stated reasons, the Union's position that the Service has violated the terms of Article 8.5 on overtime utilization is sustained.

A W A R D

1. Management violated Article 8 of the National Agreement by mandating Non-Overtime Desired List (OTDL) personnel to work overtime prior to maximizing the OTDL.
2. The Service shall pay carrier Manka an additional 50% for the forced overtime required to be worked.
3. The Service shall pay 1.92 hours of overtime to be divided equally among the applicable ODL employee who could have worked the overtime in question.

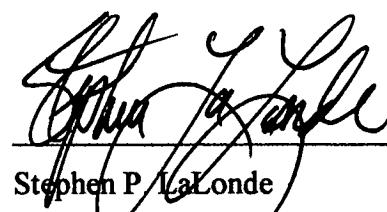
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A F F I R M A T I O N

I affirm on my oath as Arbitrator that the foregoing is my Opinion and Award in this matter and that I am the individual described herein who has executed this document.

DATE OF AWARD:

December 13, 2005



Stephen P. LaLonde
Arbitrator