C#08707

REGULAR ARBITRATION PANEL

In the Matter of the Arbitration

between

UNITED STATES POSTAL SERVICE

and

NATIONAL ASSOCIATION OF LETTER CARRIERS

GRIEVANT:

POST OFFICE: Beverly Hills, Ca.

CASE NO: W4N-5C-C 42082
GTS # 6044

BEFORE: Thomas F. Levak, ARBITRATOR

APPEARANCES:

For the U. S. Postal Service: Max Morelock

For the Union: Dale Hart

Place of Hearing: Beverly Hills, CA.

Date of the Hearing: 11/16/88

AWARD: See Opinion & Award

Date of Award: 2/23/89

Arbitrator

BEFORE THOMAS F. LEVAK, ARBITRATOR

REGULAR WESTERN REGIONAL PANEL

In the Matter of the Arbitration Between:	W4N-5C-C 42082 GTS # 6044
U. S. POSTAL SERVICE THE "SERVICE"	DISPUTE AND GRIEVANCE CONCERNING OVERTIME
(Beverly Hills, Ca.)	ARBITRATOR'S OPINION AND AWARD
and	
NATIONAL ASSOCIATION OF LETTER CARRIERS, AFL-CIO THE "UNION"	

This matter came for hearing before the Arbitrator at 9:00 a.m., November 16, 1988 at the offices of the Service, Beverly Hills, California. The Union was represented by Dale P. Hart. The Service was represented by Max Morelock. Testimony and evidence were received. The parties' post-hearing briefs were received by the Arbitrator on February 2, 1989. On February 5, 1989, the Arbitrator received a letter from the Union objecting to the admission of additional evidence submitted by the Service with its post-hearing brief. Based upon the evidence and the arguments of the parties, the Arbitrator decides and awards as follows.

OPINION

I. THE ISSUE.

At the commencement of the arbitration hearing, the parties stipulated that the following issue was to be resolved by the Arbitrator:

> Did the Service violate National Agreement Articles 8, 8.5 and 15? If so, what is the appropriate remedy?

II. FINDINGS OF FACT.

Background.

This case concerns the Beverly Hills, California office of the Service. The only witness called by the Service was Michael Orland, Beverly Hills General Superintendent, Deliveries and Collections. The only Union witness was Gerald Weinstein, who has served as President of the Beverly Hills City Branch for 16

years. Weinstein also works as a Letter Carrier at the Beverly Hills office.

There are approximately 90 routes at the Beverly Hills office. Those routes service a large business community, and about 90% of the mail is 1st Class. Most Letter Carriers start work at 6:00 a.m.; others start at 5:00 a.m., 5:30 a.m., and 6:30 a.m. Ordinarily, without overtime, Beverly Hills office Letter Carriers deliver about 1,400 ft. of mail per day. Most Letter Carriers leave for the street by 10:00 a.m., and return between 2:30 and 3:30 p.m. It is the goal of Beverly Hills management to have all mail delivered and all Letter Carriers off the street by 4:30 p.m. This goal is referred to by management as its "Operational Window."

The normal starting time for Beverly Hills office Distribution Clerks is 2:00 a.m. to 2:30 a.m. Distribution Clerks work and process mail 7 days a week, while Letter Carriers do not work or deliver mail on holidays. Early morning Clerks presort mail for the next day.

1st Class mail is processed by LSM operators at Inglewood, California (referred to as the "Marina (MMPC)" in the Service's post-hearing brief) and is brought by truck in a number of trips during the early morning hours. Letter mail is in trays separated by route, a minimum of 92 trays. When that mail arrives, Clerks stop what they're doing and distribute that mail to the routes, which normally takes about 30 to 45 minutes. According to Orland, the majority of the mail arrives on the last two trucks sometime between 5:30 a.m. and 7:30 a.m. However, according to Weinstein, by 4:45 a.m. at the latest, the "hot cases" are full of 1st, 2nd and 3rd Class mail, and Carriers could start working 1st Class mail at that time continuously until they leave the street. He noted that if they did so work 1st Class mail continuously, there would be a possibility that they might not leave for the street until 11:00 or 12:00, but that such would still allow them to return from the street inside of the Operational Window.

The Beverly Hills office employs both regular full-time Letter Carriers and PTF's. With regard to overtime, regular full-time Letter Carriers are divided into the following categories: (1) 85 Carriers are not on any overtime desired list; (2) 10 Carriers are signed up for the general overtime list, not to exceed 10 hours; (3) 7 Carriers are signed up to the general overtime list not to exceed 12 hours; and (4) 36 Carriers were signed up on the work assignment overtime desired list, under which a Carrier may only be assigned overtime on his own route.

The Facts Giving Rise to the Grievance.

During the early part of the week of February 8, 1987, Orland conducted his regular weekly meeting with his four subordinate supervisors. At that meeting, the major topic of

discussion was how best to deal with the office's operational needs on Tuesday, February 17, 1987. Monday, February 16, 1987, was scheduled as President's Day, a Service holiday but not a national holiday and not generally a state or local holiday. Saturday, February 14, 1987, was scheduled as the last work day for Letter Carriers at the Beverly Hills office. Carriers were not scheduled to resume work until Tuesday, February 17.

For the past several years, Beverly Hills management had kept track of overtime worked by Letter Carriers on the days following holidays. Those records indicated to Orland that Letter Carriers could be expected to work about 137 hours overtime on Tuesday, February 17, 1987, about the same number as the year before. Projections were for approximately 2,200 ft. of mail on that date, as opposed to the normal 1,400 ft.

Orland testified that he calculated that had he used only the 17 employees on the overtime desired list who could work anywhere in the unit, and had he used them a maximum of 12 hours, such would have only resulted in 68 hours of overtime, far short of the 137 hours overtime needed. He further testified that had he exhausted that overtime and then called in employees off the overtime desired list, he would not have been able to effect all 1st Class mail deliveries within the 4:30 p.m. Operational Window.

Orland testified that it would not have been practical to call in Letter Carriers at 4:00 a.m., the time that 1st Class mail starts arriving, since over half of the 1st Class mail arrives at the office between 5:00 a.m. and 7:30 a.m. So, he argued, if a Letter Carrier had come in 2 hours early, he would have been able to case up some mail, but he would have had to wait for more mail at his case and therefore would have had dead time with nothing to do. He testified that only a minimal amount of 3rd Class mail, approximately 100 ft., would have existed that Letter Carriers could have also worked on. Orland also noted that even the 1st Class mail that arrives on the 4:00 a.m. truck does not arrive at a Letter Carrier's case until about 45 minutes later.

Orland testified that because of all those considerations, he advised his supervisors that they could "preshift" all Letter Carriers 1/2 hour to 1 hour early, without regard to overtime desired lists, and that they could bring in PTF's at 5:00 a.m. to get things started. On February 17 his supervisors did so.

In answer to a hypothetical question posed by the Arbitrator, Orland testified that he had been required to assign Letter Carriers as demanded by the Union he would have followed the following procedure: He would not have brought in Letter Carriers on the 12-hour list 4 hours earlier, instead he would have brought them in 1 to 2 hours earlier. He then would have brought in the 10-hour overtime list Carriers on the same basis. He also would have brought in supervisors early to supervise those Letter Carriers, and would have advised supervisors to be

ready at the second truck at about 5:30 a.m. to call needed Letter Carriers in. He testified that had he followed that procedure, some Carriers would still be delivering after 5:00 p.m., when businesses are closed, and as late as 6:30.

Weinstein testified that he disagreed with Orland's observations. He testified, for example, that Letter Carriers on the 12-hour overtime list with a starting time of 6:00 a.m. could have been brought into work at 2:00 a.m. He noted that since Clerks started work at 12:00 a.m. on February 17, they easily could have been providing work for those Letter Carriers by 2:00 a.m. Weinstein further opined that on February 17, all Letter Carriers got off the street by 3:00 p.m., and that by working as it did, management simply avoided the payment of double-time to 10- to 12-hour employees. He testified that had all overtime desired list employees and PTF's been called into work by 4:45 a.m., he could foresee no circumstances under which 1st Class mail would not have been timely delivered to all businesses.

The February 4, 1987 Letter.

On February 4, 1987, Senior Labor Relations Program Analyst Gary L. Connely issued a Step 3 resolution letter in Beverly Hills Case Nos. W4N-5B-C 11745 and 11750, which provided in relevant part:

> The above captioned grievances were held in abeyance at the regional level pending adjudication of the national grievances interpreting the provisions of Article 8 of the National Agreement and the national Article 8 Memorandum. Subsequently in a Step 3 meeting concluded on 1/20/87 between you and myself, the grievances were rediscussed and resolved.
>
> The issue in these cases is the assignment of overtime for full-time regular employees who are not on the "overtime Desired" list or the "Work Assignment Overtime Desired" list under the terms of Article 8.5C2d, which states:
>
> > "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";
>
> and, the fifth, or "letter carrier" paragraph of the national Memorandum, which states:
>
> > "In the Letter Carrier Craft, 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."

We have agreed that the above mentioned issue has been resolved by Arbitrator R. Mittenthal in national award #H4N-NA-C 21 (Fifth Issue). Therefore, in accordance with that award, we have reached the following resolution:

1) Local management is hereby ordered to cease and desist from any violation of the fifth paragraph of the national Memorandum.

2) No money remedy is appropriate in this case, or for any other violation of the fifth paragraph arising prior to local management's receipt of this decision.

3) For violations of the fifth paragraph arising after local managements receipt of this decision, a money remedy may be appropriate.

The foregoing agreement constitutes a complete resolution of these grievances, however, it does not waive or prejudice the regional parties respective positions concerning the type and/or computation of the money remedy under #3 above. Nor have we reached agreement on the circumstances under which such a remedy would be approprite.

In conclusion, the local parties are hereby instructed that any similar grievances currently being held in abeyance at Step 2, should be reopened and discussed in accordance with the national award and this decision.

III. SERVICE CONTENTIONS.

The February 17, 1987 schedule did not violate Article 8.5 due to the circumstances of mail availability and consideration of exceptions allowed under certain operational conditions. Management had as its overriding concern the capability to process and deliver all the mail, especially 1st Class within operation limitations and time constraints. That time constraint, the 4:30 p.m. Operational Window, has been in place for sometime and has never been challenged by the Union.

It is a basic principle that every attempt must be made to

schedule employees to match as close as possible a varying workload demand. On February 17, that demand was heaviest between 5:30 and 7:30 a.m. Thus, all available Carriers were scheduled, as closely as possible, within that time. Scheduling Carriers at an earlier time have resulted in a mismatch of workload hours, in violation of M-39 Section 141.122, requiring that at least 80% of a Carrier's mail be available prior to the Carrier reporting. Further, POM Section 416 requires that 1st Class mail be given priority, and the evidence is that 3rd Class mail represented only a minor portion of the available mail on the morning of February 17.

The Operational Window adopted at the Beverly Hills office is sanctioned by the Article 8 Memorandum of Understanding.

Management had to base its plan on estimates, not upon hindsight. The fact that some Carriers returned from the street ahead of the 4:30 p.m. Operational Window does not detract from the fact that management used its best judgment.

The Service is entitled to require non-overtime desired list employees to work, even though employees on the overtime desired list have not worked the 12-hour maximum on a particular service day if adherence to an Operational Window would not permit exhaustion of the overtime desired list. Such was the situation on February 17. The Service's position is supported by memorandums of understanding executed at the National level, and dated June 8, 1988 and December 20, 1988.

IV. UNION CONTENTIONS.

The Service's position that it is entitled to preshift all employees without regard to overtime desired lists is contractually invalid. In fact, the Service had agreed in a pre-arbitration settlement dated October 16, 1987 (Case No. W4N05C-C 38044) that its position is incorrect.

Article 8.5 mandates scheduling in accordance with the overtime desired list. The basis of this grievance is the Union's objection to the advance scheduling in an overtime status of full-time regular Letter Carriers who were not on any overtime desired list, and their ultimate working of that "preshift" overtime.

Disputes as to overtime desired list versus non-overtime desired list Carriers have largely been resolved by the December 14, 1984 memorandum incorporated into the 1984-87 National Agreement and by two National decisions of Arbitrator Richard Mittenthal: Case No. 14N-NA-C-21, 6/26/86; Case Nos. H4C-NA-C-19 and -21, 4/11/86. It has been settled by Arbitrator Mittenthal that the failure of a postal facility to comply with a cease and desist order regarding the proper scheduling of Letter Carriers sanctions a monetary remedy.

In light of the February 4, 1987 letter from Connely to Young, and the subsequent violation of the cease and desist portion of that letter, the remedy sought by the Union in this case is appropriate.

In order to comply with Arbitrator Mittenthal's interpretation of Article 8, overtime desired list Carriers should have been maximized to 12 hours prior to requiring non-overtime desired list Carriers from working overtime. That position is supported by Arbitrator Jacobs in Case No. C4N-4G-C 25862, 7/28/87.

At the hearing, the Service attempted to demonstrate that although the mail flow was continuous over the 2 non-delivery days prior to the day in question, resulting in 3 days mail having to be delivered in on the day in question, the 1st Class mail was not sorted and brought to the Carriers' cases until 4:30 to 4:45 a.m., and that a majority of the mail did not get to the cases until 5:30 to 7:00 a.m. That allegation was made despite the stipulation by the parties that Distribution Clerks began work at approximately 12:30 a.m., approximately 2 hours earlier than their normal starting time. It is not credible to believe that the Service would not process mail to Carrier cases for 2 days of non-delivery and bring in Distribution Clerks 2 hours early on the date in question, some 6 to 7 hours prior to most Carriers' normal starting times and not begin getting the mail to Carrier cases prior to 4:30 a.m. Clearly, the ability of the Service was there to get the mail sorted to Letter Carrier cases earlier than they asserted.

Management was already scheduling Carriers in on an average of 45 minutes early. What if they had scheduled the overtime desired list Carriers and PTF's in the same amount of time earlier than their normal schedule as they scheduled in the Clerks, with instructions to Clerks to get mail to the Clerks earlier than 4:30 a.m.?

In total, scheduling PTF and the overtime desired list Carriers in the same amount early as had the Clerks been scheduled in early, would have afforded the total of 52 1/2-hours of relief that had been provided to the non-overtime desired list Carriers in the craft that day, approximately 1.8 hours under the disputed amount of overtime worked by the non-overtime desired list Carriers. Had the scheduling been done in that manner, there would have been no concern over Carriers delivering the mail by the so-called Operational Window.

With regard to the Operational Window argument, first addressed at Step 3, there are no Operational Window standards in any Handbook or Manual, nor is that matter covered by the National Agreement as an exception to the overtime provisions. It is noteworthy that in Case No. HAN-5B-C 17682, Arbitrator Benjamin Aaron ruled that the Service is obligated under Article 8 to break up a route among available overtime desired list Carriers rather than bringing in a a non-overtime desired list

Carrier on overtime on a non-scheduled day.

What actually occurred is that local management made no attempt to comply with their contractual obligations. They simply took the position that they had the right to preshift all Letter Carriers on a heavy volume day. There is no proviso in Article 8.5 or in the Letter Carrier paragraph that exceptions to those rules exist when mail volume is heavy. Exceptions only exist as per Article 41.1.C.4, concerning actions in an emergency, which is described as an unforeseen circumstance where a combination of circumstances which call for immediate action in a situation which is not expected to be of a recurring nature. Recurring President's holidays could hardly be considered to be an emergency.

As a remedy, the compensation the Union asks for overtime desired list Carriers is in the form of overtime at the applicable rate for which they would have received had the Agreement been adhered to. The compensation for non-overtime desired list Carriers is administrative leave equivalent to the amount of overtime they worked.

V. ARBITRATOR'S CONCLUSION.

The Arbitrator concludes that the Union has established by preponderant evidence that the Service violated Article 8 of the Agreement. Accordingly, the grievance is sustained. The following is the reasoning of the Arbitrator.

Preliminarily, the Arbitrator feels he must address the Union's objection regarding the evidence submitted by the Service with its post-hearing brief. (The Arbitrator would note that one of the exhibits is identical to Jt. Ex. 17, received into evidence at the arbitration hearing.) Ordinarily, the Arbitrator would summarily sustain the objection. However, because post-hearing National level settlements offered by the Service might be a justification for their consideration, or possibly for a reopening of the hearing, the Arbitrator carefully examined the evidence. The Arbitrator's review leads him to the conclusion the the submitted documents have no direct bearing on the resolution of the issue before the Arbitrator, as they are of peripheral concern only, while the documentation submitted at the hearing directly governs. Accordingly, the objection is sustained.

Turning to the merits of this case, the Arbitrator would note that while he has made a careful study of the exhibits and the arguments of the parties, this case turns upon a relatively simple fact: the National Agreement and its incorporated Memorandum of Understanding require that overtime work be assigned in a certain manner. Beverly Hills management, for business reasons (most likely, to avoid the payment of penaly overtime pay) has simply ignored the National Agreement.

The thrust of management's position is that it has the right to preshift all Letter Carriers, without regard to its Article 8 commitments or the "letter carrier paragraph," on a projected heavy volume of mail day following a holiday. Management argues that it is entitled to do so to meet the demands of its unilaterally declared Operational Window. The Arbitrator cannot agree with that position. Absolutely nothing within the National Agreement supports management's reasoning.

In order to support the Service's position, the Arbitrator would have to conclude, at the least, that the parties to the National Agreement never contemplated or realized that heavy 1st Class mail volume days regularly would follow holidays. Clearly, such a conclusion is an impossible one to reach. The Arbitrator would also have to conclude that when the parties negotiated the National Agreement and their Memorandum of Understanding that they never foresaw that staffing difficulties would result from that language, never foresaw that Local management would be severely hampered on post-holiday heavy mail volume days by that language, never foresaw that compliance with that language might require the overtime scheduling of supervisors and Clerks, or even a modification of the scheduling of employees who bring the first class mail from other facilities, and never foresaw that such language would sometimes require the payment of substantial overtime and penalty pay. Such a conclusion is equally impossible to reach. Overtime langauge necessarily inhibits management's right to schedule, and to assign and direct the work force, and necessarily results in increased costs in the form of overtime wages.

Further, in order to find in favor of the Service, the Arbitrator would have to conclude that the Beverly Hills management-imposed 4:30 p.m. Operational Window is binding on the Union and somehow overrides the overtime language of the National Agreement. That conclusion, too, is not possible. Such a unilaterally imposed managerial objective, however soundly grounded in good business practice, cannot override express employee rights granted by the National Agreement. Article 3, Management Rights, allows some unilateral action, but does not aid the position of the Service, since this case involves clearly expressed specific employee rights.

Even assuming, arguendo, some merit in the Service's Operational Window argument, the Arbitrator's basic conclusion would be the same. Evidence submitted by the Union clearly establishes that management could have met its Operational Window goal had it complied with the overtime provisions of the Agreement. It may be true that to do so, management would have had to reassign Supervisors and Clerks to ensure that sufficient 1st Class mail was sorted and brought to Letter Carrier cases at an earlier time on the morning of February 14, 1987. And it is most certainly true that such assignment would have resulted in increased costs in the form of overtime and penalty pay. However, proof of increased costs is no defense where the parties themselves have specifically provised for those costs in the

National Agreement.

One additional point should be made: Although the Service has not raised Article 41.1.C.4 as a defense, reference to that article is appropriate to demonstrate that the parties who negotiated the National Agreement contemplated that certain circumstances not now before the Arbitrator are sufficient to provide relief from the requirements of the National Agreement. Article 41.1.C.4 relates to the "emergency exception," and the Arbitrator agrees with the Union that the instant situation does not involve an emergency. Holidays are situations of a reoccuring nature, and the overtime/heavy mail volume situation on the day following those holidays is both expected and of a recurring nature. It must be conclusively presumed that had the parties intended that similiar relief was appropriate on heavy mail volume days, they would have provided for a "heavy mail exception."

This brings us, then, to the question of remedy. Because Beverly Hills management has failed to honor the cease and desist order contained in the February 4, 1987 letter from Gary L. Connely to William Young in Case Nos. W4N-5B-C 11745 and 11750, it is appropriate for the Arbitrator to enter an award in accordance with the remedies sought by the Union.

With regard to specific hours worked, the Arbitrator would note that while the Union has totalled specific hours in its post-hearing brief, the parties stipulated that should the Arbitrator rule for the Union, he should enter a general award only, while retaining jurisdiction to resolve any dispute concerning the specific damages due. The Arbitrator would further note that at the commencement of the arbitration hearing the parties stipulated that Joint Exhibit No. 10 sets forth an itemization of hours worked by all affected employees, subject to verification by the Service. Accordingly, the Arbitrator will enter a general award providing for overtime pay for all overtime desired list Carriers that would have been paid had the National Agreement been adhered to, and compensation for the non-overtime desired list Carriers in the form of administrative leave equivalent to the amount of overtime they worked.

For the foregoing reasons, the grievance is sustained.

AWARD

The Service violated Agreement Article 8. The grievance is sustained.

All overtime desired list Letter Carriers shall be compensated in the form of overtime at the applicable rate that they would have received had the Service adhered to the National Agreement.

Non-overtime desired list Letter Carriers shall be

compensated through administrative leave equivalent to the amount of overtime they worked in violation of the National Agreement.

The parties shall utilize Joint Exhibit No. 10 in determining the overtime compensation and administrative leave compensation due affected Letter Carriers. The Service shall provide the Union with any challenges to the computations contained in Jt. Ex. 10 no later than March 30, 1989, together with a full and complete explanation in writing for those challenges. In the event that the parties are unable to agree upon the actual amount of overtime compensation and administrative leave due affected employees, the matter shall be resubmitted to the Arbitrator who retains jurisdiction to resolve that dispute.

DATED this 23rd day of February, 1989,

Thomas F. Levak, Arbitrator.