

C-26042

REGULAR ARBITRATION PANEL

In the Matter of the Arbitration)	Grievant: Class Action
)	
Between)	Post Office: Santa Ana, California
)	
UNITED STATES POSTAL SERVICE,)	USPS Case No.: F01N-4F-C 05033653
)	
And)	DRT Case No.: 01-050431
)	
NATIONAL ASSOCIATION OF)	
LETTER CARRIERS, AFL-CIO)	
)	

BEFORE: Claude Dawson Ames, Arbitrator

APPEARANCES:

<u>For the U.S. Postal Service:</u>	Carol Cook, Labor Relations Specialist
<u>For the Union:</u>	Christopher Jackson, Advocate
Place of Hearing:	Santa Ana, California
Date of Hearing:	May 4, 2005
Date of Award:	June 23, 2005
Relevant Contract Provision:	Articles 8.4-B and 15.2 of the National Agreement
Contract Year:	2001 - 2006
Type of Grievance:	Contract Interpretation, Out-of-Schedule Pay

Award Summary

The Grievant, 204b Supervisor Hortencia Beltran, is entitled to receive "out of schedule" overtime premiums as applicable under Article 8, Section 4-B, effective January 8, 2004 and continuing. The Service is ordered to cease and desist further violation of Article 8.4-B of the National Agreement.

RECEIVED

Claude Dawson Ames
CLAUDE DAWSON AMES, Arbitrator

JUL 14 2005

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NALC HEADQUARTERS

I.

BACKGROUND AND PROCEDURAL HISTORY

The Union brings the instant grievance on behalf of 204b Supervisor, Hortencia Beltran, for a determination of appropriate “out of schedule” pay for work performed beginning January 5, 2004 until present. The dispute was first presented to the parties’ Dispute Resolution Team (DRT) , Santa Ana District, on January 26, 2005. The issue was: Did Management violate the National Agreement when they failed to pay the detailed supervisor (204b) H. Beltran “out of schedule” pay for the time spent detailed.?

DRT issued its decision in the affirmative on February 8, 2005, finding that Management did violate “the provisions contained on pages 8-6 and 8-7 [Hours of Work] of the Joint Contract Administration Manual (JCAM) when they failed to pay the detailed 204b Supervisor Hortencia Beltran out of schedule pay.” However, the DRT was unable to reach “common ground” as to the appropriate remedy and declared an **impasse** on this issue.

The Union maintains that 204b Supervisor Beltran is entitled to “out of schedule” pay for work performed from the date of being detailed (January 5, 2004) until present. The Service disagrees, arguing that 204b Supervisor Beltran is only entitled to “out of schedule” pay for the 14 days preceding the filing of the grievance” by the Union.

A hearing was held on May 4, 2005, at the Santa Ana Main Post Office. Christopher Jackson, Regional Administrative Assistant - Region One, represented the Class (Beltran) and NALC. Carol A. Cook, Labor Relations Specialist represented the Service. The parties stipulated that the grievance was properly before the Arbitrator for a determination of appropriate remedy.

II.

ISSUE PRESENTED

The issue presented for resolution before the Arbitrator is as follows:

What is the appropriate remedy for Management's failure to pay detailed 204b Supervisor Hortencia Beltran "out of schedule" pay?

III.

RELEVANT CONTRACTUAL LANGUAGE AND REGULATIONS

ARTICLE 6 - HOURS OF WORK

Section 4. Overtime Work

B. ... Nothing in this Section shall be construed by the parties or any reviewing parties to deny the payment of overtime to employees for time worked outside of their regularly scheduled work week at the request of the Employer.

ARTICLE 15 - GRIEVANCE-ARBITRATION PROCEDURE

Section 2. Grievance Procedures - Steps

Step 1:

(a) Any employee who feels aggrieved must discuss the grievance with the employee's immediate supervisor within fourteen (14) days of the date on which the employee or the Union first learned or may reasonably have been expected to have learned of its cause.

EMPLOYEE & LABOR RELATIONS MANUAL (ELM)

434.6 Out of Schedule Premium

434.611 "Out of Schedule Premium" is paid to eligible full-time bargaining unit employees for time worked outside of, and instead of, their regularly scheduled workday or workweek when employees work on a temporary schedule at the request of management. Such notice is not required for "pool-type" employees.

434.62 Eligibility

434.621 Exhibit 434.621 indicates those employees who are eligible to receive "out of schedule premium" while working a qualifying temporary schedule

within a bargaining unit or while detailed to a non-bargaining position.

IV

POSITION OF THE PARTIES

Union's Position:

The Grievant performed higher level non-bargaining unit work as a 204b Supervisor and is entitled to out of schedule pay for all time worked outside of her normal work schedule. The out of schedule premium is an FLSA (Fair Labor Standard Act) issue which supersedes any management agreement based on a "past practice." No past practice can exist which violates the parties' National Agreement. Arbitrators have awarded and ruled at the National and Regional levels that "204bs" are entitled to "out of schedule pay" for work performed while detailed. The Union timely filed this grievance and notified management immediately when it became aware of an Article 8.4(b) violation. The Union is seeking out of schedule pay from January 8, 2004, until present, as a remedy for 204b Supervisor Beltran.

Employer's Position:

The Service does not dispute the fact that Ms. Beltran was in an acting supervisory (204b) position at the time of the grievance, and was working in a non-bargaining detail unit. As such, the Service has taken appropriate steps to compensate the grievant for its violation and to pay her "out of schedule" pay for the 14 days preceding the Union's filing of its grievance on December 27, 2004. The Union was well aware of Management's "past practice" of payment and 204b Supervisor Beltran's work schedule prior to filing its grievance. But chose to "lay in the weeds" while a compensatory claim was accumulating, then ambush the employer. This practice was allowed to continue also by the Union in violation of the National Agreement. The Union is now

attempting to place total liability on Management "for a situation where both parties failed." This was a joint error and mutual mistake. The appropriate remedy as proposed, is out-of-schedule pay for the 14 days preceding filing of the grievance and an order to cease and desist.

V.

DISCUSSION

It is well recognized that an appropriate remedy for wage violations, where as here, the parties have previously agreed (DRT) that Management did violate Article 8 (Work Hours) in failing to pay appropriate out of schedule pay to a 204b Supervisor is an order, "that the employer make up the difference in what the employee was paid and the amount he or she should have been paid." The amount of this sum is often referred to as "back pay." Back wage issues are governed statutorily by the Fair Labor Standards Act (as incorporated into Article 19) and under Article 8 (Work Hours) of the National Agreement. The Arbitrator is governed here by the clear and unambiguous language of Article 8, Section 4-B (Overtime Work) which specifically states:

Overtime shall be paid to employees for work performed only after eight (8) hours on duty in any one service day or forty (40) hours in any one service week. Nothing in this Section shall be construed by the parties or any reviewing parties to deny the payment of overtime to employees for time worked outside of their regularly scheduled work week at the request of the Employer.

The Service does not contest a DRT's determination that Ms. Beltran is an acting 204b Supervisor who, at the time of the grievance, was working in a non-bargaining unit detail. Nor does it contest DRT's determination that Ms. Beltran is entitled to out of schedule pay. What is contested by the Service is the period of back pay entitlement. The Union maintains that the period runs from the date of detail (January 8, 2004) to present. The Service disagrees and argues

that the period should be limited to 14 days previous to the Union's filing of the grievance. Notwithstanding this position, the Service does agree with the Union that a past practice of non-payment (overtime pay) cannot be in violation of the National Agreement: but neither can the Union be allowed, argues the Service, to just "lay in wait" while a known compensatory claim is accumulated. The liability should be equally shared by the parties.

The Arbitrator, after a careful examination of the evidence presented finds no basis to restrict or limit 204b Supervisor Beltran's "out- of- schedule back pay to the 14 days previous to the filing of the grievance." The Service has not shown by a preponderant standard of evidence that the grievant or her Union was aware prior to filing its grievance on 12/27/04, that the Tustin Office maintained a practice of not paying 204b's out- of- schedule pay in violation of Article 8 of the National Agreement. The Union has presented credible evidence of it's timely filing after first requesting and reviewing employee clock rings, then contacting members of the DRT Team, to determine the appropriate out- of- schedule pay regulations for 204b supervisors.

The evidence further demonstrates that the Tustin Office was aware of its ongoing violation and failure to pay out -of- schedule pay to 204b supervisors prior to this grievance. And, then attempted to restrict and limit their full recovery of back wages under the guise of an existing past practice, where none existed or could exist, in direct violation of FLSA and the National Agreement. The grievant cannot be said to have voluntarily waived her right to out- of-schedule premium pay.

Prior National awards by Arbitrators Gamser (AB-C-341) and Mittenthal (A8-10-939) support this view and stands for the long held proposition that employee's detailed as 204b supervisors are entitled to their out- of- schedule premiums, when detailed as temporary supervisors under Article 8, Section 4-B of the Agreement. The clear and specific language of

Section 4-B precludes any reviewing authority, such as an arbitrator, from denying payments of overtime to employees for the time worked outside of their regularly scheduled work week at the request of the Employer.

The grievant is entitled to be fully compensated for all out-of-schedule work performed while detailed as a 204b supervisor and does not waive her right to overtime compensation under Article 15.2 of the National Agreement. Employee's are entitled to their wages and overtime premiums when and as earned under the FLSA. Accordingly, for the reasons stated above the grievant is entitled to the following remedy.

AWARD

The Grievant, 204b Supervisor Hortencia Beltran, is entitled to receive "out of schedule" overtime premiums as applicable under Article 8, Section 4-B, effective January 8, 2004 and continuing. The Service is ordered to cease and desist further violation of Article 8.4-B of the National Agreement.

Respectfully submitted,

Dated: June 23, 2005



CLAUDE DAWSON AMES, Arbitrator