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ARBITRATION AWARD

IN THE MATTER OF

Ivan Bunin	)	AAA CASE NO.
	)	16 69 0234 74
and	)	74-0211/41-N
	)	
United States Postal Service	)	

ARBITRATOR: Marcel Mallet-Prevost

APPEARANCES:

For Ivan Bunin: Donald M. Murtha, Esq.
Michael R. Murphy, Esq.

For the Postal Service: Lawrence A. Dinerstein, Esq.
Eugene Granof, Esq.

Question Presented

Bunin, a distribution clerk, worked temporarily as an Acting Supervisor which necessitated his working outside of his regular schedule. The question presented is whether, under P.L. 89-301 and the court decisions construing that statute, the Postal Service "required" Bunin to work outside his regular schedule, thus entitling Bunin to overtime, or whether Bunin "volunteered" for the schedule changes and thus is not entitled to overtime.[1/]

I. Background Considerations

P.O. 89-301 was enacted by Congress in 1965 with the general intent to modernize the working conditions of postal employees "by providing overtime pay for overtime work in place of the anachronistic system of compensatory time off..." (United Federation of Postal Clerks, AFL-CIO, et al v. W. Marvin Watson, Postmaster General, 409 F.2d 462 (C.A.D.C.) (HB p.1).[2/] Extensive litigation followed its enactment. In 1968 the

1/ The hearings in this case and a companion case, Albert Cheskin and United States Postal Service, 74-0093/25-N, Case No. 16 69 0127 74; were held on November 6 and 7, 1974, in New York City. Upon extensions, the briefs for the claimants were received by the arbitrator on January 17, 1975, and for the Postal Service on January 21, 1975.

2/ Handbook for Arbitrators, composed for use in this Back Pay Recovery Program, is used for various citations herein, and will be referred to as "HB p.-".

District Court for the District of Columbia granted summary judgment against the Postal Clerks Federation which had challenged the Postmaster General's interpretation and application of the statute. The Postmaster General had contended he could, upon notice, make temporary out-of-schedule assignments without paying overtime. In 1969 the Court of Appeals reversed and remanded the case, in the decision cited above. The Court held that the statute required the Postmaster General to establish regular work schedules in advance which would give qualified annual rate regular employees "a regular predictable schedule", and that they were entitled to statutory overtime for work temporarily performed "outside" their regular schedule. On March 6, 1970, the District Court issued its Order and Judgment pursuant to the opinion of the Court of Appeals (HB p.31). Objecting to portions of the Order, the Postal Unions appealed. And on January 4, 1971, the Court of Appeals issued an Order clarifying some aspects of its original 1969 opinion (HB p.33). This resulted in an amendment, on March 18, 1971, of the District Court's March 6, 1970, Order, the details of which are not pertinent here.

Thereafter, on August 26, 1971, the District Court issued a Consent Order which was designed to "establish an administrative procedure for disposition of individual claims" and to provide "for the final disposition of this litigation" (HB p.11). The parties then expended substantial effort in undertaking to implement the terms of the Consent Order. Pilot tests were run in a number of area post offices in an attempt to develop appropriate procedures before instituting them on a national scale. As a result of the tests the Postal Service concluded that to reach a fair and practicable result as quickly as possible it would be necessary to resolve certain ambiguities and omissions in the Consent Order. This, however, was never accomplished. When further negotiations between the parties failed to produce agreement upon a plan of action, the Postal Service moved the District Court to approve the procedures contained in the Service's Proposed Instructions to Postal employees as to their entitlement to recover back overtime pay under the Consent Order. The

Postal Unions objected in detail to various provisions of the Instructions and moved the Court to adjudge the Postmaster in contempt for failure to comply with the Consent Order. The Postal Service responded in detail to the Unions' objections. Finally, on April 3, 1973, the District Court issued a Memorandum Opinion denying the Unions' motion and approving the Postal Service's Proposed Instructions (HB p.37). The Court suggested that, since involving the Court in the resolution of disputes as to the amounts of overtime pay due to individuals, might present an overbearing administrative burden, the parties should try to develop an appropriate procedure and submit it to the Court for approval. The parties thereafter stipulated a procedure which included provision that cases not settled administratively would be subject to "final and binding arbitration, in lieu of court proceedings...," and also that the "arbitrator shall be bound by the provisions of the Consent Order of August 26, 1971, and the Implementing Order and Decision of April 4, 1973..." (HB pp.49-50).

As already indicated, the focus of the dispute here is the construction of the terms or concepts "voluntary" and "required" in applying them to a given set of facts. The statute itself does not use the terms. They evolved in the course of the litigation briefly outlined above. The arbitrator, as noted, is bound by the two principal Orders of the District Court. I take this to mean that he is not free to make an independent interpretation of the Court of Appeals' opinions. But I assume he may rely upon them to whatever extent they would seem to be helpful in understanding what the District Court may have meant by what it said.[3/]

In its original opinion the Court of Appeals referred to a Post Office theory that overtime pay is a device to pay a differential to scheduled employees for "inconveniencing" them for working beyond their schedule (HB p.6). In its Order of January 4, 1971, the Court of Appeals declared

3/ In all respect I do not suggest that the Court has been unclear. It is just that there is something about this whole course of litigation that seems to resist simple treatment. Perhaps it all stems from the statute and the mood which moved Chief Judge Bazelon to observe at the outset that "In many respects * * * the statute will not be remembered as a classic of lucid drafting." (HB pp.4-5).

that it was the intent of its earlier opinion "to provide overtime pay to workers who are inconvenienced by rescheduling" (underscoring supplied (HB p.33). In the later Order the Court also stated that employees who have been temporarily rescheduled are entitled to overtime pay for the work outside their normal schedule "unless the rescheduling is made expressly to accommodate the convenience of an employee and at the request of that employee" (emphasis supplied, HB. p.34). Thus the concept of an employee's "volunteering" began to take shape.

In Section I of its Consent Order (August 26, 1971) the District Court set out certain definitions to which the parties had stipulated. The definitions of "required" and "voluntary" are as follows:

> K. Required temporary schedule change: Any temporary change in the regular work schedule of a qualified annual rate regular employee not for the convenience of and at the request of the employee.
>
> L. Voluntary temporary schedule change: Any temporary change in the regular work schedule of a qualified annual rate regular employee which was established by defendants (Postal Service) to accommodate the convenience of the employee at his request (emphasis in text supplied HB p.13).

The District Court went on to observe that the Court of Appeals had required the Postal Service to pay overtime to any employee "ordered temporarily to work outside of his regular schedule", but was not required to pay overtime "where the temporary work schedule was established expressly to accommodate the employee's convenience, at his request" (emphasis supplied HB p.16). Finally, the District Court in Section VI of the Consent Order, under Stipulated Issues, set forth a combination of the definitions of "voluntary" and "required" in rather stark terms, namely, under item 1.(c):

> Any temporary schedule change made to accommodate the convenience of an employee at the request of the employee shall be considered a voluntary schedule change. Any other temporary change in an employee's regular work schedule will be deemed a required change. (HB p.22).

Thus up to this point the matter of an employee's request for a temporary schedule change to accommodate his convenience appears to be the key element in the concept "voluntary." And if this is a proper view of the term "voluntary", its application to a set of facts should not prove

particularly difficult. However, as we have seen, the litigation did not end here. And what followed, culminating in the District Court's Memorandum Opinion of April 3, 1973, it seems to me, made the problem quite difficult.

The Memorandum Opinion discusses various contentions of the parties with respect to procedure, contempt and the Proposed Instructions. However, it does not discuss the terms "voluntary" and "required" which most concern us here, and which were hotly contested by the parties before the Court. After disposing of what it regarded as the major problems, the Court said, in a footnote, that the areas of disagreement it had not discussed "are of relatively minor importance, and concern for the most part disputes as to the clarity and precision of the language employed" by the Postal Service in its Instructions. The Court then approved the Instructions (Notice 114, HB p.53) as follows:

> The Court has carefully reviewed the plaintiffs' objections and the defendants' responses thereto, and has concluded that the language to which plaintiffs have objected properly conforms to the terms of the Consent Order, the reach of the Court of Appeals mandate in Groettum, the scope and operation of the Post Office Department's established policies and procedures in force during the relevant period, and the "Management-Employee Agreement." (HB p.47, n.23).

In other words, the Proposed Instructions and the parties' disagreement concerning them seemed to present no real problem to the Court.

For present purposes the most important part of the Instructions not discussed by the Court are Section III.E. Required Schedule Changes and Section IV. J. Notification of Decisions on Claims (HB pp.58, 66-67). Section III.E. 1. states that an employee is entitled to overtime pay for time he was required to work temporarily outside of, and instead of, his regular schedule. But if the change was made "(a) at the employee's request and (b) for his convenience, it was not a required change, and he is not entitled to overtime pay * * *" (HB p.58). This language reflects the emphasis of both Courts upon the involvement of the employee's request with the purpose of his convenience. Paragraph 2 sets out "examples of required schedule changes," including, "(a) where an employee

was ordered to work"; and (b) where an employee was requested by management to work, even though the employee was willing to accept or agreed to the change in schedule" (ibid). That is, when management makes the request, the schedule change is required, and the employee's convenience or inconvenience is of no concern.

Paragraph 3 sets out "examples of schedule changes which were not required". There are 8 examples, (a) through (h). Examples (a) through (f) relate to schedule changes either requested by the employee for personal reasons - which seems to comport with the "convenience" notion - or permitted by the terms of the employee's bid. The only example which appears to relate to the facts of the instant case, as we shall see below, is example (h).[4/]

Example (h) provides:

> Where an employee's schedule was termporarily changed because he had advised management of his desire to be considered for certain temporary assignments as and when the opportunities for such assignments might arise (for instance, a request by an employee on a night tour that he be assigned to any temporary daytime office work whenever a vacancy of this sort became available). (HB pp.58-59).

Example (h) will be discussed below in conjunction with the facts of the case. But it seems significant to me that the parenthetical "for instance" contained in Example (h) is clearly a request by the employee for a temporary change of schedule for personal reasons. In other words this

4/ Example (g) concerns a situation where an employee's schedule is changed because he "successfully bid or applied" for a temporary vacancy. "Bid" and "application" are technical terms in the Postal Service world. They are defined in the National Agreement (1973) concerning Postal Clerks as follows (Article XXXVII):

> 6. Bid
> A written request submitted to the installation head to be assigned to a duty assignment by a full-time regular employee eligible to bid on a vacancy or newly established duty assignment.
>
> 7. Application
> A written request by a full-time regular employee for consideration for an assignment for which he is not entitled to submit a bid.

The instant case does not concern any such written bid or application.

would seem to pull Example (h) toward the employee request and convenience notion - not away from it.

Section IV. J. Notification of Decisions and Claims (HE pp.66-67) explains how the employee's claim forms will be marked to show which hours of claimed overtime are approved and which are denied. Where claims are denied a letter code is provided as a means of showing the reason for the denial. The code runs from "A" through "X" (omitting "V" and "W"). As set out in the Instructions, each code letter is accompanied by what might be called a shorthand explanation of the reason for the denial. And each code explanation contains a reference to the substantive portion of the Instructions upon which the code reason is based. For instance, "A - Claim was not submitted within the applicable time limits. See p.8," or "B - Employee was not a qualified annual rate regular at time of schedule change. See p.2".

The codes which touch particularly upon the instant case, and the companion case (Cheskin) noted above, are codes P, Q and R.

Code P reads:

> Change in schedule was not required. Employee's schedule was temporarily changed because he had previously advised management of his desire to be considered for certain temporary assignments as and when the opportunities for such assignments might arise. See p.5.

Code P clearly refers to Example (h), set out above.

Code Q reads:

> Change in schedule was not required. Employee indicated to management that he desired to be considered for temporary assignments to higher level as and when such assignments might arise. See p.5.

Code Q also clearly refers to Example (h) above.

Code R reads:

> Change in schedule was not required. Employee accepted the higher level assignment on a voluntary basis. Employees would not have been assigned to that higher level job in the absence of a volunteer.

Code R carries no reference to the Section III. E. Examples.

The code paragraphs will be discussed further, along with the facts below. At this point I shall simply observe that counsel for Claimant

relies upon the already extensively quoted language in the Court of Appeals' Opinions and in the Consent Order for the proposition that, unless the rescheduling is made to accommodate the employee's convenience and at the employee's request, it is a required change of schedule. Counsel argues also, however, that the Instructions support this view.

The Postal Service argues, however, that the Reason Code may be read literally and, it seems to me, almost without regard to the language of the Consent Order. The Service reaches this result by contending, in effect, that all it said by way of defense and explanation of the Proposed Instructions and the Reason Code in its Reply to the Unions' Objections in District Court was adopted by the Court when it overruled the Unions' Objections and approved the Instructions without change as conforming with the Court of Appeals mandate. This leads the Service to restate its strongest position, namely that "under the terms of the Consent Order, a schedule change may be deemed voluntary even though the 'request for the temporary position may not have originated with the employee' and even though 'such a schedule change is not necessarily made to accommodate the convenience of the employee.'"

The trouble with Claimant's argument is the very existence of the Court approved Instructions and Reason Code and the difficulty of fitting them together with the Consent Order. The trouble with the Postal Service's argument is that all the District Court ever said in this area is the same thing the Court of Appeals said, namely, that unless the rescheduling is made to accommodate the employee's convenience and at his request, it is a required change of schedule. As already noted, the Court did not mention required, request or convenience in its Memorandum Opinion approving the Instructions, but lumped disagreements in this area with other unspecified matters which the Court felt were of "relatively minor importance" which concerned mostly disputes as to the "clarity and precision of the language employed" by the Postal Service. It was only after saying that, that the Court approved the Instructions as conforming with the Court of Appeals mandate. The Court did not explain whether it

thought the Court of Appeals' Opinions and its own Consent Order should be read more loosely than would appear on their face, or whether the Court was reading the Postal Service's Instructions and the Service's interpretation of them more restrictively than the Service must have intended. In the circumstances, in applying the law to the facts in a case like the present one, it seems to me that some care must be taken to avoid letting the Instructions and the Reason Code run away with the Consent Order.

II. The Facts and Discussion

Ivan Bunin, during the period pertinent here, was a distribution clerk (Grade 5) at Long Island City, N.Y., Postal Concentration Center. His regular bid schedule was 7:30 a.m. to 4:00 p.m., Monday through Friday. In late 1970 Bunin took the supervisor examination, one of the steps by which employees seek to advance themselves to supervisory positions. In February 1971, Bunin was notified that he had passed the examination. He was thereupon placed on the supervisor eligibility list. Employees are placed on this list in a ranking order according to the grades they make in the examination. The list is used by management in connection with the selection of employees for promotion to supervisory jobs and also as a source for selecting employees to be detailed for temporary duty as Acting Supervisors.

Shortly after being placed on the "list", Bunin was asked by his Foreman whether he would be interested in trying Acting Supervisor work as temporary vacancies arose. Bunin said he would be interested. The Foreman then told Bunin he might have to work week ends. Bunin said that would be "OK". Bunin testified that he felt there was nothing else he could say if he wanted the higher level work. The record shows that experience in higher level work may be helpful to an employee in being selected for permanent promotion to Supervisor. Thereafter Bunin was assigned on various occasions to work as an Acting Supervisor. His assignments were posted on a bulletin board and he learned where and when he was supposed to work in that capacity by consulting the board.

Sometimes his assigned work fell within his regular schedule and sometimes it fell outside his regular schedule on Saturdays and Sundays. This arrangement continued until Bunin was promoted to Foreman of Mails, effective November 27, 1971. Bunin filed a claim for back overtime pay for the hours worked outside his regular schedule between February 27 and October 15, 1971.

The question, of course, is whether Bunin's changes of schedule were required or voluntary, considered against the discussion set forth above. On Bunin's Claim Form the Postal Service marked the hours for which overtime pay was denied with Reason Code Q. As we have seen, Code Q was used to indicate that the schedule change was not required, because the employee had "indicated to management that he desired to be considered for temporary assignments to higher level" work as opportunities might arise. Relying upon the literal lines of Code Q, the Postal Service contends that since Bunin did in fact "indicate" his desire for the work in question, the resulting schedule changes were not required but were voluntary. But I cannot believe that Code Q, which purports to be a reference to Example (h) (Sec. III. E.3.), can be meant to expand the scope of Example (h) to this extent.[5/] As noted above, the setting of Example (h) with the 7 other Examples in paragraph 3 seems to align Example (h) with the "request for convenience" concept recognized by the District Court's Consent Order. This is underscored by the parenthetical "for instance" which is plainly a "request" by the employee. Bunin was asked by his Foreman whether he would be "interested" in taking assignments as Acting Supervisor, and Bunin said he would be. Against the background and considerations under discussion here, that simple action comes closer to management requesting

5/ Nor can I believe that the District Court meant to adopt, without saying so, a reading of Code Q so flat and so isolated that it simply cannot stand with the language of the Consent Order. Such a reading, against the Opposition of the Unions could hardly reflect "a disagreement between the parties *** of relatively minor importance" concerning merely "the clarity and precision of the language" employed by the Postal Service (Memorandum Opinion, n. 23, HB 47).

Bunin to do the work than it does to Bunin requesting management to assign him work outside of his schedule. This, it seems to me places Bunin's case under Sec. III. E. 2.(b) of the Examples of required schedule changes:

> When an employee was requested by management to work, even though the employee was willing to accept or agreed to the change in schedule.

When a Foreman asks an employee if he would be "interested" in higher level work he plainly indicates to the employee that he wants him to do the work. The Foreman is asking the employee if he will do the work. And to say that when the employee answers "yes", the employee is requesting management to assign him the work is drawing a finer line than is warranted in the construction of language used by ordinary people in the work-a-day world.[6/]

Conclusion and Award

I find that Bunin's out of schedule work was not requested or voluntary on his part, within the meaning of the District Court's Consent Order and Memorandum Opinion, but was required. Accordingly under Section III. E. 2.(b) of the Instructions (Notice 114, HB 58), he is entitled to overtime pay for the period in question.

6/ The Postal Service urges that Bunin's signing of Form 440 (Availability for Promotion) on which he indicated a willingness to accept a promotion as a Supervisor to any tour or work location, is evidence of Bunin's requesting the work assignments and schedule changes here in question. But according to testimony at the hearing, this Form, as its title implies, relates to actual promotion to Supervisor, not to temporary detailing.

Upon the foregoing, the Arbitrator makes the following Award:

1. Ivan Bunin worked 160 hours outside of, and instead of, his regular schedule from pay period 5-1971 to pay period 22-1971.

2. Under P.L. 89-301 the Postal Service is directed to pay Ivan Bunin overtime compensation at one-half the appropriate hourly rate for 160 hours.

Dated:
February 6, 1975

Marcel Mallet-Prevost
Arbitrator