C-27141

REGULAR ARBITRATION PANEL

In the Matter of the Arbitration

between

UNITED STATES POSTAL SERVICE

and

NATIONAL ASSOCIATION OF LETTER CARRIERS, AFL-CIO

GRIEVANT: Class Action

POST OFFICE: Kansas City, Kansas

USPS CASE NO: E01N-4E-C 06260805
NALC CASE NO: 05-042978

BEFORE: David A. Dilts, Arbitrator

APPEARANCES:

For the U.S. Postal Service:	Ann Olsen
For the Union:	David Teegarden
Place of Hearing:	U.S. Post Office, 5215 Richland Ave., Kansas City, Kansas
Date of Hearing:	May 25, 2007
Date of Award:	June 29, 2007
Relevant Contract Provision:	Article 8
Contract Year:	2001
Type of Grievance:	Simultaneous Scheduling of Overtime

AWARD SUMMARY

The preponderance of credible evidence shows that management simultaneously scheduled employees on the Overtime Desired List, with employees not on the Overtime Desired List to work scheduled overtime. This is a violation of Article 8.5.G of the 2001 National Agreement. In this particular case, management failed to adequately plan sufficiently in advance so as to permit coverage of the station's routes so that the window of operation and Article 8.5.G would both be satisfied. Such a violation of the Agreement does deny ODL employee their contractual rights under the National Agreement and there was demonstrable harm to those employees. It is therefore this Arbitrator's considered opinion that the proper remedy is a cease desist order, and that the ODL employees who worked less than twelve hours, shall be compensated for twelve hours (four at the overtime rate) for Jaune 15, 2006. No remedy is due those employees not on the ODL list who were forced work because they received compensation at the overtime rate.

David A. Dilts, Arbitrator

ISSUE

The Step B Team framed the issue in this matter as:

Did Management violate Article 8.5 when they forced non-OTDL carriers to work mandatory overtime on 6/15/06, and if so, what is the appropriate remedy?

BACKGROUND

The relevant facts in this dispute are not in substantial dispute. The background, undisputed facts contained on page 3 of Joint exhibit 2 states:

> The Wyandotte West Station has 19 full city routes, 1 auxiliary route (approximately 1 hour and 10 minutes in length), and 1 collection route (one and one-half hours in length). On 6/15/06 the station had 5 regular city carriers on scheduled annual leave, (Gruen, Kemner, Mills, Masters, Murrill), 2 regular city carriers on extended sick leave (Chambers, Biggs), and 1 T-6 carrier on short term sick leave (Hughes). This represents 42% of the 19 routes that had the regular carrier not scheduled. The station brought in to work on their regular non-scheduled day 2 regular carriers (Stubler, Clark), and 1 rehab employee (Shelton). This left the station down (uncovered) one route, 1240, and Carrier Stubler was brought in 1 hour early to case (sort mail) on this route, it also left the Collection and Auxiliary route uncovered. Two routes 1242 and 1244 had rehab employees assigned to the route, these employee had limitations of allowable work hours, Carrier Shelton was on limitations of 6 hours total work for the day and Carrier Hernandez had limitation of 2 hours casing and 2 hours of delivering mail for a total of 4 hours. Carrier Shelton required a minimum of 2 hours auxiliary assistance and Carrier Hernandez a minimum of 4 hours assistance. The assistance and uncovered routes left the station with approximately 18 hours and 40 minutes that had to be pivoted out for delivery of mail. Available for this day from the OTDL list was [sic] Carriers Rodell, Roberts and Stubler and 1 PTF Wortham. PTF Wortham injured her back while casing mail and was not able to continue with her duties, she was sent to the Doctor for evaluation at 10:00 am,

she returned to the station at 2:06 pm, she was released to duty and attempted to resume her duties, she was able to carry for approximately 20 minutes but reported to management that she could not continue due to the pain. This added another 5 hours of work to the 18 plus hours that was already uncovered. The station was able to receive auxiliary assistance from another station of approximately 4 hours (PTF Ibarra) but she did not arrive until she had completed her duties at her station (approximately 2:30 pm). This effectively left 19 hours of work that the NALC is contending could have been completed by the 3 OTDL carriers in addition to their own routes. These 3 carriers worked: Robell 10 hours, Roberts 9.83 hours, and Stubler 11.01 hours (started 1 hour early). These carriers were given extra work to a time that they would be able to return to the station by the last dispatch of mail, (Window of operation).

There were no other employees available from other stations in KCKS. As per the local LMOU, vacation bidding is on a city wide basis, this particular week the maximum (20) allowable carriers were on Annual Leave. This number does not include the Sick Leave and Rehab employees of the other 5 stations, the number of carriers who were not at work exceeded the number of PTF's and Casuals that were on the rolls.

Employees who were not on the Overtime Desired List were simultaneously scheduled to work overtime with those carriers who were on the Overtime Desired List at the Wyandotte West Station on June 15, 2006. Management claims that there was an operating necessity for this scheduling and that an applicable past practice exists as authority for this scheduling.

The Union filed a timely Informal Step A grievance which was denied as was a subsequent appeal to Formal Step A. The Dispute Resolution Team declared the grievance at impasse in Step B. The National Business Agent timely appealed this matter to arbitration. The parties stipulated that this matter is properly before the Arbitrator pursuant to Article 15 of the 2001 National Agreement. An arbitration hearing was conducted on May 25, 2007 and the record was closed upon completion of the hearing.

UNION'S POSITION

The Union contends that management violated Article 8.5.G. of the 2001 National Agreement by simultaneously scheduling ODL and non-ODL employees for overtime at the Wyandotte West Station on June 15, 2006. Management has consistently claimed that this contract violation was the result of city-wide bidding for annual leave which left the station short-handed, and that the window of operation requires carriers be off the street by 6:05 p.m. Neither of these claims constitutes anything but an excuse for their failure to abide by the requirements of the National Agreement. Both of these claims are contrary to the clear language of the 2001 National Agreement and are affirmative defenses which management is obliged to prove with a preponderance of the credible evidence – which they did not, and could not do at hearing.

Management may establish a window of operation pursuant to the Article 3 rights, of the 2001 National Agreement, however, the exercise of those Article 3 rights are limited to be consistent with the requirements found elsewhere in the 2001 National Agreement. In this case, if it was the window of operation that resulted in the violation of Article 8.5.G. then management's application of their Article 3 right was in contravention to Article 8, and therefore a contract violation. Windows of operation simply cannot be used as an excuse to violate any provision of the contract, including Article 8.

Management's claim that the city-wide bidding of Annual Leave also resulted in the events of June 15, 2006 in which Article 8 is violated is also without merit. Bidding for annual leave occurs months in advance of the month of June. Management knew, or should have known

that the were facing a week in which five employees were going to be out of the station because of their annual leave bids. Management knew, or should have known, that there are other events which will limit the availability of other employees due to medical restrictions, sick leave, and other such unpredictable, though routine events. If management is going to operate the Wyandotte West Station, particularly with a restrictive window of operations, then the rigors of efficiency, the requirements of the National Agreement, added to that window leaves management far less room for error. Management must effectively plan, including contingencies for unpredictable events, if they are to balance implementing their window of operation, be efficient and live up to their obligations under the National Agreement. Clearly management failed miserably in these obligations on June 15, 2006 – and it is neither fair or consistent with Article 8 that the bargaining unit employees should be required to pay the price for a lack of effective personnel planning by the management at the Wyandotte West Station. Management violated the contract, not the employees, and the employees lost rights under Article 8.5.G for which they should be made whole.

The Union has shouldered its burden of proof in this matter when it showed the fact that non-ODL employees were simultaneously scheduled and worked overtime with the ODL employees at Wyandotte West Station on June 15, 2006. The Union has provided Arbitrator Mittenthal's national level awards in H4C-NA-C-19, 21 *et seq.* delineating when non-ODL employees may be forced to work overtime. Pursuant to Arbitrator Mittenthal's awards management forced non-ODL employees to work overtime contrary to what the framers of Article 8.5.G. envisioned as legitimate reasons to do so.

The Union respectfully requests that this grievance be sustained, and that the Arbitrator

make the aggrieved employees whole. The Union requests that administrative leave with pay be granted those non-ODL employees who were forced to work overtime on June 15, 2006 and that the ODL employees be compensated for lost overtime on June 15, 2006 up to a maximum of twelve hours per employee.

POSTAL SERVICE'S POSITION

In the instant case, management at the Wyandotte West Station knew in advance of June 15, 2006 that they had 8 open routes which would need to be cased and carried on that date. As a result, ODL employees were scheduled to work to the maximum extent possible within Wyandotte West's window of operation which includes a Dispatch of Value (DOV) at 6:05 P.M. When it was determined that the routes could not be covered solely through the use of the three available ODL employees and employees otherwise working their regularly scheduled workday, non-ODL employees were scheduled to work on their non-scheduled day and overtime was assigned to non-list employees at the end of their regularly scheduled workday.

While the Union argued that Wyandotte West Station is not properly staffed, they provided no evidence to show that this is true. At the time of the grievance, Wyandotte West had no vacant routes. They had a PTF and a reserve regular carrier assigned to the station as well as two limited duty employees who could case or carry partial routes. There was no evidence provided that under normal circumstances this station has any staffing issues. The main reason for the need for overtime on the day in question was the fact that 5 routes (out of 19 at the station) were vacant due to bid vacation. This is a result of a Local Memorandum of

Understanding which allows vacation to be bid by seniority, city wide. Since there are more senior employees at Wyandotte West than any other station, this station sometimes has an unusually large number of carriers on bid vacation at one time.

Management has shown that it did everything possible, including borrowing a PTF from another station, to avoid mandating overtime for non-list employees. The Union provided no evidence that management could have done anything differently than they did on the day in question. Of the three ODL employee available to work, two worked approximately 10 hours and one worked 11 hours.

While employees on the ODL are available to work up to 12 hours, the work in question needed to be accomplished within a 10 hour time frame between 8:00 a.m. to 6:05 p.m. when the final truck leaves the station for the plant. Carriers at Wyandotte West are normally scheduled to begin work prior to 8:00 a.m. because not enough mail is available for them to case prior to that time. However, one ODL carrier was scheduled to begin one hour early on June 15 as it was determined that there would be enough mail available for one employee to case prior to the usual 8:00 a.m. starting time.

Many years ago, the Postal Service in Kansas City, Kansas, like many other cities across the nation, established a customer service goal of having all mail delivered to its customers by 5:00 p.m. each day. Carriers have long been required to make every effort to return to the station no later than 5:40 p.m. in order for all mail to be processed and loaded on the truck which arrives at the station at 5:50 p.m. and departs for the plant at 6:05 p.m. Carriers are scheduled to work accordingly. This has been a long standing past practice which was accepted by the Union at Kansas City, Kansas and not grieved until one year ago. While Step B settlements provided in

the grievance package show the Union grieving the simultaneous scheduling of list and non-list employees for overtime, this occurred only when the ODL carriers were not worked up to the DOV. The Step B decisions resolving these grievances called for the payment of the ODL carriers only up to the DOV (which is normally 10 hours, not 12).

The 5:00 p.m. operational window and the DOV have not changed. Nothing has changed in the way management schedules overtime. The 5:00 p.m. window of operation, the 6:05 p.m. dispatch of value, and the simultaneous scheduling of list and non-list employees to meet those goals has been in place for as long as anyone can remember. Any yet, in 2006, the Union for the first time began filling grievances in Kansas City, Kansas on management's failure "maximize" the ODL to 12 hours prior to scheduling non-list employees.

Management is not required to work the ODL employees 12 hours merely because non-ODL employees were simultaneously scheduled for overtime based on a legitimate, long established operational window. Clearly, there are no provisions for such in the contract or any other handbook, manual or memoranda.

The Union attempts to argue that the 6:05 p.m. dispatch of value is not a legitimate business reason for simultaneously scheduling list and non-list employees. The plant manager provided a written explanation regarding the necessity for the dispatch of value which is contained in the grievance file. His testimony was outlined in a letter sent to the Postmaster, which is contained in the grievance file. While the Union argues that the dispatch of value is not always met and is, therefore, invalid. Management provided several awards where arbitrators have determined that the mere fact that an operational window is not always met does not invalidate the practice.

For all of the foregoing reasons, management respectfully requests that this grievance be denied as being without merit.

ARBITRATOR'S OPINION

The is no dispute that the management at Wyandotte West Station simultaneously scheduled non-ODL and ODL employees to work overtime on June 15, 2006. There is also no dispute that there was a window of operation that had as one of its goals a dispatch of value from the Wyandotte West Station at 6:05 p.m. Further, the parties have a LMOU which requires Annual Leave bidding to be accomplished city-wide. Complicating matters in this case, is the fact that Wyandotte West is a desirable work location and has a high seniority workforce in the City Letter Carrier craft. The question before this Arbitrator is whether the circumstances and the events of June 15, 2006 at the Wyandotte West Station justified management's simultaneous scheduling of non-ODL employees to work overtime with employees who were on the ODL at this station.

The record of evidence in this case contains facts which are not in substantial dispute. There are, however, arguments in this record which are in dispute. There were also nineteen previous arbitration decisions entered into this record, in addition to those contained in the grievance file. The parties both assert that the issues in this case have been resolved at the National Level and it is simply for this Arbitrator to apply those National Level interpretations to the record of facts in this matter. This Arbitrator will examine the relevant National Level awards in this record before applying the principles decided there to the specific facts present in

this matter.

The parties have argued various authorities and contend that these authorities each support their respective positions. Among these authorities are National level awards concerning the simultaneous scheduling of ODL and non-ODL employees. There were also a host of regional awards entered into this record as guidance for this Arbitrator. In the considered opinion of this Arbitrator, the facts and circumstances are similar (though not identical, to those in E01N-4E-C 06175483, DRT 05-042641 decided by this Arbitrator in May 5, 2007).

Article 8, Interpreted at the National Level[1]

Article 8 of the parties' 2001 National Agreement (Joint exhibit 1) states: *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***: Sections A and B refer to the establishment of an Overtime Desired List, and how an employee is placed on that list. Section C.2.a states the general rule: *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.* Section G states exceptions to the general rule: *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. . . .*

[1] Much of this section is repeated from E01N-4E-C 06175483, DRT 05-042641, May 5, 2007 written by this Arbitrator. The reasoning in that award, in large measure applies to this case as indicated here.

Arbitrator Mittenthal has been asked to interpret Article 8 and the various understandings (including the Letter Carrier paragraph and memoranda) operationalizing Article 8. In a series of decisions Arbitrator Mittenthal was faced with various dimensions of simultaneous scheduling, and management's rights to use non-ODL employees (e.g., H4C-NA-C 19, 21). Arbitrator Mittenthal also interpreted Article 8's "new" language in a case he heard in January of 1991 (H4C-NA-C 30), where he opined:

. . .

> The parties simply stated that "the new language [in Article 8] is not intended to change existing practices relating to the use of employees not on the overtime desired list when there are insufficient employee on the list available to meet the overtime needs." These words do not create a new criterion for simultaneous scheduling. They do nothing more than embrace "existing practices." Thus, the parties agree that whatever " . . . practices" were in existence on this subject before December 1984 would continue in effect after December 1984.[2]
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> The memorandum accepted the status quo in this area, whatever that may mean. It is asserted, in clear and unmistakable terms, that "the new language [in Article 8] is not intended to change . . . " the customary ways of handling simultaneous scheduling. Nor can the Memorandum support any new contract obligation. Its limited scope could not have been made any plainer, " . . . this [M]emorandum does not give rise to any contractual commitment beyond the provisions of Article 8 . . . " If that is true of the Memorandum, it must also be true of the negotiations which led to the Memorandum. In face of these statements of purpose, it cannot be said that the Memorandum negotiators intended the examples they cited to constitute a new obligation with respect to simultaneous scheduling. Or, to express the point more directly, the examples of time critical situations which the parties believed would justify simultaneous scheduling cannot reasonably be regarded as the only situations which could possibly justify such scheduling. What can or cannot be justified, according to the Memorandum, depends on "existing practices." Given the parties' sophistication in bargaining, they could hardly have meant the term "existing practices" to be

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[2] Arbitrator Mittenthal also identifies July 1984 as the appropriate date for the determination of existing past practices elsewhere.

limited to the negotiators' examples.

Arbitrator Mittenthal recognized that there were customary ways of handling simultaneous scheduling which were intended to continue under a Memorandum of Understanding negotiated between the APWU and the Postal Service – during a period in which APWU and NALC had the coordinating bargaining producing a single contract for both crafts. Arbitrator Mittenthal also describes at least one set of circumstances which would justify simultaneous scheduling: *"time critical situations."* However, he also discussed other issues justifying such scheduling which are not at controversy in this matter.

Relevant Facts

Management's contentions in this matter are that there are *"time critical situations"* which bind the parties, hence this Arbitrator, that arise from the Window of Operations promulgated by Postal management in Kansas City, Kansas so that the plant may timely process mail. That Windows of Operations includes a Dispatch of value at 6:05 p.m. which requires carriers to return to the Station no later than 5:40 p.m. so as to meet that Dispatch of Value. Further complicating matters in this specific case is the fact that there is a Local Memorandum of Understanding which requires vacation bidding be accomplished on a city-wide basis, and Wyandotte West is a high average seniority Station.

Herein is the basis of the Service's arguments in this matter. The December 6, 2006 letter

from Mark Scarborough (Joint exhibit 2, p. 36) makes clear references to *time critical situations* necessary for the plant to efficiently process incoming and outgoing mail. In fact, there is no dispute between the parties that under Article 3, management has the right to establish operational windows to maintain the efficiency of operations. Arbitrator Mittenthal's award in H4C-NA-C 30 speaks to a broader context than simply time critical situations. The main thrust of Mittenthal's analysis concerns the practices of the parties that existed prior to December of 1984 (or July of 1984), and the fact that the examples relied upon by the APWU did not define the universe of either the existing practices or the time critical situations – in that case the APWU did not convince the Arbitrator that non-ODL employees ought not be used except in pre-existing practices which were used as examples in the Memorandum. Arbitrator Mittenthal noticed that business necessities are a rather broad and dynamic category of activities, which over time, and with technological progress change and may not be included in some limiting set of examples. As such Arbitrator Mittenthal determined that the parties were sophisticated enough to allow current business necessities to be controlling as they might arise and be proven. Therefore, it is clear that past practice may be a basis for management to prevail, or that time critical situations are an equity weighing heavily in favor management in these cases.

Management has argued past practice in this case. The practice argued by management is that the Window of Operations has existed for many years, and this gives local management license to do what is necessary to meet the rigors of the Window of Operations. As the parties note, and management argues, until about a year ago, there was no problem, and the Union had not filed grievances concerning the Window of Operations. What is not evident from this record, is any evidence of a past practice that permitted simultaneous scheduling of ODL and non-ODL

employees for overtime. What is in this record is a series of Step B decisions, in which the Dispute Resolution Team decided that the Window of Operations did not justify the violations of Article 8 which they observed in those records, and awarded up to 10 hours of total work to the aggrieved employees. However, it is also no clear that these Step B decisions are the totality of such decisions, and that the Dispute Resolution Team considered the matters present in this case. This Arbitrator is not persuaded that these limited number of Step B decisions are sufficient to establish a binding past practice. Even if such a practice was established, there are problems with an application of those practices, because they would serve to amend Mittenthal's decision in the above cited case – which the B Team may not do.

In fact, there is a letter from Ms. Medvidovich, Vice President for Midwest Operations to Postal management which states, in pertinent part (Joint exhibit 2, p. 186):

> . . . We have numerous grievances pending which are related to violations of Article 8, specifically in the area of overtime assignments. During the discussions, we found that the majority of these violations are related to the instruction in the "Midwest Area Proposals for Success" requiring carriers to be off the street by 4:30 p.m. daily. Some managers are assigning non-volunteer employees in lieu of carriers on the volunteer lists to avoid having carriers out past 4:30 p.m.
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> The "Midwest Area Proposals for Success" were designed to place emphasis on the importance of timely collections, error-free handling of collection mail, and assurance that collection mail is dispatched to allow timely processing. Making operational changes that lead to carriers being back in the office by 4:30 p.m. each day assures that all collection mail is available for dispatch. The "Proposals" certainly do not authorize deviations from instructions included in the National Agreement - EL 901.
>
> Please assure that postmasters and managers understand that these guidelines are required to managed in accordance with contractual requirements.

What this letter does is to clearly establish that the Postal Service overreached, at a minimum, in claiming that there was a long established past practice concerning the existence of the Window of Operation in the Kansas City, Kansas installation, and that this practice permitted management to simultaneously schedule ODL and non-ODL employees to work overtime in the Wyandotte West Station. A practice as urged by management in this case is clearly at odds with the instructions in this letter cited above. Arbitrator Mittenthal in H4C-NA-C 30 clearly limited the practices which are applicable to permitting simultaneous scheduling of ODL and non-ODL employees to those established practices existing and mutually acceptable to the parties before JULY of 1984 (page 7 of that award) clearly no such practice exists in Kansas City, Kansas. From this letter it is clear that no such practice existed in this District since the end of calendar year 2000.

Further, management has not shown mutual acceptance or reliance by the Union of their alleged practice. The standard necessary to prove a past practice is a rigorous standard which requires frequent applications, consistent with the alleged principle, and mutual understanding and acceptance of that principle. Nothing was entered into this record which could be interpreted as supporting such a standard.

Simultaneous Scheduling, Window of Operations, Dispatch of Value and the Contract

Management also contends that the relevant National Level awards permit an exception to the bar of simultaneous scheduling, that bar is *time critical situations.* The Window of Operation is termed a goal. Clearly, the Dispatch of Value is of substantial importance to the

processing of mail at the plant, and is to be afforded deference by the Union and this Arbitrator. However, a goal is a goal. The Dispatch of Value is a goal which does not rise to the level of contractual authority, as clearly indicated by the clear and specific language of the preamble of Article 3 – which is the authority for management to establish a Window of Operations and a Dispatch of Value, to wit (Joint exhibit 1, p. 5): "The Employer shall have the exclusive right, ***subject to the provisions of this Agreement and consistent with applicable laws and regulations . . .*** " Article 3 rights are contingent upon management following the requirements of the National Agreement elsewhere stated.

Without a showing of *time critical situations* apart from the Window of Operations (a management prerogative pursuant to Article 3) Article 3 requirements binds management to adhere to Article 8 requirements (the same principle stated in the August 21, 2000 letter cited above, Joint exhibit 2, p. 186). Clearly there are many examples of time critical situations, as noticed by Arbitrator Mittenthal in his decision cited above, but a decision by management is not a time critical situation in this application. Matters beyond management's direct control are the sorts of issues to which Arbitrator Mittenthal spoke in his award, and he may have envisioned other issues – the rubric of which may not be stretched to include the Window of Operation in Kansas City for these issues, and under these circumstances.

In all other respects the reasoning found in this Arbitrator's decision in E01N-4E-C 06175483, DRT 05-042641, May 5, 2007 applies in this matter. Management's discretion to establish a Window of Operation is clear and unambiguous, however, to demonstrate a *time critical situation* requires specific evidence of such a situation and not simply an assertion that a plan, goal or Window of Operation is sufficient to void a clear and unambiguous provision of the

2001 National Agreement.

Vacation Scheduling and the LMOU

Management asserts that the vacation scheduling and high average seniority at Wyandotte West as the foundation of the problem which gave rise to the ODL and non-ODL simultaneous scheduling of overtime. From this record, it appears that management's theory is of merit. However, it is this very theory which is the fatal flaw in management's case in this matter. It is clear that bidding for vacation time occurs months in advance of the June 15, 2006 date. Management is obliged to plan for the predictable absences, and that such predictable absences cannot be permitted to result in contract violations without a finding of managerial culpability. In this case, a single employee being injured on June 15, together with two rehab employees having restricted hours is not an unusual circumstance in any station with 19 routes. While these circumstances may constrain management, management must plan for such matters, and it is not necessary for the Union to prove any staffing short-falls under this set of circumstances and these facts.

This Arbitrator is persuaded from this record that management is responsible to adequately plan and staff, and to argue that vacation bids resulted, in the main, in the June 15 incident is essentially an admission by management that this grievance is of merit. If for no other reason, this Arbitrator would have no alternative save to find that this grievance is of merit and should be sustained.

Harsh and Absurd Results

Arbitrators must avoid decisions which impose harsh and absurd results on the parties, or on one party.[3] In this case, management's Window of Operation, Dispatch of Value, and obligations for city-wide bidding for vacation without adequate planning creates a self-fulfilling prophecy of scheduling problems. In essence, such a schedule effectively eliminates the bargained-for benefit of Article 8, Section 5 of the 2001 National Agreement. Worse still, a finding that management may rely on vacation bids to create a time critical exception would be to deny the Union the benefit it negotiated into its LMOU with respect to city-wide vacation biddng. Effectively these are harsh and absurd results, which this Arbitrator may not impose. If such a change is to occur in the application of Article 8, that change must occur at the negotiations table, not in this forum as the Union pleads in this matter.

This does not bar management from such changes. As is clear from the decision in H4C-NA-C 30, there are ways that management can rehabilitate a case of alleged violations of Article 8, and those require proof of an established practice pre-dating July 1984 or a legitimate business necessity (apart from management's plan). Once the Union proves simultaneous scheduling, management may still prevail by adducing evidence that it had the right to do so – again through credible evidence of an appropriate practice or business necessity. No such evidence was proffered at hearing in this matter.

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[3] See Elkouri and Elkouri, *How Arbitration Works, sixth edition*, Washington, D.C.: Bureau of National Affairs, Inc., 2003, pp. 470-72.

Conclusion

The equities in this matter weigh heavily in favor of the Union. Further, the preponderance of credible evidence supports the Union's position that simultaneous scheduling occurred and no practice, pre-dating December or July of 1984, or business necessity was proven through the steps of the grievance procedure. The contract, and prior arbitration awards makes clear that overtime is to be distributed to ODL Carriers, and that exceptions to this general rule exist. Those exceptions were not proven to be applicable in this case, only assertions that exceptions exist and should be applied which ar. The record, however, is devoid of any proof that such exceptions for operational necessity exist, or should be applied. Therefore this Arbitrator is persuaded that the grievance must be sustained.[4]

In examining the remainder of the arbitration awards entered into this record, several were not on point, or were based on a substantial body of evidence which was not present in this case. Those cases cited in the JCAM were persuasive as demonstrating what the parties' mutual intent was for these specific issues and helped to shape this decision. In general, however, the parading of prior decisions simply takes the Arbitrator's time, hence the parties' resources, and should be limited only to those decisions which illustrate the applicable points, under useful records of evidence.

Remedy

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[4] This is consistent with the decisions rendered by regional arbitrators faced with similar facts and circumstances. In particular see the decision of Linda DiLeone Klein, whose reasoning in that decision is clear and on point (I94N-4I-C 97122042).

The Union requests administrative leave as compensation for non-ODL carriers who were forced to work overtime. After prolonged and careful consideration, this requested remedy is without merit. Those individuals forced to work overtime were paid a premium rate of pay for their work.[5] This Arbitrator is persuaded that the premium rate of pay is adequate compensation for these employees, and that once those hours were worked, they cannot be replaced in any meaningful way by this mere mortal.

The Union requests that a monetary remedy be awarded to those ODL employees who lost overtime hours because of management's aggrieved actions in simultaneous scheduling non-ODL employees instead of ODL employees, to the maximum of twelve hours per employee. Management's actions are inconsistent with the contract, and no serious attempt was made to provide proof through the grievance procedure that an operational necessity existed. While Management's advocate is experienced, articulate, and extremely competent, she cannot perform miracles by correcting the absence of appropriate arguments and evidence at Informal Step A or Formal Step A. The fact is simple, this action by management appears to have been to attempt to gain limitations on Article 8 through arbitration which were not negotiated. Further, it is impossible to remedy the harm to ODL employees in the quarter following their be improperly denied the opportunity to work the overtime to which they were entitled. Therefore, the ODL employees are to be paid the monetary remedy of the overtime rate for the hours they should have worked, had management not violated the contract, limited to twelve hours per employee on the

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[5] In particular see the decision of Linda DiLeone Klein, who determined that the overtime pay received by the non-ODL carriers was all that was due as remedy (I94N-4I-C 97122042). Arbitrator Klein's decision is also consistent with this Arbitrator's views enunicated in a prior decision concerning these issues (E01N-4E-C 06042723) September 3, 2006 from Kansas City, Missouri.

ODL at the overtime rate.

Finally, the Union's request for a cease and desist order is granted. Management is to cease simultaneous scheduling of non-ODL and ODL employees, without an established practice, operational necessity, or other proper cause for such scheduling – what was enunciated by management in this matter is not good cause for simultaneous scheduling of ODL and non-ODL employees.

No other remedy is due in this matter, save that which was discussed above.