

C# 10421

REGULAR ARBITRATION PANEL

In the Matter of the Arbitration

.between

UNITED STATES POSTAL SERVICE

and

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

Grievant: John Eppenstein

Post Office: Boston, MA

Case No: N7N-1E-C 31363

NALC No: 90-169

NALC GTS No: 6924

Before Jonathan S. Liebowitz , **Arbitrator**

Appearances:

For US Postal Service

Ronald K. Fredey, Manager, Labor Relations

For Union:

John J. Casciano, NALC Advocate

Date of Hearing:-

November 15, 1990

Place of Hearing:

P.O., 25 Dorchester Avenue, Boston, MA

Award:

1. The Postal Service at Wellesley Hills Post Office, Boston, MA violated Article 8.5.B.2.b of the National Agreement as to the blanket refusals of supervision, particularly of Acting Supervisor Seltzer, to leave messages of calls for overtime on grievant Eppenstein's answering machine during the period March 3 - March 23, 1990. The Service shall follow procedures as to such calls consistent with the discussion in the Opinion.

2. Mr. Eppenstein shall be paid ten hours' overtime pay to make him whole for the demonstrated instances in which the Postal Service violated the above-cited section of the National Agreement.

Date of Award: November 20, 1990

Jonathan S. Liebowitz

**Jonathan S. Liebowitz
Arbitrator**

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NALC - NEW ENGLAND REGION

Opinion

The stipulated issues are: (1) Did the Postal Service improperly bypass the grievant for an overtime opportunity on 3/3/90 and subsequent days? (2) If so, what shall the remedy be?

The grievance states that management at the Wellesley Hills Post Office is in violation of Article 8 of the National Agreement in that on March 3, 1990, it deliberately bypassed Full-Time Carrier John Eppenstein for an eight-hour overtime opportunity and again on subsequent non-scheduled days for additional overtime opportunities. The grievance states that Mr. Eppenstein is on the O.T.D.L. and that management's reason for not calling him in is that Acting Supervisor Larry Seltzer refuses to leave a message on an answering machine, hears the message, hangs up and does not wait to see if the party picks up the phone. The grievance continues that consequently, Carrier Eppenstein is down approximately fifty hours' overtime compared to other carriers on the O.T.D.L.; management's actions constitute deliberate bypassing of overtime opportunities and are unwarranted. The corrective action requested is that grievant be paid all overtime hours for each bypassed opportunity beginning with March 3, 1990.

The Steward's Step 1 grievance worksheet states that the grievance was denied because grievant used an answering machine and did not talk on the phone.

Management's Step 1 grievance summary says that Acting Supervisor Seltzer attempted to contact grievant on the morning

of Saturday, March 3, 1990 without success, that grievant has an answering machine and that Seltzer was unable to speak to him directly. It states that management cannot rely on whether grievant will or will not play back his messages to find out if he has been called in to work and that the supervisor must get the route covered in a timely fashion to provide the service that customers depend upon. It continues that it is grievant's responsibility once he signs the O.T.D.L. to make himself available when needed for call-ins. That summary also states the Union's position that Seltzer did not make a reasonable attempt to reach grievant, that when the tape comes on, he hangs up without waiting for grievant to respond, and that this has left grievant down approximately fifty hours (of overtime).

Management's Step 2 grievance summary states that the phone rings four or five times before going to the machine; if grievant is unavailable to make personal contact, the next person in line (on the O.T.D.L.) is contacted. Management states that coverage of unscheduled absences requires fast responses and that the luxury of leaving messages on answering machines is not available. At Step 2, management's decision states no deliberate bypassing of overtime opportunities. The grievance appeal to Step 3 reiterates the Union's contentions. Management's Step 3 decision refers to eight hours of overtime pay on March 3rd and states that grievant was called on the date in question but did not answer the telephone and that since there was an immediate need to fill an assignment, there was no reason for the

supervisor to leave a message on grievant's answering machine.

The Union cites Article 8.5.B.2.b of the National Agreement:

During the quarter every effort will be made to distribute equitably the opportunities for overtime among those on the list.

The Union seeks pay for grievant for 43.75 hours at the overtime rate; it cites data from the O.T.D.L. showing that Mr. Eppenstein lags employee Chiasson (also spelled "Chaisson") by that number of hours as of Friday, March 23, 1990, the last date in question.

The Union states that the Service is obligated to make a reasonable attempt to contact all employees on the O.T.D.L. for overtime work and that it did not do so here by leaving a message on the answering machine or giving time to respond; therefore, it maintains, overtime was not equitably distributed at the Wellesley Hills Post Office per the Overtime Desired List.

The Service contends that it made attempts to contact Mr. Eppenstein but reached the answering machine. It cites Article 3.C of the National Agreement. That Article states as pertinent that the Employer shall have the exclusive right, subject to the provisions of this Agreement and consistent with applicable laws and regulations, to maintain the efficiency of the operations entrusted to it (Article 3.C). The Service states that it is grievant's choice to have an answering machine and that there was no contract violation in not leaving a message on it.

The Union introduced testimony that Mr. Seltzer, the Acting Supervisor, stated that he would not talk to an answering machine; that was true at that time; but Mr. Eppenstein does receive calls and messages now, including from Mr. Seltzer. Shop Steward Frank Vitiello testified that as of March 3rd, grievant ranked very low in overtime hours worked in the quarter (48); he was called the next week for two hours on Friday; per Vitiello, Eppenstein reports at 0900, Seltzer at 0530; so Seltzer could have assigned at least two hours' overtime a day. That testimony also shows that supervisors maintain a list on a pad of the next day's non-scheduled carriers by sequence according to the lowest number of overtime hours worked, primarily for use by supervision at night.

Malcolm Hession, the supervisor at Step 1, testified that he denied the grievance because he has to get the routes covered, especially business routes, and has no time to leave a message on a machine and to see if the party will answer it; in the two or three years that grievant has been at that Post Office, Hession called and got him in; he did not leave word on grievant's machine that if he wanted to come in, he should call in the next couple of minutes. He did not recall if he lets the phone ring until the machine comes on, but he did terminate calls when it was on because he had to get a route out then and there. Mr. Hession testified that a number of Letter Carriers at Wellesley Hills have answering machines; he gets last-minute call-ins and tries to cover business routes early within a reasonable time

frame; Mr. Eppenstein was a utility employee at the time, covering a string of routes; now he is a reserve and can cover any route in the office. Hession said that he tries to align carriers with the routes they know best but will put a carrier on a route based on low overtime hours worked to make overtime equitable; he needs someone as soon as possible for business routes to eliminate customer complaints. He did not call grievant and say to pick up the phone and did not speak while the message was playing.

The Service stated that it would not disagree that there were times, with sufficient notice, when a supervisor may have left a message on Eppenstein's answering machine.

Grievant testified that he was not asked to come in early on overtime; Seltzer said that once the machine was on, he would hang up; Eppenstein spoke to Seltzer and Manager Carroll; and a few weeks after that, they started to call him again. At that time, his wife was working on Tour 1 and six months pregnant so he had the machine to be sure that he would get her calls; he worked on Tour 2; the machine comes on after four rings. Grievant testified that he would wait until the machine would stop; he would pick up the phone but the supervisors would not stay on the line; but Supervisors Hession and Rennie (spelling phonetic) did call and did leave messages on the machine. Mr. Seltzer does so now.

Mr. Eppenstein also testified that there were times when he had to put his name circled on the call list to remind super-

vision that he was on the O.T.D.L.; he drives a truck, hours 0915 to 1815, Monday through Friday. In the early morning, he would answer the phone and no one would be there; at work, he pointed out to Seltzer two people who were called in but were higher on the O.T.D.L.; Seltzer would say that that was Seltzer's mistake.

In a memorandum in evidence, Eppenstein states as pertinent that on March 3rd, he was on the O.T.D.L. and had worked several non-scheduled days before; management elected to call the second person on the list and worked down the list; Eppenstein was never called. The next paragraph, about bringing routers in early to set up routes, was not an issue at hearing; Eppenstein states, however, that he is the lowest in total hours of overtime given out in the Wellesley Hills Post Office.

Mr. Vitiello's portion of that memo adds that Hession has called the machine and that Eppenstein has called back and reported for overtime.

But Eppenstein testified that he did not call the Post Office to ask if they were trying to get hold of him; he gets wrong numbers and did not know if it was the Post Office; he was left off the call list, January-March. But the Service points out, and it was agreed, that the grievance covers March 3 to March 23, 1990. Eppenstein added that Night Supervisor Rennie called in this time period and left a message that if you want to come in, call me back in two minutes; Hession left messages on the machine on Saturdays to report early on Monday(s).

As the Service points out, the Union has the burden of proving a contract violation in this case; the facts here call for balancing the interests of supervision in getting prompt coverage on routes for employees who will be absent with the right of the employees on the O.T.D.L., including Mr. Eppenstein, to equitable distribution of opportunities for overtime per the "every effort" language of the National Agreement. If management is placed by the circumstances in such a rush that the supervisor cannot leave a message to call back within two minutes, then the use of the answering machine would not be practicable. This is particularly true in view of the fact that other Letter Carriers at Wellesley Hills have answering machines. It could be administratively impossible if there were a time bind and the calls produced a number of messages on machines.

However, if supervision receives sufficient notice, perhaps a matter of hours, that a carrier will not be in, then a supervisor would have enough time to call and leave a message on the machine with a two-minute call-back period or, if it is during the night, with a reasonable limitation as to when the call-back must take place.

On the other hand, if Mr. Eppenstein is to use an answering machine, he should have one which is triggered after one or two phone rings; he should know that if the phone rings at a time when he might expect a call-in, to call the Post Office to find out if supervision is attempting to reach him for overtime. Of course, if he is there when the call comes in, he should pick it

up whether the machine starts to record a message or not. And if he is out and not going to be in for a while, his outgoing message should so state so supervision can know that. He has the flexibility to tailor his outgoing message to particular circumstances.

A blanket refusal to leave a message on the answering machine, the position then of Acting Supervisor Seltzer and, per the evidence, of Supervisor Hession at times, not shown to have been necessitated by any rush caused by the needs of the Service, amounts to an unreasonable insistence on personal contact which is inconsistent with making every effort to equalize overtime opportunities as required by Article 8.5.B.2.b. That was changed following the discussion among Eppenstein, Seltzer and Carroll; so Eppenstein can be called, at least at times (and Hession did call him and leave a message at times) consistently with the needs of the Service. The blanket refusal denied Mr. Eppenstein the opportunity to have equitable access to overtime. Therefore, the Union is entitled to a direction to the Service as a remedy.

On the other hand, Mr. Rennie, the Tour 1 supervisor, did call and leave word to call back within two minutes; that seems reasonable where time permits and was actually done; where time permitted, Mr. Hession called on Saturdays to report early on Monday. In addition, grievant was partially responsible because he would not call back when he would hear the phone ring and because his answering machine apparently required longer than necessary to come on.

The claim for 43.75 hours' overtime is excessive on these facts. All that was shown is the March 23rd comparison with employee Chiasson. Per the O.T.D.L., Chiasson appears to be the second highest in overtime hours worked as of that date (of 32 listed employees). So that is not a good benchmark. In any event, we do not know how many hours were lost because supervision would not leave a message on the answering machine, because grievant did not call back, or because supervision had no time to leave such a message when covering the routes. A make-whole remedy must be based upon, or derived from, demonstrated facts and not be conjectural or speculative. The only specific evidence as to loss of an overtime opportunity is Eppenstein's testimony about Seltzer's admission - we do not know how many times that occurred - and the statement in Eppenstein's memo in evidence. That evidence may reasonably be taken to show two instances of lost overtime, eight hours on March 3rd and, it may be inferred, two (0700 to 0900) per the conversation with Seltzer. These figures are supported by the fact that Eppenstein received eight hours' overtime on Saturday, March 17th, and otherwise received it in two-hour increments at the times in issue.

I have considered, but do not agree with, the Postal Service's argument that the remedy sought by the Union is outside the scope of the National Agreement and, therefore, would be contrary to the provisions of Article 15.4.A.6, second sentence. I have not overlooked the fact that the O.T.D.L. table in

evidence shows that grievant was lowest in the Wellesley Hills Post Office as to overtime hours worked, apparently beginning with March 10th. He was below all but one other employee, Malany, before that. Still, there is no demonstrated figure as to number of hours which Eppenstein would have worked which can be used to draft a make-whole remedy for him other than the direction to the Postal Service and the ten hours' overtime pay mentioned above.

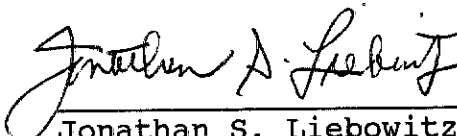
An award redressing the demonstrated contract violation and directing an appropriate remedy follows.

Award

1. The Postal Service at Wellesley Hills Post Office, Boston, MA violated Article 8.5.B.2.b of the National Agreement as to the blanket refusals of supervision, particularly of Acting Supervisor Seltzer, to leave messages of calls for overtime on grievant Eppenstein's answering machine during the period March 3 - March 23, 1990. The Service shall follow procedures as to such calls consistent with the discussion in the Opinion.

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Dated: November 20, 1990


Jonathan S. Liebowitz
Arbitrator