C#12924

REGULAR REGIONAL ARBITRATION PANEL

In the Matter of the Arbitration	
between	Grievant : B. Perkins
UNITED STATES POSTAL SERVICE	Case No : S0N-3C-C 15012
	GTS # : 005865
	Region : 4
and	POST OFFICE : Osceola, AR
NATIONAL ASSOCIATION OF LETTER CARRIERS, AFL-CIO	

BEFORE	:	Mark I. Lurie, Arbitrator
APPEARANCES		
For the U.S. Postal Service	:	William V. Woods
For the Union	:	John W. Hogue
Place of Hearing	:	United States Post Office
	:	Osceola, Arkansas
Date of Hearing	:	February 19, 1993
U.S.P.S. Brief Postmarked, and the Hearing Declared Closed	:	March 12, 1993

AWARD

The grievance is sustained. The Grievant should have Saturday restored as a non-scheduled day, and be paid overtime for all hours worked on Saturdays, through the date of this Award, in coverage of carriers on incidental leave.

April 1, 1993

Mark I. Lurie
Arbitrator

REGULAR REGIONAL ARBITRATION PANEL
OPINION AND AWARD

In the Matter of the Arbitration	)	
between	)	Grievant : B. Perkins
	)	Case No : S0N-3C-C 15012
UNITED STATES POSTAL SERVICE	)	GTS # : 005865
	)	Region : 4
and	)	POST OFFICE : Osceola, AK
NATIONAL ASSOCIATION OF LETTER CARRIERS, AFL-CIO	)	

BEFORE : Mark I. Lurie, Arbitrator

APPEARANCES

For the U.S. Postal Service : William V. Woods

For the Union : John W. Hogue

FACTS

The Osceola Post Office employs 6 carriers (2 PTF's and 4 regular carriers) to cover 5 routes (4 regular and 1 auxiliary route). The Grievant is a letter carrier and, for the past 26 to 27 years, Saturday and Sunday have been his nonscheduled days. The Osceola Office is contractually obligated to grant incidental leave on any given day to at least one employee who requests it; Saturday has been a popular day for the taking of such leave. Thus, frequently on Saturdays, there have been 4 carriers available to service the 5 routes, and overtime has been required. The Grievant is on the overtime desired list, and over the past year, has been called in to work overtime on 42 of the 52 Saturdays.

On October 1, 1992, the Grievant was advised by letter that, effective with the 23rd pay period of 1992, his non-scheduled days would be changed to Thursday and Sunday; this

grievance was filed in response to that change. Under "UNION CONTENTIONS" in the Standard Grievance Form, the Union claimed that Management had violated:

> "Article 30 of the local agreement, and... Articles 8, 41 and 30 of the national agreement."

No further explanation of the specific contractual terms deemed violated was offered.

There was no Step 2 hearing held or decision issued and, notwithstanding that, by reason of Article 15, Section 3.C., the grievance would have automatically progressed to the next step in the grievance procedure, the Union filed a written appeal to Step 3. The appeal cited violations of articles 8, 15, 19, 30 and 41 of the National Agreement, but did not cite any violations of the Local Memorandum of Understanding dated May 27, 1992, (hereinafter, the "LMOU"). The appeal explained only one basis for the grievance - that the Service's action constituted harassment and age discrimination against the Grievant. The Service's Step 3 decision concluded:

> The decision to change non-scheduled days [is] a management decision as provided for under Article 41. The Union has failed to demonstrate how the National Agreement was violated.

ISSUE

The issue is whether the change of the Grievant's nonscheduled days from Saturday and Sunday to Thursday and Sunday violated the Collective Bargaining Agreement or the Local Memorandum of Understanding negotiated thereunder.

RELEVANT PROVISIONS OF THE AGREEMENT AND THE LMOU

Article 3, Management Rights

The Employer shall have the exclusive right, subject to the provisions of this Agreement and consistent with applicable laws and regulations:

A. To direct employees of the Employer in the performance of official duties;

B. To hire, promote, transfer, assign, and retain employees in position within the Postal Service and to suspend, demote,

discharge, or take other disciplinary action against such employees;

C. To maintain the efficiency of the operations entrusted to it;

D. To determine the methods, means, and personnel by which such operations are to be conducted;...

Article 8, Hours Of Work

Article 8.2.C.

The employee's normal work week is five (5) service days, each consisting of eight (8) hours, within ten (10) consecutive hours, except as provided in Section 1 of this Article. As far as practicable the five days shall be consecutive days within the service week.

Article 15, Grievance-Arbitration Procedure

Section 2. Grievance Procedure - Steps

Step 2:(d) At the meeting the Union representative shall make a full and detailed statement of facts relied upon, contractual provisions involved, and remedy sought. The Union representative may also furnish written statements from witnesses or other individuals. The Employer representative shall also make a full and detailed statement of facts and contractual provisions relied upon. The parties' representatives shall cooperate fully in the effort to develop all necessary facts, including the exchange of copies of all relevant papers or documents in accordance with Article 31. ...

Step 2:(g) If the Union representative believes that the facts or contentions set forth in the decision are incomplete or inaccurate, such representative should, within ten (10) days of receipt of the Step 2 decision, transmit to the Employer's representative a written statement setting forth corrections or additions deemed necessary by the Union. ...

Step 3:(b)(*inter alia*) "Each party's representative shall be responsible for making certain that all relevant facts and contentions have been developed and considered."

15.3 Grievance Procedure-General

(B) Failure by the Employer to schedule a meeting or render a decision in any of the Steps of this procedure within the time herein provided (including mutually agreed to extension periods) shall be deemed to move the grievance to the next Step of the grievance-arbitration procedure.

Article 30, Local Implementation

Article 30.B.

There shall be a 30-day period of local implementation... on the 22 specific items enumerated below, provided that no local memorandum of understanding may be inconsistent with or vary the terms of the 1990 National Agreement.

21. Those other items which are subject to local negotiations as provided in the craft provisions of the Agreement.

22. Local implementation of this Agreement relating to seniority, reassignments and posting.

Article 41, Posting
Article 41.1.A.3.
The existing local procedures for scheduling fixed or rotating non-work days... shall remain in effect unless changes are negotiated locally.

Local Memorandum of Understanding, dated May 27, 1992, Article 30 Item 2 provides

All Full-Time City Carriers will be on a fixed schedule and off days now assigned to city routes shall remain with the carrier.

UNION'S POSITION

The change in the Grievant's nonscheduled days violated Article 30, Item 2 of the LMOU, which provided that off-days assigned to the city routes would remain unchanged. The violation of Article 30, Item 2 of the LMOU also contravened Article 41.1.A.3. of the Agreement, because it constituted a change in local procedures for scheduling fixed non-work days, but was not negotiated locally.

The change also violated Article 8 of the Agreement. When the Grievant's work week contained a nonscheduled Saturday and Sunday, it consisted of 5 consecutive service days. When his nonscheduled day was changed from Saturday to Thursday, the obligation was imposed upon Management, by Article 8.2.C., to demonstrate that retaining the Grievant's consecutive work week would not have been practicable. The Service has not so demonstrated.

THE SERVICE'S POSITION

The Union's contention that the posting was improper under Article 30, Item 2 of the LMOU had not been raised prior to the arbitration hearing. It was not argued by the Grievant at the Step 1 meeting; nor by the Union at the Step 3 hearing. Under Article 15, Section 2, Step 3(b), the Union representative was obligated to make certain that at

the Step 3 hearing, "...all relevant facts and contentions [were] developed and considered." He failed to do so. Furthermore, because the Union waited until the arbitration hearing to argue that specifically Item 2 of LMOU Article 30 had been violated, the claim constituted an unfair surprise to the Service and, consequently, should not be afforded consideration by the Arbitrator. To do otherwise

> "would allow the Union to merely list the entire National agreement as an alleged violation and then pick and choose whatever alleged violation they deemed necessary to bring forth at arbitration." [from the Service's post-hearing brief]

Finally, the Service rejected the Union's contention that, under Article 8.2.C., it would have been practicable for the Grievant to have been scheduled for five consecutive work days, with Saturdays and Sundays off. The weight of arbitral authority favored practicability as meaning compatible with operational efficiency; the high level of overtime expense caused by the Grievant's having Saturday as a non-scheduled day was obviously inefficient.

DECISION

The Service's claim - that the Union failed to timely argue the violation of Article 30, Item 2 of the LMOU - is in the nature of an affirmative defense, for which the Service had the burden of proof. The Arbitrator finds that the Service has not sustained that burden.

On the Standard Grievance Form, the Union expressly alleged that Management had "violated Article 30 of the local agreement..." While the Union did not specify which of the items in Article 30 was allegedly violated, the only item which bore even a remote relevance to the claimed violation was Item 2; and, indeed, Item 2 dealt directly and plainly with the subject matter of the action being contested - Item 2 prohibited any change to the Grievant's nonscheduled days. The Arbitrator finds a] that the Grievance Form was sufficiently precise as to have put the Service on notice that it was being charged with a violation of Article 30, Item 2 of the LMOU, and b] that the Service's argument that the Union had initially made overly broad

claims of violations, from which it later selectively picked and chose at the arbitration hearing, is not well-founded.

The Arbitrator also finds that it is not reasonable to construe the Union's failure to reiterate, in the Step 3 appeal, the alleged violation of LMOU Article 30, Item 2, as an intentional waiver of that claim. The Grievant was deprived of a Step 2 hearing. This discourages the conclusion that the absence of the Item 2 claim from the Step 3 appeal was the product of an airing of the issue, and its subsequent willfull abandonment, as opposed to a clerical omission, with no waiver of contract rights intended. As for whether the Union abandoned the claim by failing to raise it at the Step 3 hearing, the Arbitrator finds that there is insuffienct evidence to prove that a violation of LMOU Article 30, Item 2 was not discussed at the Step 3 hearing or, even if not discussed, that it was nonetheless clearly apprehended by the parties to be a relevant basis upon which the grievance claim was made. In short, given the Union's initial citation of Article 30 of the LMOU, Item 2 thereof looms as such an imposing and dispositive contractual right, bearing clearly and squarely on Management's action, that the Service cannot reasonably be presumed to have been unaware of its relevance, and the Union cannot be presumed to have waived its application, in the absence of unambiguous proof by the party making those claims - the Service. Such proof has not been presented in this case.

Management has the discretion, under Article 3 of the Agreement, to direct its employees in the manner it deems most efficient. Construing Article 8.2.C. "practicability" as advocated by the Service, non-consecutive days off may be instituted when Management reasonably believes doing so will improve efficiency. The Arbitrator has not been called upon to determine whether LMOU Article 30, Item 2 is inconsistent with the National Agreement. Under Article 30, Item 2 of the LMOU, Management has relinquished its authority to change the scheduled days off of its full-time city carriers, including the Grievant, even if doing so will

improve the efficiency of operations; i.e., is practicable. The Arbitrator therefore concludes that Management violated Article 30, Item 2 of the LMOU when it changed one of the Grievant's nonscheduled days.

AWARD

The grievance is sustained. The Grievant should have Saturday restored as a non-scheduled day, and be paid overtime for all hours worked on Saturdays, through the date of this Award, in coverage of carriers on incidental leave.

April 1, 1993

Mark I. Lurie
Arbitrator