C-27125 A/B

REGULAR ARBITRATION PANEL

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In the Matter of the Arbitration

between **Grievant: Class Action**

UNITED STATES POSTAL SERVICE **Post Office: Brooklyn**

and **Case No.: A01N4AC06221329-06NC669**
A01N4AC06221328-06NC668

NATIONAL ASSOCIATION OF LETTER CARRIERS, AFL-CIO **NALC DRT No. 15-049098**
NALC DRT No. 15-049099

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BEFORE: Irene Donna Thomas, Arbitrator

APPEARANCES:

For the United States Postal Service: Albert Alverez, Jr., Labor Relations Specialist
P.O. Box 7401; Islandia, NY 11760-9401

Witnesses: George Baez, Manager, Customer Services

For the NALC: Bruce Didriksen, Regional Administrative Assistant
Thomas A. Matthews, Regional Administrative Assistant
347 W. 41st Street, New York, New York 10036

Witnesses: Anthony Martucci, Letter Carrier

Place of hearing: 1050 Forbell Street; Brooklyn, New York

Date of hearing: April 27, 2007
Record Closed: May 15, 2007

Date of award: June 15, 2007

Relevant Contract Article: 8

Contract Year: 2001 - 2006

AWARD SUMMARY

The grievance is sustained but the requested remedy modified. The employer violated the national agreement by scheduling non-ODL employees to work overtime before assigning ODL employees to work up to 12 hours; but, the remedy is limited to that stated in the Article 8 Memorandum of Understanding.

Irene Donna Thomas, Arbitrator

INTRODUCTION

Pursuant to the arbitration procedures between the United States Postal Service and the National Association of Letter Carriers, AFL-CIO, the undersigned was selected to hear and decide the dispute described herein and to render a final and binding Opinion and Award. The union filed these grievances asserting that management violated the national agreement when it called in carrier employees who were not on the OTDL to work overtime.

The arbitration hearing was opened before this arbitrator on April 27, 2007 at 1050 Forbell Street in Brooklyn, New York. The parties were given a full and fair opportunity to present sworn testimony, submit documents and arbitral precedent in support of their respective positions. Upon the parties' request, they were given an opportunity to submit written closing statements which were mailed, as required, on May 11, 2007. The record closed on May 15, 2007 upon receipt of the union's closing brief. The testimony, documents, arguments and arbitral decisions submitted by the parties were carefully considered in rendering the Opinion and Award outlined below.

ISSUE

The parties stipulated that the issues to be decided are: (1) Did management violate Article 8 when on August 8, 2006 it called in carriers not on the ODL for 8 hours and not maximize the ODL to 12 hours? If [so], what shall the remedy be?, and (2) Did management violate Article 8 when on August 9, 2006 it called in carriers not on the

ODL for 8 hours and not maximize the ODL to 12 hours? If [so], what shall the remedy be?

STIPULATIONS

1. These cases can be consolidated.

2. Management has a 5:30 p.m. "Window of Operations."

3. The times listed on page 14 of Joint Exhibit 2 and Joint Exhibit 3 are accurate.

4. The union stipulated that George Baez, Manager, Customer Services, will testify regarding the issues identified in Joint Exhibit 3 in the same manner as he testified with respect to issues in Joint Exhibit 2.

5. The record is to be held open for two weeks to give the parties an opportunity to serve written briefs. After Arbitrator Thomas receives the briefs, the record is closed.

STATEMENT OF FACTS

Despite the voluminous record in these cases which has been read and considered carefully, the background facts are simple: the employer in Brooklyn, New York has unilaterally established a 5:30 p.m. "Window of Operation." This means that the employer has determined that all letter carrier street duties are to be completed by 5:30 p.m. On August 8, 2006, the employer at the Brooklyn GPO called four non-ODL employees in to work overtime. Management did not work all ODL employees, PTFs and casual carriers a maximum of 12 hours. On August 9, 2006, management, again, called four non-ODL employees to work overtime. Again, management did not work all ODL

employees, PTFs and casual carriers a maximum of 12 hours.

SUMMARY OF TESTIMONY

Testimony of Anthony Martucci, Letter Carrier (Shop Steward GPO)

Mr. Martucci testified that he has been employed by the United States Postal Service for 29 years. He is a shop steward at the Brooklyn GPO and has held this position for 10 years. Mr. Martucci investigated and filed these grievances.

Mr. Martucci testified that he works at Cadman Plaza, near the Brooklyn Bridge. About 100 letter carriers work there. Auxiliary carriers are used when regular employees are not at work. There are 10 parcel post routes, an auxiliary route, 55 letter carrier routes and 10 "U-group" routes.

There are separate ODL lists for letter carriers and truck drivers. Mr. Martucci testified, that there were 16 letter carrier employees on the ODL, excluding truck routes. On a non-scheduled day, people on the work assignment list, a list which stipulates that these employees will work on their assignment only. They are not eligible to come in for eight hours of overtime. These work assignment list employees only work overtime on their assigned route. If a work assignment employee on a regularly scheduled day worked "off of his day," this would be a contract violation. Of those employees on the ODL, their work hours would be from 7:30 a.m. to 4:00 p.m. The "Window of Operation" at the Brooklyn GPO is 5:30 p.m. Having this "window of operation" means that the employer tries to have every carrier off the street by 5:30 p.m. If a carrier's tour ends at

4:00 p.m., he has an hour and a half, or only 9.5 hours of overtime. Article 8.5 of the national agreement calls for a maximum of 12 hours of overtime.

Mr. Martucci testified that the "station complement" means the number of people who are supposed to be employed at the facility. There are supposed to be 102 employees; but, there are actually 86 employees there. The Brooklyn GPO is short 16 employees. There was supposed to be 11 PTFs and 2 casual employees. But, at the time the grievance was filed, the GPO had six PTFs and 1 casual. Therefore, every day, the GPO started with four people short. Local supervisors, "Rivera" and "Ray Kemp" said that they tried to get people from other stations to work. They further said that most times, they were unsuccessful because those stations were in the "same boat" so no one wanted to give up an employee(s). He testified that it is "fair to say" that the offices thought that they were understaffed.

The "annual leave matrix" shows the number of carriers allowed to be off on vacation in any particular week for all stations in Brooklyn. With respect to the Brooklyn GPO, 12 employees were allowed to be out (in Station 11201). During the week in question for these two grievances, 12 carriers were out on vacation. There were not enough employees to deliver the routes. To cover, management used both the ODL employees and the work assignment lists (people who are not on the ODL) to make up the staffing. No one on the ODL worked 12 hours. The PTFs did not work 12 hours and the casual did not work 12 hours.

Mr. Martucci testified that this is not the first time that the union has filed a grievance on this issue. The union has filed four grievances. One grievance was settled at Step 1 and the others were settled at Step 2 (the Form A level). At the time, management did not offer an explanation for settling the grievances, they just did.

Mr. Martucci testified that based upon his investigation of these dates, he sees an Article 8.5.G violation. Management uses the "window of operation" to justify the use of non-ODL employees to work overtime. The office was not properly staffed. The ODL was not being managed properly because ODL employees did not get up to 12 hours of overtime before assigning non-ODL employees to work it. Mr. Martucci testified that he met with George Baez, who was manager of the Station at the time. He asked Mr. Baez why he was scheduling non-ODL employees in this manner. Mr. Martucci testified that Mr. Baez told him that it was "sort of an emergency." Mr. Martucci asked what was the emergency. Baez said that they had to get the carriers off the street by a certain time. Mr. Martucci testified that he makes it a point to introduce himself to everyone who comes in the door. He does a "meet and greet," so to speak, and knows that there was not a "big turnover during the summer." There were no transfers or quitting employees. There may have been one employee on workers' compensation or light duty.

On cross examination, Mr. Martucci testified that overtime work is usually assigned in the morning; but, it may be assigned at other times. On rare occasions, the employer may ask carriers to "rack a route" when they come back to the station.

Overtime assignments are usually required because routes are split and sometimes a because a route is overburdened. The carrier route book shows how the route can be split. It can be split 4 or 5 ways. A 5 way break down is when a carrier gives an assist on his or her own route. That route can have up to 2 hours of overtime or some other amount of time that management determines. In cases of work assignments, other carriers would not be assigned.

On re-direct examination, Mr. Martucci testified that how the route is split is pre-determined. There is no rule determining how a route must be split. Management often "play[s] around with that."

Concerning the eight carriers asked to work on their non-scheduled day, all of those employees, except one, were on the work assignment list. Mr. Martucci testified that he received a "lot of complaints" from employees who are forced to work on their non-scheduled day.

Testimony of George Baez, Manager, Customer Services

Mr. Baez testified that he works at the Cadman Plaza Post Office. He is the responsible official for Cadman Plaza. Carriers normally begin their tour at 7:30 a.m. and end their tour at 4:00 p.m. As soon as they report to work, the supervisor instructs them as needed, i.e., to go to their respective stations. They spend about three hours in the station and then go into the street to deliver mail. If the day is normal, they return between 3:30 to 4:00 p.m. There are days when it is necessary to have the route covered.

Some reasons that routes are covered include: vacation picks, unscheduled absences (people who call in sick) and vacancies.

Mr. Baez testified that managers cannot change the annual leave matrix. If employees request days off for medical appointment, etc., they are granted. These absences are in addition to vacation absences. Coverage is needed for sick leave and emergencies (i.e., child is ill or there is some type of medical emergency) and an employee is not available for the day. Mr. Baez testified that management usually finds out about emergencies that morning.

Mr. Baez testified that management goes into the day with a "plan" scheduled from the day before. He testified that he sits down, looks at the vacancies they have and assigns PTFs and casual employees as needed. He looks at the amount of people that he has on the ODL. He figures he has "X" number of routes and "X" number of employees. Mr. Baez testified that "we can split that and still be within the Brooklyn policy of the window of operation." When they sit down and plan the route staffing, it is based on current employee staffing.

Mr. Baez testified that there are two lists: the ODL and the work assignment lists. When assigning staff, they look over the ODL and exhaust this list. If everything goes as scheduled from the day before, using the ODL is sufficient. Mr. Baez testified that there have been occasions, many times, that he has had to change the plan. On August 8, 2006, the employer brought in people who were not on the ODL: Bermudez, Zhen, Colastanti

and Simpson. He testified that he did not recall the ODL candidates who were available. Mr. Baez testified that based on this schedule, on August 7, he looked at the schedule for August 8. He had an exorbitant number of vacant routes that could not be covered only with the ODL.

Mr. Baez testified that when management goes around and assigns people to work overtime, it is based on the volume of mail. Carriers are given specific instructions to be back (off the street) by 5:30 p.m. If a carrier starts working at 7:30 a.m. and he can't work beyond 5:30 p.m., he gives him an hour in the office and one hour in the street. Carriers are due back in the office by the window of operation.

Mr. Baez testified that there are carriers who returned to the office before 5:30 p.m. If the carriers return to the office at 5:30 p.m., they end their tour at 5:30 p.m. Mr. A. K. Clark, for example, returned from the street at 4:38 p.m. (16:78) or about a quarter to 5:00 p.m. Mr. Baez testified that as long as an employee returns by the window of operation, they get overtime up to the window of operation. He gives instructions to carriers in the morning. Carriers can make a request for assistance. The supervisor will usually try to accommodate the carrier so that they can come back before the window of operation. If a carrier is on the street and feels that he cannot complete the route by 5:30 p.m., they call from the street by 3:00 p.m. The supervisor will then determine if assistance is available at the station. If so, they will send these employees out. If not, the supervisor will instruct that carrier to complete the route. Mr. Baez testified that there are

times, then, when carriers are not back by 5:30 p.m.

Mr. Baez testified that Cadman Plaza had a "couple of vacancies" at the time of this grievance. There were at least two vacancies. Vacancies are created due to retirement, through transferring out, bidding to another assignment, etc. Due to the bidding process, there are vacancies usually every 30 days. The bidding process is a contractual obligation that management is required to meet.

Mr. Baez testified that the Station gets new employees about once or twice a year. These new employees are not always capable of performing the duties. The turnover is "very high", about three new employees quit about three weeks ago after being on the job about two months.

On cross-examination, Mr. Baez testified that he is not necessarily the individual who makes the daily assignments. He testified that at the time of the grievances, there were a number of people on annual leave. He cannot recall the emergencies on August 8 or August 9. He testified that "he believes" that he had a minimum of two vacancies on these days. He could not recall retirements just before August 8. He testified that he lost about two to three PTF employees, assigned to Cadman, but were assigned to work at other stations. Mr. Baez testified that it was a "management decision" to assign the PTFs to work at other stations. He testified that he did not recall any transfers just before these particular dates.

Also on cross-examination, Mr. Baez testified that there are times when a letter

carrier must go beyond his end time. During that period, only one carrier, Clarke, called from the street. He testified that he knew this because "we definitely do not schedule carriers to work 11 hours." The employee would have had to call from the street to get authorization.

Mr. Baez testified that four people were called in to work. The "pivoting" is scheduled in the morning. A "pivot" is when an assignment is split between a number of carriers, i.e., one assignment is split between four people. Mr. Baez testified that he would have known in the morning that whoever got a "pivot" would be out longer than the normal time to return from the street. Mr. Baez testified that there is no reason why a carrier could not work in the station beyond 5:30 p.m. Mr. Baez testified that the last dispatch truck is about 5:50 p.m.

POSITION OF THE PARTIES

Union:

The union's position can best be summarized by its post-hearing brief. The grievances involve the assignment of overtime work at the Cadman Plaza Station on August 8 and August 9 of 2006. In each case, the NALC is challenging the use of full-time regular (FTR) letter carriers who are not on the Overtime Desired List (ODL), rather than maximizing use of casual, part-time flexible (PTF) and full-time regular employees who are on the ODL. In both instances, the Employer cites a unilaterally devised "window of operation" (WOO) as justification for the action(s) taken. In Brooklyn, the

"window of operation" during the relevant time period was set at 5:30 p.m. Because the employer's motivation for implementation of the "window" has been to have all delivery personnel complete their street duties by 5:30 p.m., only the affected employees' return times, and no necessarily their "punch-out" times are relevant to the dispute. In these cases, the union's cited violations involve the use of full time regular employees not on the ODL on their non-scheduled days, so the provisions of the "letter carrier paragraph" (Article 8, Section C.2.D) are not applicable to the dispute(s).

The issue of the employer imposing and administering a "window of operation" by virtue of its Article 3 rights, where such action results in the compromising of its contractual obligations under Article 8, has been the subject of numerous previous arbitrations, with varying results. The Employer invariably defends its right to simultaneously schedule full time regular employees who are both on and off the ODL by citing its Article 3 rights, the 1986 Mittenthal arbitration award which establishes that situations sometimes exist which would necessitate such "simultaneous scheduling," and/or a liberal interpretation of what constitutes an "emergency" under the Article 3, Section F, contract language.

In far too many of these cases, the employer cites its contractual rights without regard to the contractual obligation it bears, or worse yet, it uses the "window of operation" as an excuse to accomplish other goals, such as the elimination or reduction of "penalty overtime" (i.e., work over ten hours on a scheduled day, work over eight hours

on a non-scheduled day, overtime work on the fifth regular-scheduled day of the work week).

In the evaluation of the contractual merit in cases such as this, the Union generally asks that the arbitrator examine three facets of the Employer's decision-making before rendering a final decision regarding this issue:

1. Whether the Employer has provided bona fide reasons for creation of the "window," or if that decision is arbitrary on its face, thereby providing no justification for any "simultaneous scheduling" where the "window is cited.

2. Whether the Employer, notwithstanding its own "window argument, has made judicious and efficient use of available employees (casuals, PTFs and FTRs on the ODL) to relieve those not on the ODL from being mandated to work overtime.

3. Whether the employer, in good faith and consistent with its contractual obligations, has sufficiently staffed the affected workplace to address foreseeable personnel shortages and thereby eliminate the need for "simultaneous scheduling."

For the purpose of the appeals before the arbitrator in these cases, the union acknowledges that the creation of the Brooklyn "window of operation" of 5:30 p.m. was dealt with in previous arbitration proceedings and is not the basis for these grievances. However, the union does *not* acknowledge that the previous arbitration decisions in any way absolve the employer from a continuing responsibility to do everything in its power to observe the Article 8 rights of Letter Carriers in its employ. Any contention by the

Service that the arbitral ruling upholding the implementation of the Brooklyn "window" gives license to an unfettered disregard for the Overtime Desired List must be rejected by the Arbitrator. To do otherwise would effectively render the language of Article 8.5 meaningless.

The evidence in this case shows that on August 8, 2006, eight non-ODL employees were forced to work their non-scheduled days against their will and forced, in individual instance(s), to work in excess of eight hours on their non-scheduled days(s), in contravention of the specific provisions of Article 8, Section F. No ODL employee worked 12 hours and only one worked 11 hours. Twelve available employees had at least one-half hour of additional time that they could have been utilized to provide street assistance before the 5:30 p.m. "window" closed. Two employees had more than one hour of available time.

On August 9, 2006, no available ODL employee worked 12 hours. None worked 11 hours. Two PTFs worked less than 30 minutes of overtime each. Eleven available employees had at least one-half hour of additional time that they could have been utilized to provide street assistance before the 5:30 p.m. "window" closed, including six with more than one hour, and two others with almost one hour.

This data shows the scheduling choices that were within the authority of local management at the Cadman Plaza station. It clearly shows that available employees who were ready, willing and able to work additional overtime without working past the 5:30

p.m. "Window" were not utilized in the manner consistent with the spirit and intent of Article 8.5.g of the National Agreement. Several regional arbitrators have held that when the employer invokes the "window of operation" defense as justification for simultaneous scheduling of non-ODL with ODL letter carriers, the burden shifts to the employer to prove that there was no alternative other than to do so. In these cases, local management has demonstrated only the belief that use of the "window of operation" argument provides immediate and unfettered immunity from Article 8 contractual obligations.

Finally, the N.A.L.C. firmly believes that there is an inherent obligation on the part of the employer to provide ample resources to fulfill its mission. It should go without saying that any organization which provides a service should count its employees as its primary resource. It is beyond dispute that the creation of the "window of operation" is an "organizational and/or operational change" within the meaning of Handbook EL-312, Section 211.1(h), and, as such, necessitates the continual reassessment of staffing needs to meet the demands, both operational and contractual, of compliance. For these reasons, among others, these grievances should be sustained.

Employer:

The employer's position can best be summarized by its post-hearing brief. The employer argued that a review of the facts as present at the arbitration hearing revealed that:

1. On August 8 and August 9, 2006 the GPO carrier section did not have

sufficient letter carriers to meet delivery requirements within the Window of Operations. ON August 8, 2006, 4 non-ODL carriers were brought in on their non-scheduled day and worked a total of 33 hours and 42 minutes. On August 9, 2006, 4 carriers were brought in on their non-scheduled day and worked a total of 32 hours.

2. There is no indication that on those two days management could have delivered the mail timely without brining in the non-ODL carriers for overtime.

The crux of the union's case is that as a result of a "lack of staffing," management violates the National Agreement when carriers not on the ODL are called in to work 8 hours. This approach by the union is the most recent argument in their attempt to do away with the Window of Operations established nearly a decade ago in Brooklyn. The argument that carriers who returned earlier and "could have gone back out" is the same argument and circumstances the union presented before Arbitrator Dienhardt, #06255275, Union #15-049371 and 07009863, Union #15-049374.

It is the position of the Postal Service that management did not violate Article 8.5.G when non-ODL carriers were required to work simultaneously with other carriers. This is based on the National Agreement and past arbitration awards that were presented to the Arbitrator. Non-ODL employees were required to work overtime because there were no ODL employees **available**–they were simultaneously working.

The Memorandum of Understanding Between the United States Postal Service and Joint Bargaining Committee Re: Article 8 states in part:

> The new provisions of Article 8 contain different restrictions than the old language. However, the new language is not intended to change existing practices relating to use of employee [sic] not on the overtime desired list when there are insufficient employees on the list available to meet the overtime needs. For example, if there are five available employees on the overtime desired list and five not on it, and if 10 workhours are needed to get the mail out within the next hour, al ten employees may be required to work overtime. But if there are 2 hours within which to get the mail out, then only five on the overtime desired list may be required to work.

That MOU appears to anticipate the necessity of the Postal Service to improve customer service to the extent that a Window of Operations would at some point be instituted nationwide.

The employer contended that the issue of "proper" staffing and a violation of Article 8.5.G is properly before us in this arbitration. The issue is "Did management violate Article 8." If the union wanted to press the issue of staffing, the issue should have been, "Is management required to keep a certain level of staffing in order not to try to avoid requiring non-ODL carriers from doing overtime."

It would also be awkward for an arbitrator to rule that management is required to maintain a certain level of staffing for the purpose of not requiring non-ODL carriers to perform overtime. That would then make the union a partner with management on hiring practices. It would also raise the question of degree. If a station was down 25% of its staffing, would it have to hire? What about 15%? What about 7%? Does the union decide along with management at what pont it would be mandatory to hire carriers?

As a remedy for management's alleged violation of Article 8.5.G, the union

requests that the Postal Service pay an additional monetary award above the normal 50% for the violation. There is no basis in the Agreement to pay this additional 50% since the remedy for an Article 8 violation is clearly stipulated in the National Agreement (Memorandum of Understanding, dated December 20, 1988, page 162).

Finally, the arbitrator should consider the following points:

1. Management could not have met its requirement to try to get all the carriers off the street in order to meet the window of operations without calling in the non ODL carriers to work simultaneously with ODL carriers, PTF's, and the casual carrier. There were no more "available" ODL carriers to utilize.

2. Management has a contractual right to utilize the non ODL carriers.

3. There is no contractual obligation to have a certain level of staffing in order to, when necessary, utilize non ODL carriers to work overtime. The use of ODL carriers under 8.5.G is not connected to Article 7 of the National Agreement. Management in these cases utilized the employees that were available to them, not employees who were not yet hired and on the rolls.

The employer argued that in view of all of this, the arbitrator was also requested to consider that these grievances should be denied under the doctrine of "stare decisis." For these reasons, among others, these grievances should be denied.

DISCUSSION AND ANALYSIS

Article 3 of the national agreement provides that the Employer shall have the

exclusive right, subject to the provisions of this Agreement and consistent with applicable laws and regulations: * * *

B. To hire, promote, transfer, assign, and retain employees in positions within the Postal Service . . . .;

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.

The parties' Memorandum of Understanding regarding the overtime provisions of Article 8 explicitly states that:

> excessive use of overtime is inconsistent with the best interests of postal employees and the Postal Service, it is the intent of the parties in adopting changes to Article 8 to limit overtime, to avoid excessive mandatory overtime, and to protect the interests of employees who do not wish to work overtime, while recognizing that bona fide operational requirements do exits that necessitate the use of overtime from time to time. The parties have agreed to certain additional restrictions on overtime work, while agreeing to continue the use of overtime desired lists to protect the interests of those employees who do not want to work overtime. (emphasis added).

With respect to the Letter Carrier craft, rather than requiring a non-ODL employee to work mandatory overtime, the employer is required to use auxiliary assistance when

management determines that overtime or auxiliary assistance is needed on an non-ODL employee's route on one of his regularly scheduled days.

Article 8.5.G of the national agreement provides that when scheduling overtime, "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." Article 8.5.G, then, places an affirmative obligation on management to avoid ordering employees to work mandatory overtime. The parties agreed in their JCAM that one purpose of the overtime desired list is to excuse full-time carriers not wishing to work overtime from having to do so. The parties agreed that:

> Before requiring a non-ODL carrier to work overtime on a non-scheduled day or off his/her own assignment on a regularly scheduled day, management must seek to use a carrier from the ODL, even if the ODL carrier would be working penalty overtime.

Thus, the employer must minimize overtime for employees not on the overtime desired list and maximize overtime for those on it. After careful consideration of the evidence and testimony, I conclude that this grievance should be sustained.

As a threshold matter, this grievance is not about the "window of operation" or management's right to unilaterally establish a "window of operation" as a means to efficiently accomplish its objectives. The union admitted this proposition. The issue in this case is the effect of the unilaterally established "window of operations" on the union's collectively bargained rights.

It is clear that, in negotiating Article 8, the parties were concerned about limiting forced or mandatory overtime. This issue was so important that the parties embodied the principles underlying Article 8 in a separate Memorandum of Understanding. In that document, the parties agreed that, although the Memorandum did not give rise to independent rights, the intent of Article 8 was "to limit overtime, to avoid excessive mandatory overtime, and to protect the interests of employees who do not wish to work overtime." The parties also agreed, however, that there may be times when bona fide operational needs may required the use of overtime "from time to time." In sum, then, Article 8 precludes the employer from forcing or mandating employees to work overtime without substantial justification.

The substantial justification for forcing employees to work overtime proffered by the employer in these cases is their self-imposed deadline of 5:30 p.m.–the window of operation. Mr. Martucci testified, unchallenged, that management explicitly told him that the "sort of emergency" requiring the use of forced overtime was the "window of operation." Mr. Baez testified that to meet the 5:30 p.m. deadline, management plans to force employees to work forced overtime *the day before.* Thus, before all ODL employees are assigned to work up to 12 hours of overtime, management has already scheduled non-ODL employees to work overtime to fill in for employee vacancies. Scheduling employees in this manner is a violation of Article 8.

It is true that Mr. Baez testified that non-ODL employees are scheduled to work

after available ODL, PTF and casual employees are scheduled to work overtime. But, the plan goes wrong when non-ODL employees are scheduled to work overtime before ODL employees have worked 12 hours of overtime.

The employer counters that there is no contract violation because "simultaneous scheduling" of overtime is permitted under Article 8. The employer points to Arbitrator Mittenthal's national arbitration award to prove this proposition. But, Arbitrator Mittenthal's award does nothing to undermine the intent of Article 8 which is to limit forced, mandatory overtime

Arbitrator Linda DiLeone Klein, I94N4IC97122042-RePPT101 (2001), decided a case based virtually on identical facts. She observed:

> The dispute which arises here is in essence a "clash" between the right of Management to maintain the efficiency of its delivery operations and the application of the overtime provisions which have been negotiated and agreed upon by the parties.
>
> After establishing the 4:30 Window of Operations, the Postal Service relied on the provisions of Article 8.5.D to justify assigning overtime to employees who were not on the ODL rather than ODL employees who had not been assigned overtime to the extent set forth in Article 8.5.G. * * *
>
> On other than his/her own route, a non-ODL employee is subject to working overtime in accordance with Article 8.5.D. They may be required to work overtime if there are not enough qualified ODL employees to work the necessary overtime. However, ODL employees must be assigned to work overtime for the full extent of their obligation under Article 8.5.G. In this regard, Arbitrator Mittenthal addressed the obligation of ODL employees in Case Nos. H4C-NA-C 19 and 21:
>
> > . . . ODL employees do not have the option to accept or refuse overtime beyond the [Article 8, Section] 5F limitations

> [namely, work over eight hours on a non-scheduled day, work over six days in a service week, and overtime work on more than four of five scheduled days in a service week]. They can be required to perform such overtime. The non-ODL employees may not be required to work overtime until the ODL employees have exhausted their overtime obligation under [Article 8, Section] 5G.
>
> In other words, ODL employees must have exhausted their overtime obligations prior to forcing non-ODL employees to work the overtime.
>
> As it relates specifically to the instant case, the Arbitrator finds that Management, by the manner in which it applied the 4:30 P.M. Window of Operations, created an artificial "insufficiency" of qualified ODL employees and thereafter relied on that "insufficiency" to justify implementing the provisions of Article 8.5.D. The Postal Service appears to have determined that any time an ODL employee had to be scheduled for overtime and if that assignment would extend beyond 4:30 P.M., there was automatic justification for concluding that sufficient qualified ODL carriers were not available and that non-ODL carriers would therefore be forced to work the overtime. It appears to the Arbitrator that Management applied the 4:30 P.M. Window in a manner which circumvented the provisions of Article 8.5.G.

The reasoning employed by Arbitrator Klein is equally applicable in these cases.

The manner in which the employer scheduled overtime in these cases not only violated Article 8 but also rendered Article 8.5.G meaningless. It is well-known that arbitrators are not inclined to adopt an interpretation of a collective bargaining agreement that will work a forfeiture. As noted in Elkouri and Elkouri, "the courts have ruled that a contract is not to be construed to provide a forfeiture or penalty unless no other construction or interpretation is reasonably possible." In these cases, the contract should not be construed to work a forfeiture because the language at issue is clear and

unambiguous. The employer's interpretation of Article 8.5.G and its position on "simultaneous scheduling" swallows the exception and becomes the rule. There is no question that the parties intended to limit forced, mandatory overtime. The employer's position in these cases virtually ignore the principles stated in the Memorandum of Understanding concerning the intent of Article 8. There has been an increase in the amount of forced, mandatory overtime being scheduled to carriers on their rest days. This arbitrator notes that the employer did not offer a reason for not scheduling ODL employees to work one or two hours (or whatever is needed) of overtime *before* the start of their schedule in order to meet its "window of operation." The point of the "window of operation" is to get employees *off* of the street by a certain time. It does not preclude the employer from starting to work earlier than usual to meet its self-imposed deadline.

The union argues that the Article 8 violation occurs due to under staffing. The facts support this proposition. The term "overtime" is usually defined in the labor arena as hours worked by an employee in excess of a standard day or week. In a normal case, when management decides that its workload cannot be completed in a particular day, it assigns employees to work overtime, usually that same day, to finish the load. In these cases, management plans to assign employees to work their non-scheduled days as "overtime" before there is actually overtime work to be done, the day before the work actually begins. See Testimony of Mr. Baez. In short, management is assigning non-ODL, non-scheduled employees to work to fill its vacancies. But, this arbitrator cannot

force the employer to hire employees. She can only require the employer to adhere to the terms of the negotiated collective bargaining agreement.

Finally, the employer strenuously argued that the doctrine of *stare decisis* should be applied in these cases. This arbitrator has observed that the doctrine of *stare decisis* "must be used cautiously in arbitration." Matter of the Arbitration of Class Action, A0004AC04064823–040098, et. al. (2004) at page 10. "The rule of *stare decisis* is a judicial policy, based on the principle that, absent powerful countervailing considerations, like cases should be decided alike, in order to maintain stability and continuity in the law." Id. As observed by Arbitrator Gary Wooters, B00M1BC04207750, "an arbitrator hearing a contract dispute is not bound to follow the decision or another arbitrator in a prior case even if the earlier decision involve the same parties, the same issue and the same contract language. Most arbitrators, however, will follow such a prior award unless it [is] plainly erroneous or defective on its face."

In this case, because I find prior awards holding that the window of operations permits the employer to ignore the clear and unambiguous language of Article 8.5.G are "plainly erroneous" or "defective on [their] face," I cannot follow those decisions in good conscience.

But, I do agree with the employer regarding the appropriate remedy. The parties memorandum of understanding clearly states the remedy that is appropriate in cases alleging a violation of Article 8. That agreement must be applied. Accordingly,

AWARD

The grievance is sustained but the requested remedy modified. The employer violated the national agreement by scheduling non-ODL employees to work overtime before assigning ODL employees to work up to 12 hours; but, the remedy is limited to that stated in the Article 8 Memorandum of Understanding.

Dated: Brooklyn, New York
June 15, 2007

Irene Donna Thomas, Arbitrator