C-27037

REGULAR ARBITRATION PANEL

In the Matter of the Arbitration	*	
between:	*	Grievant: Class Action
United States Postal Service	*	Post Office: Yonkers, NY
and	*	USPS Case No: A01N-4A-C 06260654
National Association of Letter Carriers, AFL,CIO	*	NALC Case No: C100922JS

BEFORE: Lawrence Roberts, Arbitrator

APPEARANCES:

For the U.S. Postal Service: James J. Kirk

For the Union: Thomas A.; Matthews

Place of Hearing: Postal Facility, Yonkers, NY

Date of Hearing: March 13, 2007

Date of Award: April 13, 2007

Relevant Contract Provision: Article 8-19

Contract Year: 2001

Type of Grievance: Contract

Award Summary:

The Union complained that the Employer violated the Agreement when they failed to maximize the OTDL by calling a non-ODL Letter Carrier to work on his scheduled day off. Management failed to show that any changes were made to meet their own window of operation. The grievance was sustained.

Lawrence Roberts

Lawrence Roberts, Panel Arbitrator

SUBMISSION:

This matter came to be Arbitrated pursuant to the terms of the Wage Agreement between United States Postal Service and the National Association of Letter Carriers, AFL-CIO, the Parties having failed to resolve this matter prior to the arbitral proceedings. The hearing in this cause was conducted on 13 March 2007 at the postal facility located in Yonkers, NY, beginning at 10 AM. Testimony and evidence were received from both parties. A transcriber was not used. The Arbitrator made a record of the hearing by use of a tape recorder and personal notes. The Arbitrator is assigned to the Regular Regional Arbitration Panel in accordance with the Wage Agreement.

OPINION

BACKGROUND AND FACTS:

The matter involves a class action grievance. The events leading up to this dispute occurred at the Centuck Station in Yonkers, NY.

On 22 September 2006, Management at that Station utilized Letter Carriers that were not on the Overtime Desired List (ODL) prior to maximizing those Carriers that were on the ODL to twelve (12) hours.

The Union claims this is a direct violation of Article 8.5.G, hence the instant grievance. The Employer argues their actions were necessary that day to meet a 5:00 PM Window of Operation.

The Dispute Resolution Teams declared an impasse and the matter was referred to the undersigned for final resolution.

The Parties were afforded a fair and full opportunity to present evidence, examine and cross examine witnesses. The record was closed upon the receipt of oral arguments presented by each Advocate.

JOINT EXHIBITS:

1. **Agreement between the National Association of Letter Carriers, AFL-CIO and the US Postal Service.**
2. **Grievance Package**

UNION'S POSITION:

The Union maintains the Employer violated Article 8.5. It is alleged by the Union that Management assigned overtime to a full-time regular Letter Carrier who was not on the ODL. The Union points out the Carrier was scheduled to work by Management on his non-scheduled day.

The Union mentions that most Arbitrators have decided the Employer may formulate a window of operation, provided that it makes a bona fide effort to meet its contractual commitments.

The Union contends the Employer's Article 8 obligation is not dismissed when the window of operation is sustained. It was mentioned by the Union that if the Service is given free reign to violate Article 8 by merely hiding behind the window of operation argument, it would render that particular provision meaningless.

The Union argues the window of operation carries with it an obligation to continually review and monitor it's impact with respect to the language of the Parties Wage Agreement.

And according to the Union, it is the Employer's obligation to sufficiently staff their facility. As the Union mentions, it is the obligation of the Service to provide the necessary resources to accomplish their goal without violating other provisions of the Agreement.

The Union asserts that Management should have known there were an insufficient number of Letter Carriers available on a continual basis to meet their own window of operation requirement.

The Union asks the Employer's arguments and defense be rejected in this case. The Union requests the instant grievance be sustained and payment be made to the ODL full-time regulars that should have been scheduled to work.

COMPANY'S POSITION:

It is the contention of the Employer that Article 8.5.G has not been violated. According to Management a national level Memorandum of Understanding allows the scheduling of non ODL Carriers if work needs to be accomplished in a specific frame of time. And, the Employer mentions this Memorandum of Understanding has been incorporated into the Joint Contract Administration Manual.

Management points out, that period of time in this case is the 5:00 PM window of operation. The Employer insists that if the Postal Service is to remain a viable organization, then timely delivery of the mail must be accomplished. According to the Service, this is simply an expectation of their own customers.

The Employer insists the Parties Agreement has not been violated and requests the instant grievance be denied in it's entirety.

THE ISSUE:

Did Management violate Article 8.5.G of the National Agreement when they required Letter Carrier(s) Meehan, who are not on the Overtime Desired List (OTDL) to work on their non-scheduled day, prior to maximizing the available carriers?? If so, what shall the remedy be?

PERTINENT CONTRACT PROVISIONS:

ARTICLE 8
HOURS OF WORK

Section 5. Overtime Assignments

"G. 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. Employees on the "Overtime Desired" list:

1. may be required to work up to twelve (12) hours in a day and sixty (60) hours in a service week (subject to payment of penalty overtime pay set forth in Section 4.D for contravention of Section 5.F); and

2. excluding December, shall be limited to no more than twelve (12) hours of work in a day and no more than sixty (60) hours of work in a service week.

However, the Employer is not required to utilize employees on the "Overtime Desired" list at the penalty overtime rate if qualified employees on the "overtime Desired" list who are not yet entitled to penalty overtime are available for the overtime assignment."

ARTICLE 19
HANDBOOKS AND MANUALS

"Those parts of all handbooks, manuals and published regulations of the Postal Service, that directly relate to wages, hours or working conditions, as they apply to employees covered by this Agreement, shall contain nothing that conflicts with this Agreement, and shall be continued in effect except that the Employer shall have the right to make changes that are not inconsistent with this Agreement and that are fair, reasonable, and equitable. This includes, but is not limited to, the Postal Service Manual and the F-21, Timekeeper's Instructions. Notice of such proposed changes that directly relate to wages, hours, or working conditions will be furnished to the Union at the national level at least sixty (60) days prior to issuance. At the request of the Union, the parties shall meet concerning such changes. If the Union, after the meeting, believes the proposed changes violate the National Agreement (including this Article), it may then submit the issue to arbitration in accordance with the arbitration procedure within sixty (60) days after receipt of the notice of proposed change. Copies of those parts of all new handbooks, manuals and regulations that directly relate to wages, hours or working conditions, as they apply to employees covered by this Agreement, shall be furnished the Union upon issuance.

Article 19 shall apply in that those parts of all handbooks, manuals and published regulations of the Postal Service, which directly relate to wages, hours or working conditions shall apply to transitional

employees only to the extent consistent with other rights and characteristics of transitional employees negotiated in this Agreement and otherwise as they apply to the supplemental work force. The Employer shall have the right to make changes to handbooks, manuals and published regulations as they relate to transitional employees pursuant to the same standards and procedures found in Article 19 of this Agreement."

DISCUSSION AND FINDINGS:

The issue of Overtime Desired Lists versus Windows of Operation has been well defined via prior arbitral opinion. Article 3, the Management Rights provision, certainly allows the Service to establish such a guideline. As well, Article 8.5 as negotiated, well defines the Parties intent regarding overtime parameters. On a balance scale, both Articles are of equal weight.

Article 3 allows the Service to manage their operations efficiently and determine the methods, means and personnel necessary to do so. However, the caveat in all of that is the method in which all of that is done, must not be arbitrary, capricious or unreasonable. More importantly, any of the actions cannot violate another Article or Section of the Parties Wage Agreement.

Article 8.5 denotes bargained for language regarding overtime assignments. This Section provides a fair and reasonable method of overtime distribution. To those who

wish to earn premium wages, this language sets guidelines in which such assignments shall be made by Management. This language avoids the arbitrary assignment of overtime. Conversely, it also provides a limited shield to those bargaining unit Employees who may wish not to participate in such assignments.

In this case, the Union alleges Management scheduled a non-OTDL Letter Carrier prior to maximizing the OTDL. Whether or not that actually happened in this case was never an issue. Instead, Management's defense was this was necessary in meeting their 5:00 PM Window of Operation.

At face value, that argument seems credible. On 29 November 2005, a letter was sent to all Postmasters within the Westchester Customer Service and Sales District. In pertinent part, the District Manager stated:

> **"Therefore, effective immediately, it will be the policy of the Westchester District that all mail delivery is completed and the carriers returned to the office by 5:00 PM. This is the time that many businesses close for the day and should be the latest acceptable time for our carriers to be out on the street."**

That language would include the Centuck Station, which falls within the Westchester District, to certainly be under a 5:00 PM Window.

But at arbitration, a document is not evidence, via mere ink to paper, that a Window of Operation has truly been in existence at Centuck since the Postmaster's receipt of such document. Instead, the burden is on that local Management to prove the existence of such a Window of Operation. For if that Window does not really exist, Management becomes defenseless in this case.

And in my considered opinion, that is exactly what happened in the instant case. Management failed to prove, via the preponderance of evidence, the Centuck Station was operating within a 5:00 PM Window on 22 September 2006. Instead, the Union was able to show many cases wherein Letter Carriers were on the street after 5:00 PM. Furthermore, Management failed to show that any operational changes were made to ensure compliance with the directive issued by the District Manager.

Both Union and Employer witnesses testified that based on the morning arrival of the mail dispatch, Letter Carriers do not start work until 8:00 PM. So with that, it would be correct to state that any Carrier working over 8.5 hours would be on the street after 5:00 PM. On Pages 57 and 58 of Joint Exhibit 2, the "Overtime Alert Report" for the week beginning 16 September 2006, there was an excess of some 60 logged events that a Letter Carrier was on the street after 5:00 PM. That evidence was derived from a document generated by the Postal Service.

Yet the letter quoted above states "it **will** be the Policy" to have the mail delivered and the Carriers back to the Post Office by 5:00 PM. Management cannot rely on a defense that cannot be proven to exist. The Policy was ordered to exist via document, but, by the Employer's own evidence, nothing could be further from the truth.

This grievance occurred on 22 September 2006. The Policy was dated 29 November 2005. That is a span of some ten (10) months. In my view, the term **"will"** is absolute. Not only did Centuck Management miss the proverbial Window on that particular day, it clearly appears, more times than not during that particular week, Letter Carriers had not returned to the Centuck Station prior to 5:00 PM.

On that basis, Management's Window of Operation defense clearly falls. For whatever reason, the evidence is quite clear that Centuck Management made absolutely no effort to follow that 29 November 2005 directive. And regardless of Management's argument, that Window of Operation was never really in place.

More so, and paramount in this case was the fact the Employer failed to show any changes were made to comply with the 29 November 2005 Memorandum cited above. In my view, a mere document does not indicate that a Window of Operation exists. For if it were local Management's intent to comply with that 5:00

PM Window, evidence would have certainly been presented to indicate that certain local changes were made. The record in this case is clearly devoid of such content. At this hearing, the Employer did not show that any changes were made toward a compliance with the 29 November 2005 Memorandum. Instead, some ten (10) months later, as a defense, the Service insisted some inherent scheduling right to meet a Window of Operation contractually allowed local Management to schedule outside the parameters of Article 8.5.

The mere fact that a Window Of Operation document was transmitted, does not, in and of itself, indicate the same was actually implemented. Upon receipt of that document, each Office was placed on notice that individual office compliance was required. And to do so, each office was required to perform certain local managerial "tweaks" in order to bring their particular office in compliance with such a Window.

But in this case, Management's only position was merely the fact that a Window of Operation has been created and based solely on that alone, it was their decision to schedule a non-OTDL Carrier on their scheduled off day of to ensure compliance with this Policy.

But as mentioned above, Management fell short in defense. For it was first up to Management to show that some objective change was made to comply with their own 5:00 Window of Operation

mandate. In this case, Management was unable to cite any local compliance plan. Simply put, the Employer Advocate failed to present any Local plan of action toward meeting that mandate. Certainly, it may have not required a significant change of operation, instead, some indication by Management that certain changes were made in an attempt to comply with the District Manager's mandate. Such evidence in this case did not exist.

I find this matter similar to case decided 12 August 2006 (B01N-4B-C 05187029) whereby Arbitrator Dennis J. Campagna found:

> **"First, the Service has not demonstrated the type of exigent circumstances required under the Mittenthal and Marx decisions. In this regard, while acknowledging that 8 carriers had reported off on September 20th, the Service has not shown that this was an "unusual" or unforeseen event of the type requiring a deviation from Article 8.5.**
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> **Second, the Service chose not to utilize employees on the OTDL due to the fact that even with their assistance, the Operational Window of 5:00 PM would not be met. However, this claim is inconsistent with the Service's position that it's Operational Window "is not an absolute bar, it is a goal, a plan". This point has particularly significant in the instant matter where the parties agree that the forced overtime assignment at issue was not a regular occurrence. Moreover, where, as here, the Service chose to establish its Operational Window at 5:00 p.m., it was their obligation to provide the necessary resources to implement its Window, and their failure to do so resulted in a violation of Article 8.5 (G)."**

Management knew beforehand that at least five (5) Letter Carriers were scheduled off that day. Management also knew beforehand that staffing would be short that same day.

Furthermore, the Window of Operation in this case was not a goal or a plan, but instead, an order dated 29 November 2005. And like the above case, it was Management's own obligation to provide the necessary resources to implement it's own Window. And their failure to do so resulted in a clear violation.

The language of Article 8.5 is absolute as well. 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. That language is concise and to the point.

Management failed to show their only choice was to select a Letter Carrier, not on the overtime list to work their off day. Instead, the evidence shows this was only Management's easier choice. It was shown that Management failed to deploy other options. It is not up to the undersigned to point out those other deficiencies. Instead, the Employer failed to show that Local Management made any changes in their local operation in an attempt to comply with the District Manager's directive.

The one deficiency that was found to exist in this case was the lack of a Window of Operation. And for that reason alone, the instant grievance will be sustained in it's entirety.

AWARD

The Grievance is Sustained.

Dated: April 13, 2007
Fayette County, PA