C-31510

REGULAR ARBITRATION PANEL

In The Matter of the Arbitration	GRIEVANT: Class Action
between	POST OFFICE: New Haven, CT
UNITED STATES POSTAL SERVICE	USPS #B11N-4B-C 14159250
	NALC #19-283-14ALL
and	DRT # 14-308087
NATIONAL ASSOCIATION OF LETTER CARRIERS, AFL-CIO	

BEFORE: HARRY R. GUDENBERG, ARBITRATOR

APPEARANCES:

For the U. S. Postal Service: Scott E. Duell
Labor Relations Specialist

For the N.A.L.C.: Joseph Mahon
Arbitration Advocate

Place of Hearing: New Haven, CT

Date of Hearing: August 13, 2014

Panel: New England Regular

Date of Award: September 5, 2014

AWARD SUMMARY: The grievance is sustained in part and denied in part for the reasons discussed in the full decision.

Harry R. Gudenberg

Arbitrator: Harry R. Gudenberg

At the hearing the parties were afforded full opportunity to be heard, to examine and cross examine the witness who testified under oath and to introduce evidence on the issues.

The parties made oral closing statements at the hearing and the record in this case was closed at the conclusion of the hearing.

Based on the entire record and examination of the testimony, evidence and exhibits presented, closing statements and arbitral citations submitted as well as arguments made, all of which has been fully considered, whether specifically discussed or not, the following findings are being issued in this Opinion and Award.

ISSUE STATEMENT

The issue agreed to by the parties at the B Team hearing was: Did management violate the National Agreement, specifically Articles 8.5.C.2., 15.3, and 41 when during the first quarter of 2014 they failed to make the overtime desired list equitable? If so, what is the proper remedy?

SUMMARY OF THE RECORD, EVIDENCE AND TESTIMONY

On April 4, 2014 a grievance was filed at the Allingtown Station which claimed the Service had not distributed overtime

for the first quarter of 2014 (January through March) equitably in accordance with the provisions of the National Agreement.

The grievance claimed five carriers were not made equitable for overtime during this quarter and sought payment at the appropriate overtime rate for these five carriers in amounts ranging from a low range of 4.50 hours to a high of 23.00 hours based on a review by the Union of the overtime records.

The grievance stated the equitable distribution of overtime had been a continuing issue at this facility and the grievance claimed the documents included in the record, which consisted of the Overtime Distribution Lists (OTDL), Employee Everything Reports and Overtime Alert Reports, provided evidence of this failure and said the carriers in this grievance were available to perform overtime work when the work was provided to others and the work should have been distributed on a more equitable basis.

The grievance included examples of hours of overtime to carriers who had been provided with significant amounts of overtime while others were not so provided, which gave rise to the equality issue.

The Union said management had tracked and updated the overtime report during this quarter but failed to do so on an

equitable basis since the carriers on the OTDL with fewer hours and opportunities were not afforded more hours and opportunities as they should have been.

Included as a part of the history of this dispute were a large number of prior cases at this facility (more than twenty since 2008) that resulted in the settlement of prior grievances in nineteen of these cases, either at Step A or B and the payment of overtime to some carriers for management's failure to equitably distribute overtime, while one case was resolved without a payment.

In reviewing this history, approximately two-thirds of these cases were resolved at Step A, while one-third of these cases were resolved at Step B during the period of time from 2009 to 2013 and one case from the last quarter of 2013 was not resolved.

These settlements included various comments that are noteworthy. For example, in a case covering the second quarter of 2012 the resolution included the following comments:

> "The Union provided detailed worksheets which indicate numerous instances where management had opportunities to assign additional overtime work to the affected OTD carriers. These opportunities would have distributed overtime in a more equitable manner."

and

> "The parties mutually agree to work together to ensure overtime is more equitably distributed in future quarters. Management admits the communication between the union needs to improve in regards to overtime equitability. The union asserts the only involvement currently is to monitor proper recording of time distributed. The parties are instructed to review and monitor the OTDL on a regular basis during the course of the quarter…"

While these statements contained both logic and rationality, they were apparently ignored by the parties.

According to the record management claimed the carriers in this grievance had been on leave and not available to work. The Union claimed the carriers were available on the days when other carriers were provided overtime and management made no attempt to make the carriers equitable.

The Union claimed they were not asking for these carriers to be brought up to the average of all carriers, but be equitably brought up to the hours they were available to work when the overtime was assigned to other carriers and these carriers were sent home but were available to work.

The Union asserted they had proven, especially for the hours assigned to carriers during the month of March, that management made no effort to explain why they awarded more overtime hours to employees who had the most overtime hours and

less overtime hours to those employees with fewest overtime hours.

The Union stated the data they had supplied in the record had proven the carriers were available to work the hours assigned to others and were not provided the hours or opportunities offered to other carriers on the OTDL.

An issue that was related to these facts was that two of the five grievants in this case were union stewards, who had admittedly worked overtime in the performance of a variety of other activities, but according to the records of the union were short OTDL hours, of approximately 16.50 hours and 23.00 hours respectively, before an adjustment made by the union to equitably calculate 90% of the overtime hours.

Management claimed the record did not include the proper reports (TACS Rings and Employee All Reports) for each carrier on the OTDL in order to establish who worked what compared to what another carrier worked or was offered. Management said the records relied on in the grievance did not cover the entire quarter but was cherry picked and, therefore, did not meet the required burden of proof necessary for the union to support the allegations for the claims of this quarter.

An issue raised by the B Team in their denial of the grievance was based upon the claim by the Service that the local parties at the facilities in New Haven do not administer the OTDL consistent with the provisions of the National Agreement.

The Service said the National Agreement provides for two lists; the twelve (12) hour list and the work assignment list; whereas these facilities keep a separate list for NS days which they claimed was improper and in conflict with the National Agreement.

OPINION

Initial consideration must be given to the question of the conflict between the National Agreement and the Local Memorandum of Understanding (LMOU) raised by the Service.

The Service presented a number of documents which were based on the premise that a past practice cannot overcome clear contractual language. See, Elkouri and Elkouri, Fifth Edition; and Mittenthal, Past Practice and the Administration of Collective Bargaining Agreements, in Chapter 2, Arbitration and Public Policy.

One must compare these positions with the language found in the Agreement between the NALC and the USPS.

According to the evidence and record this LMOU has existed without change since 1996, although there have been opportunities to renegotiate this LMOU whenever the National Agreement was renegotiated, in accordance with the provisions of Article 30. This question was also not raised in any of the previous referenced settlements, supra.

The 2011-2016 National Agreement contains, in Article 30 Local Implementation, language that LMOU's must not be inconsistent or in conflict with the National Agreement.

Article 30.C.1. states:

> "Any LMOU provision(s) added or modified during one local implementation period may be challenged as inconsistent or in conflict with the National Agreement only during the local implementation period of the successor National Agreement."

In a memorandum on Local Implementation found on pages 215 and 216 of the Agreement the language states:

> "6. LMOU items existing prior to the 2006 local implementation period may not be challenged as inconsistent or in conflict, unless already subject to a pending arbitration appeal. The parties may challenge an LMOU item added or modified during a National Agreement's local implementation period as inconsistent or in conflict only during the period of local implementation of the successor National Agreement."

These provisions, considered in their entirety, render the question of the inconsistency and in conflict with the National

Agreement, at least for the time being, as beyond the authority of the language of the National Agreement and the issue in dispute in this case.

The issue of the equitability of overtime for employees who have signed the OTDL is one of the issues that have bedeviled the parties for many years and at this particular postal facility as well, from the record introduced before me.

While it seems difficult to understand why the parties continually have the use of employees on the OTDL be contentious, especially after all of the prior disputes and suggested language to avoid these conflicts as previously referenced, the equitable distribution of overtime at this facility certainly seems to have taken on a life of its own.

The language in the National Agreement has been the subject of numerous arbitration decisions interpreting this language and incorporated into the Joint Contract Administration Manual (JCAM), as follows:

At page 8-11:

> "**Equitable Distribution of Overtime Opportunities**. Seniority does *not* govern the availability of overtime work for those letter carriers who wish to work overtime. Nor is overtime distributed on a rotating basis. Rather, Article 8.5. C. 2 provides that for those carriers who sign the Overtime Desired List, overtime "*opportunities*" must be distributed "*equitably*" (i.e., fairly). This does not mean that actual overtime hours *worked* must be distributed *equally*.

National Arbitrator Bernstein ruled in H1N-5G-C-2988, August 14, 1986 (C-06364), that in determining "equitable" distribution of overtime, the number of *hours* of overtime as well as the number of *opportunities* for overtime must be considered. Overtime worked on a letter carrier's own route on a regularly scheduled day is not counted or considered in determining whether overtime has been equitably distributed among carriers on the list. Missed opportunities for overtime--i.e. one OTDL carrier worked instead of another--must be made up for with equitable distribution of overtime during the quarter unless the bypassed carrier was not available--i.e. the carrier was on leave or working overtime on his/her own route on a regularly scheduled day, etc.) (See the explanation under Article 8.5.C.2.d)."

And at page 8-12 the following language is found:

"**Remedies**. National Arbitrator Howard Gamser ruled in NC-S=5426, April 3, 1979 (C-3200) that the Postal Service must pay employees deprived of "equitable opportunities" for the overtime hours they did not work only if management's failure to comply with its contractual obligations under Article 8.5.C.2 shows "a willful disregard or defiance of the contractual provision, a deliberate attempt to grant disparate or favorite treatment to an employee or group of employees, or caused a situation in which the equalizing opportunity could not be afforded within the next quarter." In all other cases, Gamser held, the proper remedy is to provide "an equalizing opportunity in the next immediate quarter, or pay a compensatory monetary award if this is not done…"

The JCAM at page 8-13 states:

"Article 8.5.C.2.d provides that "recourse to the Overtime Desired List is not necessary in the case of a letter carrier working on the employee's own route on one of the employee's regularly scheduled days." As a consequence, overtime accrued by a carrier working on the carrier's own route on a regularly scheduled day is not considered or counted in determining whether overtime has been "equitably" distributed among carriers on the list.

Additionally, overtime not worked because a carrier is working overtime on his/her own route on a regularly scheduled day is not considered an "opportunity missed" and is not made up to maintain equitability. This is because the carrier was not available to work the overtime. This situation is controlled by the prearbitration settlement of H8N-5D-C 18624, July 1, 1982 (M-00135), which states in relevant part:

1) Overtime worked by a letter carrier on the employee's own route on one of the employee's regularly scheduled days is not counted as an overtime opportunity for the purposes of administration of the Overtime Desired List.

2) Overtime that is concurrent with (occurs during the same time as) overtime worked by a letter carrier on the employee's own route on one of the employee's regularly scheduled days is not counted as an "opportunity missed" for the purposes of administration of the Overtime Desired List."

The Service, in their Step B position quoted extensively from both the Bernstein decision and other memorandum that have dealt with this issue over the years which they claimed supported their position.

Despite these extensive writings and records, the parties at this location cannot seem to make equitable overtime distribution work as intended by these prior holdings and the prior disputes and settlements at this location.

The previously cited cases in the Allington station include references to occasions when employees who had been working overtime in the performance of their duties as stewards for the union and were also seeking overtime equitability were, by agreement, eliminated from those grievance settlements.

In these previously cited cases the parties were also in general agreement as to the number of hours of equitability that had not been properly distributed, based on the data supplied in these cases.

With a history of providing detailed records, why the records in the instant dispute differed is unknown, especially after the many disputes over this same issue, but the entire

record in these prior cases was not before me.

It is noteworthy to comment that in none of these disputes did the parties follow the holding of Arbitrator Gamser, as provided in the discussion in the JCAM, but in each case were awarded pay rather than an equitability adjustment in the following quarter.

Neither did the Service attempt to use the overtime equitability records to support their positions or to support their claim that the union record missed a number of "opportunities" for overtime that would have resolved the equitability arguments.

While the initial burden rests with the grieving party to support their contentions, a defense to prove why such contentions are in error, based on the facts and records available to them, such as the overtime distribution lists and related opportunity data which was available to the Service was not made.

In the facts presented by the Union to support their argument they noted hours worked by carriers who had more overtime than the carriers who were short overtime hours. For example, they cited on March 26, 2014 Calledo worked 9.01 hours

while OTDL Perno was assigned 1.00 hour of overtime. Another example, on March 22, 2014 Acampora worked 9.00 hours while OTDL Staiano worked 1.25 hours of overtime, while claiming these employees were then available to work the overtime.

The difficulty in analyzing and applying all of this data is the unknown issue of which routes these employees were working; how much time might have been involved in moving from one delivery area to another; what time of day was involved, i.e. was this before shift or after overtime; and so on. However, since such an evaluation was not presented or disputes the record must stand on its own merit.

Certainly the claims for carriers Mahon and McGee may be somewhat questionable based on the position of the Service that their availability for opportunities may have been impacted by the work being performed as stewards.

Since the parties have settled past disputes on this same claim with the withdrawal of the question of the validity of the hours for the stewards, based on large amounts of other overtime worked by them, such action seems to be a realistic solution for these two employees in the instant dispute and no additional hours are, therefore, granted to them.

As to the claims for the other three employees (Acampora, Butler & Calledo) while management claimed the union did not meet its necessary burden since they failed, according to management to provide all necessary data to support their claim for both availability and opportunities it must be held that the data supplied was sufficient to question the equitability of the overtime disparity and not sufficiently refuted by the Service. Therefore, the hours sought for these employees (Acampora 6.50 hours; Buthler 4.50 hours; Calledo 4.00 hours) are granted.

The OTDL list, including the hours worked is available to management and to the union. It would behoove the parties to comply with the language noted in their previously settlements in an attempt to avoid these continuing disputes.