

AIRS #4734

C# 00125

ARBITRATION OPINION AND AWARD

BEFORE

ROBERT B. MOBERLY, ARBITRATOR

IN THE MATTER OF THE ARBITRATION)
BETWEEN)

UNITED STATES POSTAL SERVICE)
Ft. Lauderdale, Florida)
Employer)

and)

AMERICAN POSTAL WORKERS)
UNION, AFL-CIO)
Union)

LOCAL ARBITRATION

RE: REGULAR ARBITRATION
S1C-3W-C 25063
Class Action
Ft. Lauderdale, FL

REPRESENTATIVES

For the Employer: Mr. Holloway Adair, Jr., Labor Relations
Representative

For the Union: Mr. William E. Sullivan, Local President

Pursuant to the contract procedures of the above parties,
the undersigned was designated to hear and decide the above
dispute. An arbitration hearing was conducted in Ft. Lauderdale,
Florida, on September 27, 1984, at which time the parties were
given full opportunity to present evidence and arguments. Both
parties filed post-hearing briefs.

FACTS

On April 25, 1983, Management issued to "all full time clerks" a "clerical advertisement," which listed certain jobs to be reposted due to a change in starting time exceeding one hour (from 10:30 p.m. to 6:30 a.m.). The memorandum further stated that employees were given until May 4 to submit bids. According to the advertisement, "if present incumbents of listed positions are unsuccessful in being announced as successful bidders they will become subject to involuntary reassignment."

On May 10, 1983, Management issued two memoranda. The first announced the successful bidders for positions on the above ad. The second changed the starting time assignment of all but one un-bid regular employees to 12:30 a.m., effective Saturday, May 14, 1983.

According to the Union Steward, several unbid regular employees then requested a change in their schedules. On or about May 10, twelve employees, most of whom were on the "un-bid regular employee" list, submitted separate written requests, on Form 13, to work temporarily on other unfilled positions until the successful bidders qualified or the positions were otherwise filled. On May 18, 1983, Management issued a memorandum assigning these twelve employees to assignments with 6:30 a.m. starting times, effective May 21, 1983. The memorandum stated that the assignments were "in accordance with Article 12, Section 3B, of the Local Agreement." The local Management Labor Relations Representative testified without contradiction that this procedure

was in accordance with the local contract and has been going on for years. The Union, however, objected to this procedure and filed a grievance requesting out-of-schedule overtime for the affected clerks.

ISSUES

Did Management violate the National Agreement when it temporarily assigned the clerks in question to a 6:30 a.m. starting time, without paying them out-of-schedule overtime pay? If so, what should be the remedy?

PERTINENT CONTRACT PROVISIONS AND REGULATIONS

1981-1984 National Agreement

ARTICLE 8

HOURS OF WORK

* * *

Section 4. Overtime Work

A. Overtime pay is to be paid at the rate of one and one-half (-1/2) times the base hourly straight time rate.

B. Overtime shall be paid to employees for work performed only after eight (8) hours on duty in any one service day or forty (40) hours in any one service week. Nothing in this Section shall be construed by the parties or any reviewing authority to deny the payment of overtime to employees for time worked outside of their regularly scheduled work week at the request of the Employer.

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.

ARTICLE 30

LOCAL IMPLEMENTATION

See Memo Page 160

A. Presently effective local memoranda of understanding not inconsistent or in conflict with the 1981 National Agreement shall remain in effect during the term of this Agreement unless changed by mutual agreement pursuant to the local implementation procedure set forth below.

B. There shall be a 30-day period of local implementation to commence October 1, 1981 on the 22 specific items enumerated below, provided that no local memorandum of understanding may be inconsistent with or vary the terms of the 1981 National Agreement:

* * *

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

ARTICLE 37

CLERK CRAFT

* * *

Section 3. Posting and Bidding

* * *

F. Results of Posting

1. Within 10 days after the closing date for the posting (excluding December), the installation head shall post a notice listing the senior or successful bidder(s) and their seniority date(s). The senior qualified bidder meeting the qualification standards for the position shall be designated the "successful bidder".
2. The successful bidder must be placed in the new assignment within 21 days except in the month of December. The local agreement may set a shorter period.
3. When the duty assignment requires scheme knowledge, if the senior bidder is qualified on the essential scheme requirements of the position, assign the employee in compliance with 2 above. If the senior bidder is not qualified on the essential scheme requirements when posting period is closed, permanent filling of the preferred assignment shall be deferred until such employee is qualified on the essential scheme requirements, but not in excess of 90 days. The deferment period shall begin the date the notice is posted starting the senior bidder. Immediately after the end of the deferment period, the senior bidder then qualified shall be permanently assigned except as indicated below. During the deferment period, the assignment normally should be filled by the detail of a qualified employee.

* * *

10. An unassigned full-time regular employee should bid on duty assignments posted for bids by employees in the craft. If the employee does not bid, or is the unsuccessful bidder, such employee shall be assigned in any residual assignment. The employee's preference will be considered if there is more than one assignment available and shall be honored except where an employee can be assigned to an available duty assignment for which he/she is currently qualified (including scheme requirements).

Employee & Labor Relations Manual

434.6 Out of Schedule Overtime

.61 Definition

.611 "Out of schedule overtime" is a premium paid to an eligible full-time employee for time worked outside

of, and instead of, the employee's regularly scheduled workday or workweek when the employee is working on a temporary schedule at the request of management.

Supervisor's Guide to Scheduling and Premium Pay
(Handbook EL-401 - March 1981)

III. PREMIUM SITUATIONS

* * *

D. Out-of-Schedule Overtime

* * *

5. Unassigned Regular Full-Time Employees Out-of-Schedule. All unassigned regular full-time employees must be assigned regular work schedules. When not assigned to a posted position, employees assume as their regular work schedule the hours worked in the first week of the pay period in which the change to unassigned regular occurred. When a part-time flexible (PTF) employee is converted to full-time regular, and is not assigned to a full-time bid position, the employee becomes an unassigned regular. (See Article VII, Section 3 of the National Agreement.)

These employees are assigned regular work schedules and are eligible for out-of-schedule overtime. Temporary rescheduling must be compensated at the appropriate premium rate(s).

A management-directed permanent assignment of an unassigned regular to a specific posted position, which went unbid in accordance with provisions in the National Agreement, requires no payment of out-of-schedule overtime.

1981-1984 Local Memorandum of Understanding

ARTICLE XII

Principles of Seniority, Posting and
Reassignments

* * *

- B. Employee desiring assignment to position temporarily vacant awaiting qualification of successful bidder may apply in writing for such assignment.

The senior qualified applicant shall be assigned to fill such vacancy provided a qualified unbid, unassigned replacement (part time flexible included) is available to fill his assignment.

1. Application for such assignment must be made not more than five (5) days after publication of notice of the apparent successful bidder. The successful qualified applicant shall be placed in the vacancy as soon as practicable.
2. The successful qualified applicant will be assigned to the position in accordance with the Local and National Agreement, at which time the assigned employee will return to his regular bid position.
3. In the event the successful bidder vacates the position by bidding another position or failure to qualify, assigned employee will continue in the position until successfully bid and qualified.
4. In the event no application is made, position may be filled by assignment of any qualified employee.

POSITION OF THE UNION

The Union contends that Management arbitrarily moved the clerks from their permanent assignments (reproting time of 0300) and scheduled them to report (by application) to work at 6:30 a.m. It contends that employees who did not submit a properly executed postal form 3189 with the required approval of shop steward and supervisor are entitled to be made whole for over-time pay, citing Article 8, Section 4 of the National Agreement and Section 434.611 of the Employee and Labor Relations Manual. It cites two arbitration awards by Arbitrator Gamser and a 1982 management memorandum for the proposition that unassigned regulars once given schedule may not have their schedule changed except

through Article 37, Section 3.F.10 of the National Agreement. It further cites Handbook EL-401 in support of this proposition. In response to the argument that the local agreement permits the procedure employed here, the Union argues that the local agreement cannot supercede the national agreement and the national awards issued by Arbitrator Gamser.

POSITION OF MANAGEMENT

Management contends that the parties were not empowered to enter into Article 12 of the local memorandum since it is not one of the negotiable items pursuant to Article 30 of the National Agreement and further is inconsistent and in conflict with Article 37.3F3 of said agreement. However, says Management, the real issue is whether one party should be able to unilaterally terminate such a long-standing agreement for the purpose of unjust enrichment. Moreover, says Management, neither the local or national agreements require the submission of a form 3189 in these circumstances. Accordingly, Management requests that the grievance be denied.

DISCUSSION

In accordance with Article 12.3B of the local memorandum, Management took applications for positions temporarily vacant awaiting qualification of successful bidders, rather than posting the vacancies. As practiced in the past, employees were not

paid overtime when assigned to such vacancies.

The above local provision and practice is now under challenge from the Union. It points to Article 8.4B of the National Agreement, which states in part that "Nothing in this Section shall be construed by the parties or any reviewing authority to deny the payment of overtime to employees for time worked outside of their regularly scheduled work week at the request of the Employer." It also relies on Section 434.611 of the Employee and Labor Relations Manual, which discusses out of schedule overtime when the employee is working on a temporary schedule "at the request of management." The Union especially relies on an arbitration award by Arbitrator Gamser, a national arbitrator, which held as follows:

"The practice of filling temporary vacancies by detailing employees, whose names appear on a list of so-called volunteers, in the manner disclosed by the Bulletins issued on July 16, 1973 and prior and subsequent thereto by the authorities at the Fort Wayne Post Office, did not relieve the Employer of the obligation of paying overtime to those employees who thus volunteered in advance for out of regular schedule assignments. Such out of regularly scheduled work week details and assignments cannot be regarded as not being performed at the request of the Employer and fall under the exemption provided in Section 4-B of Article VIII of the Collective Bargaining Agreement" (Case No. AB-C-341, 1975).

The Union further points to a 1982 award by Arbitrator Gamser (Cases No. H1C-5F-C 1004 and 1007) and to a memorandum issued on October 6, 1982, from the Postal Service Southern Regional Office, which reads as follows:

"In a telecon with Headquarters this morning, an interpretation was provided for the recent Gamser award. The award pertains to the assignment of

unassigned regulars. In essence, unassigned regulars once given schedule may not have their schedule changed except through Article 37, Section 3.F.10. In other words, once an unassigned regular is given a schedule, those hours may only be changed to a residual vacancy. The unassigned regular may not have his/her hours arbitrarily changed.

[Signed]
William J. Henderson
General Manager
Labor Relations Division"

These positions, say the Union, are not residual positions.

The Union also points to Handbook EL-401, set forth supra, and notes that these employees had fixed hours and fixed days off as unassigned regulars. When they were reassigned to temporary positions, says the Union, they were entitled to overtime.

The facts demonstrate that the work involved here was temporary and was outside of the employees' regular schedules, which had been previously assigned. It is also clear that under the National Award by Arbitrator Gamser in 1975, the work here, even though applied for, must be considered done "at the request of the Employer" under Article 8.4B, thus making any contrary application of Article 12 of the Local Memorandum in conflict with the National Agreement. Arbitrator Gamser states his rationale as follows:

"The difficulty that the USPS is experiencing in its attempts to conform with the language of Section 4-B of Article VIII and avoid an overtime obligation is that it is difficult to make a voluntary assignment fully synonymous with the concept of a personal convenience reassignment. They are not necessarily the same at all. There is a significant difference between the reassignment of an employee at his or her request so that employee can attend to a personal matter and the reassignment of an employee on a list of volunteers to fill a

temporary detail of work which must be done because a vacancy already exists and must be filled.

Although the Postal Service did argue that the volunteer may derive some personal benefit from accepting the reassignment, in the cases discussed which arose at Fort Wayne the employee was allowed to work out of schedule primarily because the Service needed that employee to cover a vacancy. If the vacancy did not exist, the employee's needs would not have been accommodated. That is quite different from a 'swap' situation or the case of an employee's personal needs that are accommodated by the Service by moving employees off his or her regular assignment in order to do so.

In an industrial setting, if an employee volunteers to handle a vacancy or perform a job that requires that the employee work outside the hours of his or her normal shift, that employee still earns premium pay when working outside normal shift hours. That employee is regarded as entitled to straight time during normal shift hours and premium pay for all work performed at other times. Coming in early, even though the employee can quit early, still would not relieve the employee of an overtime payment obligation for the hours spent before normal starting time. That employee is regarded as having inconvenienced management by handling an assignment at hours when such work had to be performed. In an employee convenience situation, when no special purpose of the management is being served, it might be regarded as equitable for that employee, who is being inconvenienced, to forego overtime payments, but either special language or special arrangements would have to be made with the collective bargaining agent in order to relieve management of the overtime obligation under such special circumstances.

Premium pay for overtime is a device to encouragement the establishment of regular hours of work and regular work schedules. To permit management to work employees outside their regular hours and outside of their regular schedules without receiving overtime payments requires a more specific license than is contained in the language of Section 4-B of Article VIII, which states that the obligation is incurred when such out of schedule work is performed at the request of the Employer. If the obligation is non-existent under the circumstances which management contrived at Fort Wayne a more specific writing than that which is contained in Section 4-B would be required. In 1975, the Service recognized that to avoid an overtime payment even to 'volunteers', it

would be necessary to at least have a written waiver of such obligation from the volunteer.

The Postal Service, at Fort Wayne, decided to solicit employees to volunteer to work outside of their regular assignment hours. Obviously, an unstated but prominent consideration in adopting this course of action was to avoid an overtime payment even if some other management purpose was also being served. As stated above, this is obviously so because the agreement sets out other procedures for filling temporary vacancies and details. Even application forms and assignment forms for the filling of vacancies are available to be employed, recognizing the seniority preferences of members of the clerk craft, as set out in Article XXXVII, rather than the jerry-built procedure and forms used to handle the filling of temporary vacancies at that Post Office.

For all the reasons discussed above, it must be found that the procedures employed in Fort Wayne which caused the filling of temporary vacancies by working employees outside their regular schedules, without the payment of premium pay, were in violation of Article VIII, Section 4-B. Those employees cannot be found to have been working for their personal convenience and not at the request of the Employer. The Fort Wayne procedures cannot be employed without undermining the contractual right to such overtime payments, the definition of regular schedules and regular hours, the seniority, assignment, bidding and other provisions of the collective bargaining agreement referred to above.

The parties, through long years of recognizing a practice of 'swaps' and other detailing of employees primarily for the convenience and request of the employee, understand what an employee convenience assignment is. Of course such assignments when condoned by the collective bargaining agent and requested by the employee for his own purposes would relieve the Employer of an obligation for paying overtime to an employee for working outside his or her regularly scheduled work week."

Since the temporary work here was done "at the request of the Employer," pursuant to the rationale of the Gamser award, the employees assigned to such work are entitled to overtime pay under Article 8.4B. To the extent that the local memorandum and practice varies from such a result, they must be considered

inconsistent with the National Agreement.

Management points to Article 37.3F3 of the National Agreement, especially that portion stating that "During the deferment period, the assignment normally should be filled by the detail of a qualified employee." This provision, however, does not state the rate of pay that persons working on such temporary assignments will receive. This question, as applied to employees with regular work schedules who are temporarily rescheduled, as here, must be decided by reference to Article 8.B4 and authoritative interpretations such as the Gamser awards. Under such interpretations, as discussed above, the employees reassigned (even though by application) in the instant case are entitled to overtime pay.

Management further contends that the Union should not be unjustly enriched by the award of overtime pay, in light of the local memorandum and past practice. However, in this case the Union brought the violation of the National Agreement to the attention of Management very early, and made every effort to resolve it at an early stage. The Gamser award and subsequent affirmations have been known for some time. Under these circumstances the Arbitrator sees no reason to withhold the usual remedy which would be issued in such a case, which is an award of back overtime pay for the employees affected.

AWARD

Management violated Article 8.4B of the National Agreement when it did not pay out-of-schedule overtime pay to employees

whose schedules were temporarily changed from a 12:30 p.m. starting time to a 6:30 a.m. starting time by memorandum of May 18, 1983. Such violation shall be remedied by making said employees whole for lost overtime pay for the period in dispute.

Robert B. Moberly

Robert B. Moberly
Arbitrator

Gainesville, Florida
April 12, 1985