27312

REGULAR ARBITRATION PANEL

IN THE MATTER OF ARBITRATION	GRIEVANT: Class Action
between	POST OFFICE: NEW HAVEN-ALLINGTOWN
UNITED STATES POSTAL SERVICE	CASE NOS. USPS: B01N-4B-C 06087597
and	
NATIONAL ASSOCIATION OF LETTER CARRIERS, AFL-CIO	NALC: 19-173-06 DRT NO. 14-048981

Before: Robert T. Simmelkjaer, Esq.
ARBITRATOR

APPEARANCES

FOR THE USPS

Joseph F. Panek, Labor Relations Specialist

FOR THE NALC

Vincent Mase, President, Branch 19

Place of Hearing: Wallingford, CT
Date of Hearing: October 11, 2007

AWARD

1) The Service violated Articles 3, 5, 8.5.D and 8.5.G, Article 19, and Handbooks M-39 and M-41 when it implemented a new 5:00 p.m. window of operations for the Allingtown, CT Post Office.

2) The 5:00 WOO in the New Haven - Allingtown, CT Post Office is rescinded.

3) Carriers not on the OTDL who were required to work overtime hours as a result of the 5:00 WOO shall be granted the same number of administrative leave hours.

4) Carriers on the OTDL who were denied those overtime hours that were assigned to non-OTDL carriers as a result of the 5:00 WOO shall be paid that number of hours at the overtime rate.

October 21, 2007

Robert T. Simmelkjaer

BACKGROUND

Pursuant to the procedure for arbitration contained in the Collective Bargaining Agreement between the United States Postal Service (hereinafter "the Service") and the National Association of Letter Carriers, AFL-CIO (hereinafter "the Union"), the undersigned was selected to hear and determine the following

ISSUE: Did the Service violate the National Agreement, specifically Articles 3, 5, 8, 19 and Handbooks M-39 and M-41, when it implemented a new window of operations for 5:00 p.m.?
If so, what shall be the remedy?

At the hearing, the parties were given ample opportunity to present their respective positions. The record consists of two (2) Joint Exhibits, five (5) Union Exhibits, and four (4) Service Exhibits.

RELEVANT CONTRACT PROVISIONS

ARTICLE 3
MANAGEMENT RIGHTS

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

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

B. To hire, promote, transfer, assign, and retain employees in positions within the Postal Service and to suspend, demote, discharge, or take other disciplinary action against such employees;

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

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

E. To prescribe a uniform dress to be worn by letter carriers and other designated employees; and

F. To take whatever actions may be necessary to carry out its mission in emergency situations, i.e., an unforeseen circumstance or a combination of circumstances which calls for immediate action in a situation which is not expected to be of a recurring nature.

ARTICLE 8

Section 5. Overtime Assignments

D. If the voluntary "Overtime Desired" list does not provide sufficient qualified people, qualified full-time regular employees not on the list may be required to work overtime on a rotating basis with the first opportunity assigned to the junior employee.

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 15

GRIEVANCE-ARBITRATION PROCEDURE

Section 3. Grievance Procedure - General

D. Where grievances involve the same, or substantially similar issues or facts, one such grievance to be selected by the NBA or designee shall be designated the "representative" grievance. If the Step B team wishes to identify a representative grievance for similar disputes in its jurisdiction, it must forward a copy of the relevant case files to the appropriate NBA. The Step B team will place those grievances on hold only until such time as the NBA decides whether a representative case will be selected. If a representative case is designated, the Step B team will hold all grievances involving the same or substantially similar issues or facts pending the resolution of the representative case, provided they were timely filled at Step A and properly appealed to Step B in accordance with the grievance procedure. Where the NBA determines a representative case will not be selected, the Step B team will process the held grievances within fourteen (14) days of the NBA's decision. If not resolved at Step B, the "representative" grievance may be appealed to arbitration, or the issue may be referred to the parties' national representatives at the Headquarters level in accordance with the provisions of Article 15, Step B (e). A representative case appealed to arbitration will be placed ahead of other contractual appeals on the appropriate arbitration list.

E. Following resolution of the "representative" grievance, the parties involved in that grievance shall meet at Step B to apply the resolution to the other pending grievances involving the same, or substantially similar issues or facts. Disagreements over the applicability of the resolution of the "representative" grievance shall be resolved through the grievance-arbitration procedures contained in this Article; in the event it is decided that the resolution of the "representative" grievance is not applicable to a particular grievance, the merits of that grievance shall also be considered.

CONTENTIONS OF THE PARTIES

UNION POSITION

The Union's position is that the decision reached by Arbitrator Deinhardt in Grievance No. B01N-4B-C 06079858, Local No. 05-08-06 (Norwich) should have been applied in its entirety to the instant case. According to the Union, the Step B Dispute Resolution Team had four options per Article 15 and they exercised their authority with respect to two of those options, namely (1) they resolved the grievance, and (2) they held the grievance in abeyance pending resolution of the Norwich grievance. This B-Team decision was issued on March 29, 2006.

In the Union's view, if the Service disagreed with the B-Team decision, it had the right to ask for an interpretation of the decision, question the B-Team decision, or request the application of the decision. Having failed to exercise any of these options until 9/11/07, some 17 months after the grievance was held in abeyance and 10 months after the Deinhardt decision on 11/12/06, the Union maintains that the Service has engaged in "bad faith bargaining."

Inasmuch as both the Union and management representatives of the B-Team signed the agreement on the grievance, the Union argues that it constituted a "valid contract." As the Union puts it:

> When the B-Team reached a decision on this grievance, 19-173-06, both members of the B-Team signed the agreement, this is a VALID CONTRACT! Their decision was rendered on 3/29/06 and they notified ALL parties, including top level management. At no time did any supervisor, manager, postmaster, Director of HR, or Director of LR object to the B-

Team's decision nor did any of the enumerated ask any questions about the B-Team's decision to hold this grievance pending the representative grievance out of Norwich, CT. This is undisputable.

The B-Team was empowered to make a decision on the merits of the grievance. This decision was to hold in abeyance this grievance until the outcome of the representative grievance. Management has never refuted that the B-Team lacked the authority to hold grievances in abeyance. Management has never refuted that the B-Team lacked the authority to sign an agreement (Jt. Ex. #2@ 22). Management has never refuted that the B-Team acted in conflict with the National Agreement. In plain and simple terms, management has never refuted anything in this case file, their only refutation is that the union won the Norwich grievance and now management wants to argue that that grievance is inapplicable in the instant manner. This is "BAD FAITH BARGAINING."

The Union distinguishes Arbitrator Deinhardt's decision in Case No. B-01N-4B-C-06067484 (Pawcatuck, CT) (June 10, 2007) from the instant case. Although the Union attempted to apply her Norwich decision to a case arising in Pawcatuck* she found the prior case was not applicable. As she held, "In the instant case, however, there is nothing in the Pawcatuck grievance that establishes that there was any violation of Article 8. There was no mention of any non-ODL carriers being forced to work overtime. The Union asserts that that can be assumed from the fact that a grievance was filed...I am not willing to make that assumption."

The Union further relies on Arbitrator Deinhardt's reference to National Arbitrator Britton's decision in Case No. H7N-35-C21873 wherein Britton sustained the Union's opposition on representative grievances. He wrote:

> **"Significantly, when the instant grievance was denied at the Step 2, management stated its conclusion that it should be noted that the issues denied are being held in abeyance at Step 2 until a final resolution of this grievance can be determined by a final resolution of representative cases....Such a view comports within the understanding specified in Rose's (NALC) letter to Bane (USPS) that the grievance was considered to a 'representative grievance' for ALL grievances pertaining to the issues contained herein."**

The Union in the instant case is not arguing as it did in the Pawcatuck grievance that the Service violated the contract through Article 8.5.D and 8.5.G, but rather that the Service violated Article 15 when it refused to apply the decision and remedy set forth by Arbitrator Deinhardt in Norwich to the instant case, namely that the Window of Operations be rescinded and that the carriers adversely affected be granted administrative leave hours or overtime hours at 1-1/2 times their straight time rate depending on their situation.

SERVICE POSITION

The Service acknowledges that the respective B-Team members Polacco/Page had the authority to enter into the B-Team agreement. However, it refers to Article 15.E which, inter alia, states that: "Disagreements over the applicability of the resolution of the 'representative' grievance shall be resolved through the grievance-arbitration procedures contained in this Article..."

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* **The Post Office for the Pawcatuck, CT station is in Stonington, CT.**

According to the Service, when the B-Team met on December 1, 2006 to determine the applicability of the Deinhardt (Norwich) decision to the instant case, it declared another impasse. Therefore, this impasse has been placed before the undersigned for resolution.

The Service maintains that the National Agreement allows the parties to meet and confer after the representative case has been resolved. Inasmuch as Arbitrator Deinhardt found that her Norwich representative case was not applicable to Pawcatuck, notwithstanding the similar argument made by the Union in that case that the WOO in Pawcatuck should also be rescinded, the Service argues here that Norwich should not be automatically applied but rather its implementation of a WOO in New Haven-Allingtown considered on it merits.

Whereas Arbitrator Deinhardt found in Norwich that the Union had met its burden of proof in establishing that a violation of Article 8 occurred when OTDL and non-OTDL carriers were simultaneously scheduled for overtime, with the Service unable to provide a business justification for such scheduling, she conversely found that in Pawcatuck "there is nothing in the Pawcatuck grievance file that established there was any violation of Article 8."

In the instant case, the Service has provided its contractual rationale for establishing a window of operations, specifically "to achieve consistency of delivery...efficient collection and processing of mail." It affirms its managerial prerogatives under Article 3, maintains that "non-

OTDL carriers are utilized only when sufficient OTDL employees would not meet the service needs of our customers" and cites several arbitration decisions upholding the WOO as a necessary business decision.

In the Service's view, the WOO cases are distinguishable as between those which seek direct application of the Norwich case on contractual grounds and those which address the implementation of a WOO in reliance upon a specific fact pattern.

DISCUSSION

The case file record establishes that with respect to the instant grievance, the B-Team issued a decision on March 29, 2006 resolving the instant grievance and holding it in abeyance pending the resolution of the Norwich, CT grievance (B01N-4B-C 06079858)/ NALC 05-08-06 (November 12, 2006) – designated as the representative case for 146 cases, including the instant case.

It is undisputed that Arbitrator Barbara C. Deinhardt upheld the Union's grievance on the merits, finding that the Union had met its burden of proving that Article 3 did not give management "the unfettered right to abrogate the terms of Article 8." She found that management in its establishment of a 5:00 p.m. Window of Operations ("WOO") improperly cause carriers not on the OTDL to work overtime before employees on the OTDL had maximized their overtime allocation under Article 8.5.G.

In addition, she found that once the Union had established its prima facie case, the burden shifted to the Service "to prove that the 5:00 window was supported by valid, legitimate operational necessity that justified the simultaneous scheduling." Arbitrator Deinhardt noted that "[t]he only justifications presented by the Service during the grievance procedure were:

- "our customers want consistency of delivery"
- "an 'Operations Window' is established to have customers receive their mail as close to the same time everyday and to make every effort to get carriers back into the office so as to make evening dispatches times to the processing plant on the earliest trips possible. Dispatching the majority of mail on the last dispatch causes a hardship to the processing plant which in turn can cause dispatches into offices the next morning to run late."
- "early arrival of collection mail at out Distribution Centers provides for efficient and timely cancellation and processing of mail to successfully achieve service objectives."
- "managers use the 'Operating Window" as a guideline for planning their daily delivery operation, so as to make every effort to accommodate the needs and expectations of our customers."

Following the issuance of her Norwich decision, Arbitrator Deinhardt decided Pawcatuck, CT grievance B01N-4B-C/NALC 20-3-06 wherein she was urged by the Union to apply her holding in Norwich and thereby find that establishment of the Pawcatuck WOO had similarly violated the National Agreement.

However, Arbitrator Deinhardt found that unlike Norwich – the representative case – the Pawcatuck case was dissimilar because "the only action grieved was the creation of the 5:00 window, not any resulting

simultaneous scheduling of overtime. Therefore, the burden never shifted to the USPS to defend its overtime scheduling on the basis of business necessity."

Although the instant New Haven- Allingtown case was held in abeyance by the B-Team pending the decision in Norwich, the Union's request to have Norwich automatically applied to the instant case based on the doctrine of res judicata is, as the Service correctly asserts, subject to Article 15.3.E which, inter alia, states:

> Disagreements over the applicability of the resolution of the "representative" grievance shall be resolved through the grievance-arbitration procedures contained in this Article; in the event it is decided that the resolution of the "representative" grievance is not applicable to a particular grievance, the merits of that grievance shall also be considered.

Inasmuch as the B-Team declared an impasse on December 1, 2006, given its inability to determine the applicability of Norwich to the instant case, the language of Article 15.3 requires the Arbitrator to utilize a two prong procedure: first, determine whether the representative Norwich case should be applied to the instant grievance; second, if the Norwich decision is deemed inapplicable, then consider the merits of the grievance de novo.

As a standard for determining whether the representative Norwich case should be applied to the instant case, the doctrines of res judicata/collateral estoppel seem appropriate because the parties at Step B are directed "to apply the resolution to other pending grievances involving the same, or substantially similar issues or facts." For all the reasons provided in a case previously decided by this arbitrator (Pawcatuck Class

Action B01N-4B-C 06082735/NALC 20-04-06) (April 12, 2007), the instant to case should also be subject the findings in Norwich representative case on the basis of res judicata/collateral estoppel, with the exception that the WOO should also be rescinded as per Norwich.

Res judicata is a term that incorporates both claim preclusion and issue preclusion or collateral estoppel. "Claim preclusion requires a final decision on a claim and precludes reassertion of that claim in a subsequent arbitration proceeding." Under the doctrine of claim preclusion, the arbitrator maintains that the Service is precluded from reasserting in the instant case the claim of business necessity for its establishment of a 5 p.m. WOO when it had the opportunity to raise this defense in the Norwich case and neglected to do so. Having litigated its simultaneous scheduling of OTDL and non-OTDL carriers pursuant to the establishment of a 5 pm WOO and had Arbitrator Deinhardt uphold the grievance and rescind the WOO due to insufficient business justification, the Service has exhausted its remedies. The arbitrator not only finds that a final decision has been issued in this matter but the instant case involves substantially similar facts as addressed in Norwich so that it should also serve as a representative case.

As Whitely McCoy wrote: "Where the prior decision involves the interpretation of the identical contract provision between the same company and union, every principle of common sense, policy and labor

relations demands that it [a prior arbitration] decision stand until the parties annul it by a newly worded contract provision."

Similarly, issue preclusion/collateral estoppel is deemed applicable in that the Service is seeking to relitigate the issue decided in the Norwich case, to wit: "Did management violate the National Agreement, Article 3 and, concomitantly Article 8.5.D and G when they established a 5:00 'Window of Operation' in the Norwich, CT Post Office?" Since the issue in the instant case is identical, except for the New Haven-Allingtown Post Office, and Arbitrator Deinhardt actually issued a decision on the merits of this case, notwithstanding the Service's omission of a business justification for the 5 pm WOO, the Service is precluded under the doctrine of issue preclusion/collateral estoppel from further litigating a matter already decided in the Norwich representative case. As National Arbitrator Snow wrote, the requirements of issue preclusion are that "the issue (1) was actually litigated; (2) was necessary to the decision; and (3) the party against whom the doctrine is being asserted was a party on in privity with a party to the former action."

The instant case is distinguishable from Pawcatuck Case No. B01N-4B-C 06082735/NALC 20-04-06 (April 2007) decided by this arbitrator in that management in Pawcatuck sought to substitute as the representative case Arbitrator Wooters decision in Stamford, CT (B01N-4B-C 06083627) (2006) where he found a bona fide basis for management's claim of a business justification for a 5:00 p.m. WOO that entailed simultaneous scheduling so

long as it applied to "legitimate operational objectives" and "made in good faith." However, management in the instant case has promulgated the same arguments it presented Arbitrator Deinhardt in Norwich, namely,"general proclamations" she found insufficient to support a business justification for simultaneously scheduling OTDL and non-OTDL carriers to meet a 5:00 p.m. WOO.

Given the B-Team impasse resulting in the referral of the instant grievance to the Grievance-Arbitration procedure, the Arbitrator's initial task has been to determine whether the Norwich decision should be applied as representative case pursuant to Article 15.3.E, utilizing the principles of res judicata and collateral estoppel. Considering the evidence in its entirety, the Arbitrator has determined that the Norwich decision satisfies the reasonable criteria for application as a representative case vis-à-vis' the instant case, the principle of collateral estoppel should be invoked to preclude the Service from relitigating the issue set forth in Norwich and decided by Arbitrator Deinhardt on the merits, and res judicata is applicable to the claim of business justification – a claim for which the Service presented insufficient evidence in Norwich.

Reviewing the case file in the instant case, the Arbitrator discerns no evidence that the Service supported its need for a 5:00 p.m. WOO in Allingtown-New Haven with facts any different from those presented to Arbitrator Deinhardt in Norwich. Then as now the Service argued that its

objective was to achieve "consistency of delivery thereby improving customer service"; that reading Article 3 in conjunction with Article 8 gave "management the right to assign employees, maintain the efficiency of the operations entrusted to it and determine the methods, means and personnel by which such operations are to be conducted"; that an Operations Window is established to have customers receive their mail as close to the same time everyday..."; Dispatching the majority of the mail on the last dispatch causes a hardship to the processing plant..."; and "Managers use the 'Operating Window' as a guideline for planning their delivery operation, so as to make every effort to accommodate the needs and expectations of our customers."

Inasmuch as Arbitrator Deinhardt considered virtually identical management arguments in the Norwich case and found "[t]hese general proclamations, unsupported by the kinds of detailed testimony the Service sought to offer in the arbitration, do not serve to provide sufficient business justification for the 5:00 WOO," this Arbitrator finds no basis for declaring the Norwich case unrepresentative of the cases held in abeyance pending the Norwich decision, including the instant case. Since management, in refusing to apply Norwich as the representative case at Step B, replicated the arguments found deficient by Arbitrator Deinhardt in Norwich, assuming arguendo this arbitrator were to consider the instant case on its merits, independent of the Norwich case as per Article 15.3.E., a similar conclusion would be reached.

Following a review of the case file, the Arbitrator finds insufficient evidence to support the establishment of a 5:00 p.m. WOO that would justify the simultaneous scheduling of OTDL and non-OTDL carriers to meet the window. Notwithstanding the rationale for the WOO contained in Acting Manager Donnelly's memorandum to local NALC presidents for establishing a 5:00 WOO, the Service herein has not proven the business necessity for establishing a 5:00 p.m. WOO that requires carriers not on the OTDL to be forced to work overtime before those carriers on the OTDL have "maxed out" at 12 hours overtime.

Although Article 3 permits management "to take whatever actions may be necessary to carry out its mission in emergency situations, i.e. an unforeseen circumstance...," given the more specific and limiting language in Article 8.5.G, absent such an emergency, the Service is allowed to assign overtime to non-OTDL employees "only if all available employees on the 'Overtime Desired' list have worked up to twelve (12) hours in a day..."

The evidence provided by the Union in establishing a prima facie case of a violation of Article 8.5.G indicated that the 5:00 pm WOO was not necessary because after the implementation of the 5:00 pm WOO the dispatch times of 6:30 pm and 8:00 pm from New Haven continued, outgoing mail arriving after the last dispatch of 6:30 pm was driven to New Haven or Wallingford by management, and carriers worked past 5:00 pm before and after the 5:00 pm WOO was implemented.

Insofar as the case law is concerned, this arbitrator concurs with those arbitrators who have found that the Service cannot violate the provisions of Article 8.5.G under the guise of an Article 3 emergency or create a circumstance where the simultaneous scheduling of carriers becomes unavoidable in order to meet a WOO. As cogently discussed by Arbitrator Linda DiLeone Klein in Case No. I94N-4I-C 97122042 (2001), management may not by the manner in which it establishes a Window of Operation create "an artificial 'insufficiency' of qualified ODL employees and thereafter rely on that 'insufficiency' to justify implementing the provisions of Article 8.5.D."

Clearly, the Service's right to engage in simultaneous scheduling under 8.5.D should be the exception to the rule set forth in Article 8.5.G. Moreover, management's general right under Article 3 to "maintain the efficiency of operations and determine the methods, means and personnel by which ... operations will be conducted..." is not tantamount to an "unfettered right to abrogate" the specific rights of employees who have opted not to work overtime. Under certain unforeseen and/or non-recurring circumstances such simultaneous scheduling is contractually sanctioned, however, the routine implementation of a WOO which necessitates such scheduling without a compelling business justification violates Article 8.5.G.

Based on the foregoing analysis, the grievance is sustained, Arbitrator Deinhardt's decision in the Norwich case is deemed a

representative case for the instant grievance, and the remedy provided in Norwich and requested by the Union (Jt. Ex. 3@29) shall be awarded in the instant case.