C# 03039

IN ARBITRATION PROCEEDINGS PURSUANT TO ARTICLE 15 OF THE

NATIONAL AGREEMENT BETWEEN THE PARTIES

CASE NO. W8N-5K-C 13978 Local

Las Vegas, Nevada - January 11 1983

NATIONAL ASSOCIATION OF LETTER CARRIERS, AFL-CIO	
and	WILLIAM EATON Arbitrator
UNITED STATES POSTAL SERVICE	
Holiday Work Dispute	

APPEARANCES:

FOR THE UNION:

THOMAS H. YOUNG, JR.
Regional Administrative Assistant
National Association of Letter Carriers
363 South Main Street, Suite 107
Orange, CA 92668

FOR THE SERVICE:

GORDON P. DEAPEN, Manager, Labor Relations
United States Postal Service
1441 East Buckeye Road
Phoenix, Arizona 85026

ISSUES AND EVIDENCE

This is a dispute involving work required on a designated holiday, October 11 1980, at the Garside Station in Las Vegas, Nevada. It is stipulated that twelve carriers at Garside Station were required to work on the designated holiday, and that eight volunteers who normally would not have been scheduled to work on the holiday were available, but were not solicited to work. It is further stipulated that the holiday schedule for October 11 1980 was posted in writing in a timely manner. The resulting issues, as stipulated to by the parties, are as follows:

> Did the Postal Service comply with Article 11, Section 6 of the 1978 National and Local Agreements, and/or Section 434.537 of the Employee and Labor Relations Manual, when it did not compensate employees who were not solicited to volunteer for holiday work on 10-11-80? If not, what is the appropriate remedy, if any?

It is agreed that Article 11, Section 6 of the 1978 National Agreement is the same as that article and section of the present Agreement, with the exception that the present Agreement has been divided into three lettered paragraphs. The relevant portions of the National and Local Agreements, respectively, are as follows:

ARTICLE 11

HOLIDAYS

Section 6. Holiday Schedule

A. The Employer will determine the number and categories of employees needed for holiday work and a schedule shall be posted as of the Wednesday preceding the service week in which the holiday falls.

B. As many full-time and part-time regular schedule employees as can be spared will be excused from duty on a holiday or day designated as their holiday. Such employees will not be required to work on a holiday or day designated as their holiday unless all casuals and part-time flexibles are utilized to the maximum extent possible, even if

the payment of overtime is required, and unless all full-time and part-time regulars with the needed skills who wish to work on the holiday have been afforded an opportunity to do so.

ARTICLE XI

Section 6

The method of selecting career letter carriers to work on a holiday shall be on a volunteer seniority basis. All mandatory holiday work shall be by inverse seniority.

It is stipulated that the issues are properly before the Arbitrator free of procedural deficiencies.

Hearing was held in Las Vegas, Nevada on January 11 1983. Following presentation of stipulated facts and other evidence, the issues were submitted to the Arbitrator for final and binding determination upon oral argument at the close of the hearing.

The Postal Service agrees that the mandatory assignment of employees on the holiday was improper, and has stipulated that eight named employees, set forth in the Award below, are entitled to holiday scheduling premium pay for all hours worked up to eight hours on that day. It is agreed that volunteers should have been requested.

The remaining issue is whether eight carriers who would have been eligible to volunteer, who apparently wished to work, and who were not solicited are entitled to compensation-- and if so in what amount-- under the applicable provisions of the National and Local Agreements. It is stipulated that one carrier, Van Cleef, notified management in writing of his desire to work on the

October 11 1980 holiday, but was not scheduled. As a result, at step one of the grievance procedure his immediate supervisor agreed to compensate him. However, it is recognized that, according to the provisions of Article 15, Section 2(b) of the 1978 National Agreement, no resolution reached as a result of a step one meeting will be precedent for any purpose. The compensation granted to this Grievant was eight hours at the overtime rate, the remedy requested by the Union for the other carriers as well.

Introduced into evidence was a Holiday Settlement Agreement reached in 1974, involving several hundred grievances on various aspects of scheduling holidays under the provisions of Article 11, Section 6. Among the provisions of the settlement was the understanding that its terms "where applicable apply to the provisions of Article 11 for future holidays for the duration of the 1973 National Agreement." Other aspects of that settlement, and its subsequent treatment, are included in the arguments of the parties set forth below.

Also introduced into evidence was an award by Associate Impartial Chairman Paul J. Fasser, Jr., dated August 16 1978. That award, also discussed below, will be referred to as the Fasser award.

DISCUSSION

Union Argument

The grossest violation "up front" was the lack of solicitation. The Grievants wanted the work, and management was so informed before the holiday.

Even the one who volunteered in writing was not allowed to work. He has been awarded eight hours at the overtime rate in an individual grievance settled at step one.

Although the step one settlement in respect to this Grievant is not binding, the conclusion and award of the Fasser case are applicable, and should apply. Arbitrator Fasser held that a missed opportunity to work on a nonscheduled day is an opportunity lost forever. In circumstances similar to those of the present dispute the arbitrator awarded eight hours at the overtime rate.

The arbitrator agreed with the union argument therein that an employee who volunteers to work a holiday does so for the pay involved and, to the extent that he is improperly denied that holiday assignment, he suffers a loss of pay for which he volunteered, and thereby gained a right, to earn.

In addition, the arbitrator found that Article 11, Section 6, provides certain rights to a holiday volunteer. He held that, to maintain that the language "shall be afforded the opportunity to work" is meaningless absent a remedy in the event of its violation. Once a volunteer is reached, the Fasser award held, he is entitled to be assigned to work the holiday if his services are required. If he is not, he is to be compensated for the total number of hours lost at the holiday rate.

In addition, the Settlement Agreement of 1974 directs the parties to observe any applicable local memoranda of understanding consistent with the terms of the National Agreement on the method of selecting employees to work on a holiday. Article XI of the Local Agreement provides for the method of selecting

letter carriers to work on a holiday. That method shall be on a volunteer seniority basis, which the employer failed to observe in this dispute.

For these reasons the Union respectfully requests that the Grievants herein be awarded eight hours pay at the holiday rate.

Postal Service Argument

The principal purpose of Article 11, Section 6, is to maximize the holidays for FTEs, not to grant rights to volunteers who might wish to work the holiday. In the present dispute, it is recognized that the Local Agreement does provide a right to FTEs to bid as volunteers if casuals and PTFs cannot fill the need. So, in the present dispute, the Local Contract sets up the "pecking order" if there is a need beyond PTFs and casuals.

Nowhere in the National Agreement, however, is a penalty prescribed for those who should have been allowed to work and were not. There is no premium provided for time not worked either in the National Agreement or in relevant provisions of the E&LR Manual.

While the 1974 Settlement Agreement set forth comprehensive provisions regarding enforcement of Article 11, nowhere in that agreement or subsequently has there been negotiated a penalty, or remedy, for the type of situation presented in the present dispute. Nor has the Union previously grieved this sort of case. What it is trying to do in the present dispute is to get out of arbitration what it did not obtain in negotiations.

The fact is that a whole series of penalties have been agreed upon between the parties, both by contract and by supplemental agreement. The area involved in this dispute is void. It is the position of the Postal Service that the Arbitrator should not fill that void.

Concerning the Fasser award, it is the position of the Postal Service that the facts in that case may be distinguished, and, beyond that, that the award misconstrued the meaning of Article 11, Section 6.

The issue, as framed by the parties in that dispute, was whether the parties themselves had agreed upon a remedy in the situation where the Postal Service failed to assign the Grievant to work on a holiday for which he had volunteered to work. Having concluded that a prior informal agreement between the Union and the Postal Service was to be non-precedential and non-citable, Arbitrator Fasser based his decision upon provisions of Article 11, Section 6 of the National Agreement.

The Postal Service believes that the distinction drawn by the arbitrator between missed overtime and missed holidays is insupportable, in that the convenience of the employee is not provided for in the National Agreement. In any event, no one "elected to work" in the present dispute. Rather, employees who might have volunteered were not solicited, hence were denied the opportunity to work had they wished to.

The intent of Article 11, Section 6, is to guarantee a holiday to FTEs, not to guarantee the opportunity to work to volunteers who might wish to do so on a holiday.

For these reasons, it is respectfully submitted that neither the National Agreement nor the Local Agreement have been violated, and that the grievances should therefore be denied.

Conclusions

Turning first to a consideration of the National Agreement, the Postal Service makes a strong argument in two respects. First, it is undisputed that during a series of settlement agreements concerning violations of Article 11, no penalties have ever been considered or provided in the event that a full-time regular employee eligible to volunteer for holiday work is denied the opportunity to do so.

Second, there is the even more forceful argument that the thrust of Article 11, Section 6, is to guarantee a holiday to full-time regular employees-- not to guarantee such employees an opportunity to work on a holiday if they should prefer to do so.

In respect to the latter argument, the Fasser award should be examined with particular care. The arbitrator therein concluded that Article 11, Section 6, provided certain rights to a holiday volunteer. The opinion states that, "To maintain that the language, 'shall be afforded the opportunity to work,' is meaningless is to fly in the face" of the "good faith effort" made to grant rights to the holiday volunteer. The difficulty with this passage is that the quoted language, "shall be afforded the opportunity to work", upon which the decision appears to depend, does not appear in Article 11, Section 6.

Nor is the language of Section 6, on its face, cast primarily (or perhaps even incidentally) to guarantee a volunteer holiday work.

Rather, what is presently Paragraph B of Section 6 clearly has as its primary purpose the intent to guarantee a holiday for full-time regular employees. That holiday can be denied only in certain circumstances. The full-time employee (as well as part-time regularly scheduled employees) can be required to work only after all casuals and PTFs are utilized to the maximum extent possible, and, if the work is still not covered, after all full-time and part-time regulars with the needed skills who wish to work have been afforded an opportunity to do so. The right granted by these provisions is the right of the full-time and part-time regular not to work a holiday. It is not to guarantee such employees who wish to work the opportunity to do so.

Thus, it is difficult to see how a close analysis of the language of Section 6 can yield the inference that it provides that full-time or part-time regulars "shall be afforded the opportunity to work" if they desire to do so. The granting of a primary right with certain qualifications is one matter. To find in one of those qualifications an intent of the parties to create a second specific right, and to imply therefrom an enforcement remedy not set forth or agreed upon by the parties, is quite another matter. We must conclude, therefore, that the Union's claim in the present dispute cannot be grounded in the provisions of Article 11 of the National Agreement.

The Local Agreement applicable herein is another matter. As the 1974 Settlement Agreement recognized, provisions of local memoranda of understanding consistent with the National Agreement on the method of selecting employees to work on a holiday must be observed.

Article XI of the Local Agreement provides that the method of selecting career letter carriers to work on a holiday "shall" be on a voluntary seniority basis. This provides, as a local matter in the present dispute, the basis for finding a violation which does not appear in the National Agreement. Not only is a "pecking order" suggested, it is mandated. Obviously, it is not possible to select carriers on a "voluntary seniority basis" if the carriers are not advised of the opportunity to volunteer.

The remaining question, a violation of the Local Agreement having clearly occurred, is what remedy, if any, is to be applied. The Postal Service suggests that no remedy is available since the parties have never agreed upon one in such circumstances, while the Union suggests that a full eight hours at the overtime rate is appropriate.

The Postal Service argument cannot be entirely discounted. It is undisputed that the parties have provided specific and numerous remedies for violations of Article 11 over the years, and that no provision has been made for a remedy in the present circumstances. Even though the present violation is grounded in the Local Agreement, not the National Agreement, the overall purpose of the National Agreement must be taken into account.

That purpose, clearly, is to afford a holiday, not to afford the opportunity to work on a holiday. Hence, even though the Local Agreement has been violated, there is merit in the Postal Service argument that the employees who did not work enjoyed, all the same, the essential right granted to them by Article 11, Section 6 of the National Agreement.

Even so, it flies in the face of equitable considerations, as well as good faith enforcement of contractual requirements, to deny a remedy where a violation has occurred. As the common law maxim has long had it, "There is no right without a remedy." Nor is the party who has violated the Contract-- Local or National-- given much incentive to observe it in the future if the violation is allowed to occur without penalty.

The non-precedential agreement involved in the Fasser award, while held to be not binding in that award-- and it is certainly not binding in the present dispute-- nevertheless presents a common sense and equitable remedy in a closely analagous situation. There the parties agreed that employees who had volunteered to work on a holiday, but who were denied the opportunity, should be paid four hours at the regular rate. That solution, it seems to me, strikes a reasonable balance between the principal purpose of Article 11, Section 6, to guarantee a holiday, and the violation of the Local Agreement which has occurred. It also recognizes that the parties have never agreed upon premium pay for time not worked, while acknowledging the principle that where a violation has occurred a remedy must be afforded.

The four hours pay at the regular rate is also appropriate in view of the fact that that remedy is the closest the parties themselves have come to specifying what the remedy should be for a violation of this sort.

The Award is rendered accordingly.

AWARD

1. The following employees, who worked on 10-11-80, shall be paid holiday scheduling premium pay for all hours worked up to eight hours on that day:

Smith, B. J.	Lewis, J. L.
Moore, A.	Anyon, J. E.
Rider, E. T.	O'Brien, W. F.
Witherspoon, J. C.	Hogan, Sr., H. R.

2. The Postal Service did not comply with Article XI, Section 6 of the Local Agreement when it did not compensate employees who were not solicited to volunteer for holiday work on 10-11-80. Each such employee is therefore awarded, as a full remedy for the infraction proven, four hours pay at the regular rate.

3. The Arbitrator retains jurisdiction of the dispute until the amoung due each employee has been determined and paid, and in the event that any dispute should arise as to the interpretation of application of the Award.

William Eaton
Arbitrator

FEB 14 1983

February 10 1983