C-26914

REGULAR ARBITRATION PANEL

In the Matter of Arbitration	)	Grievant: Class Action
between	)	Post Office: Wethersfield, CT
UNITED STATES POSTAL SERVICE	)	USPS Case No: B01N4BC06072667
and	)	DRT # 14-048816
NATIONAL ASSOCIATION OF LETTER CARRIERS, AFL-CIO	)	

BEFORE: EILEEN A. CENCI

APPEARANCES:

For the U.S. Postal Service: Edward Tierney

For the Union: Gennaro Mascolo

Place of Hearing: Hartford, CT

Date of Hearing: November 30, 2006

AWARD: Management violated the National Agreement, specifically Article 8, by working non-OTDL carriers for overtime on other routes while carriers on the OTDL were available. The remedy for this violation is set forth on page 14 of the Opinion and Award.

Date of Award: February 16, 2007

Regular Regional Arbitration Panel

Eileen A Cenci

Eileen A. Cenci

OPINION

STATEMENT OF PROCEEDINGS:

This matter was arbitrated pursuant to the grievance and arbitration provisions of a collective bargaining agreement (National Agreement) in effect between the United States Postal Service (Service) and the National Association of Letter Carriers (NALC or Union). A hearing in this matter was held before me on November 30, 2006 in Hartford, Connecticut. The parties appeared and were given a full and fair opportunity to be heard, to present evidence and argument and to examine and cross examine witnesses. The parties explained at the outset of the hearing that this case had been designated as a representative grievance, in that it was the first of a large number of substantially similar grievances affecting letter carriers in the Connecticut District to be heard.

The Union called Gennaro Mascolo, David Gagnon and Michael Willadsen as its witnesses. The Service called Kim Horan and Thomas Sullivan to testify. The parties elected to file post-hearing briefs and these were received by the arbitrator on January 18, 2007. The record was closed at that time.

ISSUE:

The parties agreed to adopt the issue statement from the B team:

Did management violate the National Agreement, specifically Article 8, by working non-OTDL carriers for overtime on other routes while carriers on the OTDL were available?

If so, what shall the remedy be?

FACTS:

The specific facts that gave rise to this grievance are that three letter carriers who are not on the overtime desired list (ODTL) were forced to work overtime in Wethersfield on February 6, 2006. Two carriers (Ellegard and Kaluza) were forced to work on hour overtime on Route 6 and one carrier (Valentine) was required to work one hour of overtime on Route 23.

The reasons for the forced overtime on February 6, 2006 were disputed by the parties. Gennaro Mascolo, Executive Vice President of Merged Branch 86 of the National Association of

Letter Carriers (NALC) and the steward for this grievance, testified that in a service talk in late January, employees were informed that a 5:00 operational window would be implemented on February 5, 2006. As of that date all carriers would be required to return from the street by 5:00 p.m. each day, and carriers would be required to work overtime, if necessary to meet that goal. On February 3, 2006 manager David Donnelly sent a memorandum to local NALC presidents to inform them that the Connecticut District would be establishing a window of operations (WOO) in order to ensure that customers would enjoy the consistency of delivery that they want, and to ensure early arrival of collection mail at distribution centers, so that there would be efficient and timely cancellation of mail to achieve service objectives (J. 2 #65).

The Service disputed that the 5:00 window was in effect on February 6, 2006 and claimed that the forced overtime on that date was not caused by an operational window. It raised questions about whether the service talk announcing the operational window had occurred in January, and pointed out that the February 3 letter to NALC presidents did not refer to a date when the window would be implemented. The Service attempted to prove that numerous carriers were unavailable due to leave or limited or light duty on February 6, 2006, and that this fact, rather than an operational window, created the need for forced overtime. Further, the Service pointed out that most carriers returned from the street at about 6:00 p.m. on February 6 and one did not return until 7:00 p.m., proving that the operational window was not in effect. At the same time, Tom Sullivan, Manager of Customer Service, indicated that the operational window was in effect in Wethersfield as of February 6, 2006. The Murphy Road facility was one of the first to implement the window and did so on February 4 or 6. Mr. Sullivan further testified that the 5:00 window was implemented pursuant to a national directive in order to ensure timely, consistent delivery to customers and because of the 24 hour clock within the postal service. The reason most carriers returned from the street at about 6:00 p.m. rather than at 5:00 p.m. on February 6, 2006 was that there were not enough carriers to make the 5:00 window, so the decision was made to bump the time to 6:00 p.m.

The Union strenuously objected to any claim by the Service that the forced overtime on February 6, 2006 was caused by excessive absences on that day rather than by implementation of an operational window. It pointed out that this was entirely new argument on the part of the Service, which had not previously argued at any level of the grievance process that extraordinarily difficult

circumstances on February 6, 2006 had been the cause of the forced overtime. Instead, the Service had maintained throughout the grievance process that it had the authority, under Article 3, to establish an operational window and to require carriers not on the ODTL to work overtime if necessary in order to meet that window. A review of the grievance materials in the file supported the Union's contention that the Service had not denied, prior to the arbitration hearing, that the operational window was in effect of February 6, 2006 and that it was the reason carriers not on the OTDL had been required to work overtime on that day. Nor had the Service argued, prior to arbitration, that unusually difficult circumstances and personnel shortages had caused the forced overtime at issue in this case. The Arbitrator ruled at the hearing that the Service was precluded from raising a new defense to its actions for the first time at arbitration

The Union presented evidence that there were carriers on the OTDL who were available to work overtime on February 6, 2006 in place of the three non-OTDL carriers who were required to work. Some carriers on the OTDL worked less than twelve hours on that day and could have been required to work additional hours. In addition, three PTF's who worked on that day could, in the view of the Union, have been assigned additional hours. One carrier on the OTDL refused overtime on her non-scheduled day. Had she been required to work, it would not have been necessary to require carriers who are not on the OTDL to work overtime.

CONTRACT

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;

Article 8.5 Overtime Assignments

When needed, overtime work for full-time employees shall be scheduled among qualified employees doing similar work in the work location where the employees regularly work in accordance with the following:

A. Employees desiring to work overtime shall place their names on either the "Overtime Desired" list or the "Work Assignment" list during the two weeks prior to the start of the calendar quarter, and their names shall remain on the list until such time as they remove their names from the list. Employees may switch from one list to the other during the two weeks prior to the start of the calendar quarter, and the change will be effective beginning that new calendar quarter.

E. 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.

F. Excluding December, no full-time regular employee will be required to work overtime on more than four (4) of the employee's five (5) scheduled days in a service week or work over ten (10) hours on a regularly scheduled day, over eight (8) hours on a non-scheduled day, or over six (6) days in a service week.

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.

MEMORANDUM OF UNDERSTANDING BETWEEN THE UNITED STATES POSTAL SERVICE AND JOINT BARGAINING COMMITTEE

(American Postal Workers Union, AFL-CIO, and National Association of Letter Carriers, AFL-CIO)

Re: Article 8

Recognizing that excessive use of overtime is inconsistent with the best interests of postal employees and the Postal Service, it is the intent of the parties in adopting changes to Article 8 to limit overtime, to avoid excessive mandatory overtime, and to protect the interests of employees who do not wish to work overtime, while recognizing that bona fide operational requirements do exist that necessitate the use of overtime from time to time...

The new provisions of Article 8 contain different restrictions than the old language. However, the new language is not intended to change existing practices relating to use of employees not on the overtime desired list when there are insufficient employees on the list available to meet the overtime needs. For example, if there are five available employees on the overtime desired list and five not on it, and if 10 work-hours are needed to get the mail out within the next hour, all ten employees may be required to work overtime. But if there are 2 hours within which to get the mail out, then only the five on the overtime desired list may be required to work.

...

In the Letter Carrier Craft, where management determines that overtime or auxiliary assistance is needed on an employee's route on one of the employee's regularly scheduled days and the employee is not on the overtime desired list, the employer will seek to utilize auxiliary assistance, when available, rather than requiring the employee to work mandatory overtime.

...

MEMORANDUM OF UNDERSTANDING BETWEEN THE UNITED STATES POSTAL SERVICE AND THE NATIONAL ASSOCIATION OF LETTER CARRIERS, AFL-CIO

The Memorandum of Understanding represents the parties consensus on clarification of interpretation and issues pending national arbitration regarding letter carrier overtime as set forth herein. In many places in the country there has been continued misunderstanding of the provisions of Article 8 of the National Agreement; particularly as it relates to the proper assignment of overtime to letter carriers. It appears as if some representatives of both labor and management do not understand what types of overtime scheduling situations would constitute contract violations and which situations would not. This Memorandum is designed to eliminate these misunderstandings

1. If a carrier is not on the Overtime Desired List (ODL) or has not signed up for Work Assignment overtime, management must not assign overtime to that carrier without first fulfilling the obligation outlined in the "letter carrier paragraph" of the Article 8 Memorandum. The Article 8 Memorandum provides that "...where management determines that overtime or auxiliary assistance is needed on an employee's route on one of the employee's regularly scheduled days and the

employee is not on the overtime desired list, the employer will seek to utilize auxiliary assistance, when available, rather than requiring the employee to work mandatory overtime." Such assistance includes utilizing someone from the ODL when someone from the ODL is available.

2. The determination of whether management must use a carrier from the ODL to provide auxiliary assistance under the letter carrier paragraph must be made on the basis of the rule of reason...

Article 15 Grievance-Arbitration Procedure

Formal Step A

(d) At the meeting the Union representative shall make a full and detailed statement of facts relied upon, contractual provisions involved, and remedy sought. The Union representative may also furnish written statements from witnesses or other individuals. The Employer representative shall also make a full and detailed statement of facts and contractual provisions relied upon. The parties' representatives shall cooperate fully in the effort to develop all necessary facts, including the exchange of copies of all relevant papers or documents in accordance with Articles 17 and 31...

Step B

(b) ...It is the responsibility of the Step B team to ensure that the facts and contentions of grievances are fully developed and considered, and resolve grievances jointly.

POSITIONS OF THE PARTIES:

National Association of Letter Carriers [Union]

The Union maintains that management is not justified in forcing carriers who are not on the ODTL to work overtime in order to make an operational window. An operational window is a service goal and the Union recognizes that the Service has the right under Article 3 to establish such a goal for mail delivery. However, management may not render Article 8 meaningless in order to meet a service goal. The Service is required to properly staff its offices in order to meet an operational window without forcing carriers who are not on the OTDL to work overtime. In this case, management required carriers who were not on the OTDL to work overtime even though there were

ODTL carriers who had not worked 12 hours in a day or 60 hours in a week and were available to perform the work. The Union also argues that there was no real need to establish a 5:00 window at the Murphy Road station. There are dispatches from Murphy Road at 7:20 p.m. or even later, so mail can reach the plant from Murphy Road even if all carriers do not return to the office at 5:00 or even 6:00 p.m.

The Union also argues that simultaneous scheduling of OTDL and non-OTDL employees for overtime is not permissible in the carrier craft. The Mittenthal arbitration award upon which the Service relies to justify simultaneous scheduling to meet an operational window was an APWU case. Although the NALC and APWU bargained jointly for the 1984 Agreement, and both signed the Article 8 Memorandum which was interpreted by Arbitrator Mittenthal to permit simultaneous scheduling, the NALC is in a different position from the APWU. The Article 8 Memorandum stated that, "...the new language is not intended to change existing practices relating to use of employees not on the overtime desired list when there are insufficient employees on the list available to meet the overtime needs." The Union points out that prior to 1984 no practice of simultaneous scheduling existing in the carrier craft although it did exist in the APWU. The Article 8 Memorandum did not change existing practices and did not permit simultaneous scheduling in the carrier craft.

The Union asks that the grievance be sustained and that the Service be ordered to cease and desist from using non-OTDL carriers to perform overtime prior to using all available OTDL carriers up to the maximum extent allowed under the National Agreement. It also asks that the arbitrator order that the 5:00 window be rescinded in Wethersfield. The Union seeks an additional remedy to make the affected employees whole. Carriers who chose not to sign the ODTL but were nonetheless required to work overtime suffered real harm in the loss of personal and family time that cannot be replaced. The three carriers who were required to work overtime should be granted administrative leave equal to the amount of overtime they were required to work. Carriers on the ODTL who were not assigned the overtime were also harmed, since they had a contractual right to be given a preference to earn the money associated with overtime assignments. The Union asks that ODTL carriers to be identified by the Union be paid at the applicable overtime rate for the number of hours non-ODTL carriers worked overtime in violation of Article 8.

United States Postal Service [Service]

The Service points out that the agreed issue statement in this case does not specifically refer to an operational window as issue statements in other cases involving operational windows have done. The case should, therefore, be seen as an Article 8 overtime case and not as one that is specifically limited to the question of whether an operational window justifies forced overtime.

Non-OTDL carriers were required to work overtime on February 6, 2006 because of legitimate operational needs. Numerous carriers were unavailable on that day as a result of sick leave, annual leave and limited or light duty assignments. The Union has not met its burden of proving that the Service lacked a legitimate business reason for scheduling the three carriers for one hour of overtime each on February 6, 2006. The alternatives to scheduling non-OTDL carriers for overtime that have been suggested by the Union in this case are not reasonable. For example, the Service needed one hour of overtime several different routes, and should not have been required to bring a carrier in for a full 8 hours on her non-scheduled day in order to meet that goal. The grievance should be denied in its entirety.

The Service maintains that under the National Agreement as interpreted by the Mittenthal National Award, it is permitted to simultaneously schedule OTDL and non-OTDL carriers for overtime even before OTDL carriers have been maximized, in order to meet an operational window. The Service concedes that such scheduling must be based upon legitimate and valid reasons of operational necessity. There is no validity to the Union's argument that simultaneous scheduling is permitted in the clerk craft but not in the carrier craft, as both Unions signed the MOU that permits simultaneous scheduling. The determination of whether management must use a carrier from the OTDL to provide auxiliary assistance under the letter carrier paragraph is subject to the rule of reason.

In the event that the arbitrator does award a remedy in this case, the remedy should be limited to the three carriers involved in this grievance and should not be based upon the representational nature of the grievance. Further, based upon the MOU clarifying Article 8, any remedy should involve a correction to the opportunities available within the list, and should not involve a monetary remedy.

DISCUSSION:

Several procedural matters that were raised at the hearing will be addressed below, in addition to the question of whether a contract violation occurred.

Preliminary Issue: New Evidence and Argument

The issue of whether new argument or evidence is permissible was raised and ruled upon at the hearing, but because it has been addressed by both parties to some extent in their post-hearing submissions, and because it is an issue of major significance in this case, I will again address it here. The issue arose when the Service presented testimony that the reason three carriers were forced to work overtime on February 6, 2006 was not because a 5:00 window had been implemented on that day, but instead because of a shortage of personnel. The Union strenuously objected to introduction of any evidence that a 5:00 window was not the reason for forced overtime on February 6, 2006, claiming that this was entirely new argument that had never been raised at any other stage of the grievance process. The Service countered that the agreed-upon issue statement did not specifically refer to a 5:00 window, as issue statements in some other cases involving a window of operations have done.

Having carefully considered the record in this case, the arguments of the parties, and the arbitration awards submitted by the parties, I reaffirm my decision at the hearing that the Service is precluded from arguing that the forced overtime on February 6, 2006 was caused by factors unrelated to a 5:00 window. Although the agreed issue statement did not specifically refer to a 5:00 window, the arguments of both parties at each step of the grievance procedure prior to arbitration, addressed the issue of whether management had the right to schedule non-OTDL carriers for overtime in order to meet a 5:00 window. At no time prior to arbitration did management suggest that the reason for forced overtime on February 6, 2006 was anything other than the need to meet a 5:00 window. The parties submitted their contentions in detail and in writing at the Formal A and Step B levels of the process and each party exclusively tailored those arguments to the question of whether management had the right to schedule non-OTDL carriers for overtime in order to meet a 5:00 window for mail delivery.

Article 15 requires that both parties fully develop and present the record at the Formal A level

to be presented to the B Team. The grievance record that was presented to the B team then becomes the record that is admissible at arbitration if the case is not resolved in the grievance process. The purpose of this requirement is to ensure that the parties will fully understand each other's positions, so that resolution may be reached at the earliest steps of the grievance procedure. The contractual process is designed to avoid arbitration by ambush, whereby new evidence and argument are presented for the first time at arbitration. While there may situations that call for some flexibility in the rule that new argument and evidence will not be accepted at arbitration, the Service sought here to fundamentally change its position as to the reason non-OTDL carriers were required to work overtime on February 6, 2006. This is exactly the type of situation the entire grievance process has been constructed to avoid, as it creates a fundamentally unfair situation for the party that has prepared in case in good faith reliance on the principle that the record that has been developed throughout the grievance process will form the basis of the arbitration hearing.

My decision to preclude the introduction of entirely new evidence and argument at arbitration is unrelated to the fact that the parties designated this as a representative grievance. The Service correctly points out that the grievance must be considered on its own merits and that the parties will determine after receiving the decision whether or how the decision may be applied to other grievances that have been filed.

Simultaneous Scheduling of Overtime in the Carrier Craft

The Union has argued that simultaneous scheduling of overtime is not permitted in the carrier craft because it did not occur prior to 1984, and the Memorandum of Understanding the parties entered into that year stated explicitly that there would be no change to existing practices. The Union points out that the national award by Arbitrator Mittenthal, which the Service relies upon as justification for simultaneous scheduling of carriers to meet an operational window, was issued in an APWU case (Mittenthal # H4CNAC30).

The establishment of windows of operation, and the simultaneous scheduling of letter carriers in order to achieve that service goal, has been the subject of lengthy discussions in the course of bargaining, as well as two separate Memoranda of Understanding. In addition, these issues have been arbitrated many times in various locations around the country in cases involving the carrier craft. The

parties in this case submitted numerous regional arbitration awards in support of their respective positions and I have carefully reviewed them. The overwhelming majority of the cases I reviewed were letter carrier cases involving the question of whether simultaneous scheduling of overtime in order to meet an operational window was justifiable in the circumstances. In each case the regional arbitrator accepted the premise that the Mittenthal decision permits simultaneous scheduling in the carrier craft under certain circumstances, then went on to analyze whether it was warranted on the facts of the particular case. The Union had apparently conceded, in most of the cases, that the Service has the right to establish an operational window and may, in some circumstances, require non-OTDL carriers to work overtime in order to meet that window. My reading of the material submitted in this case suggests that both the NALC and the Service have generally proceeded on the assumption that simultaneous scheduling may be permissible in the carrier craft in some, but not all circumstances, and that each case must be decided on its own facts. Given that these principles seem to have been widely accepted by regional arbitrators and by the parties in most regions of the country for many years, it would be disruptive to the stability of labor relations to now revisit the issue of whether simultaneous scheduling of overtime is ever permissible in the carrier craft. I decline to address that issue in this case. As set forth more fully below, I find that the issues presented here can be more properly decided on other grounds.

Article 8 Violation

I turn then to the question of whether the Postal Service violated Article 8 by requiring non-OTDL carriers to work overtime on February 6, 2006 when OTDL carriers were available. The general principles governing this question are set forth in Articles 3 and 8 of the National Agreement as well as in the Article 8 Memoranda of Understanding. Management has the right, under Article 3, to maintain the efficiency of operations and to determine the methods, means and personnel by which such operations are to be conducted.

This includes the right to establish a window of operations, as the Union here concedes.[1] At the same time, management may not ignore its obligations under Article 8 in order to achieve its legitimate service goals. The parties have recognized, in Article 8 and the related Memoranda of Understanding, that excessive use of overtime is to be avoided, and that employees on the OTDL are to be scheduled for overtime to the maximum extent allowed before employees who are not on the OTDL can be required to work. It is understood that these principles are subject to a rule of reason, and that there may be circumstances where carriers who are not on the OTDL will be required to work overtime even when carriers on the OTDL have not worked to the maximum extent permitted by contract. However, such simultaneous scheduling must be based upon legitimate and valid reasons involving operational necessity (Mittenthal, #H4CNAC30). Non-OTDL carriers should be utilized where there are unforeseen circumstances requiring immediate action, rather than in foreseeable, recurring situations (LaLonde, #C26287). The Service is not permitted to achieve the service goal of a WOO by regularly scheduling carriers who have not expressed an interest in overtime to work it. Instead, the Service must provide the necessary staffing and resources to accomplish its goals without violating the National Agreement (Campagna, #C26095). While the burden of proof is on the Union to establish a contract violation as in any contract case, many arbitrators have adopted a shifting burden analysis in cases involving simultaneous scheduling of overtime. Thus, while the Union is required to establish a prima facie case, once it has done so, the burden shifts to the Postal Service to prove that its decision to schedule non-ODTL carriers was based upon operational necessity (Campagna, #C05187029).

In this case, the Union has established a prima facie case by proving that three carriers who were not on the OTDL were required to work overtime on February 6, 2006 even though there were other carriers in the same office who were on the OTDL and had not worked twelve hours on the day

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1 While the general right of the Service to establish a WOO is widely recognized and accepted, including by this arbitrator, it must be noted that Arbitrator Barbara Deinhardt has ruled that the Service violated the National Agreement when it implemented the 5:00 window in Norwich, Connecticut in February 2006 (#C06079858). This is the same 5:00 WOO announced by David Donnelly for the Connecticut District in a February 3, 2006 memo to local NALC presidents that is at issue in this case. Arbitrator Deinhardt ordered that the WOO be rescinded, since the Service had failed to establish legitimate business reasons for the 5:00 WOO.

in question or sixty hours for the week. In the absence of the new evidence and argument that was excluded, the Postal Service has not shown an operational need to assign overtime to carriers who were not on the OTDL in order to efficiently meet delivery goals. The Union has therefore met its burden of proof and established a violation of the National Agreement.

Remedy

The three carriers who were required to work overtime on February 6, 2006 in violation of Article 8.5 F and G are to be compensated by being granted administrative leave equal to the amount of overtime they were required to work on the day in question. Additional harm was caused to carriers on the OTDL who were denied the opportunity to work the overtime that should have been assigned them under the terms of the National Agreement. These carriers can only be made whole by being compensated for the time they should have worked overtime on the day in question, and this is the remedy arbitrators have generally ordered for such violations. The parties are therefore directed to work jointly to identify those carriers who should have been assigned overtime on February 6, 2006. The carriers so identified should be compensated at the applicable overtime rate for the hours they would have worked overtime had management not wrongfully required non-OTDL carriers to perform the work. I decline the Union's request to order the Connecticut District to rescind the 5:00 p.m. operational window in light of Arbitrator Deinhardt's award. This remedy was not requested by the Union at the lower levels of the grievance procedure or at the arbitration hearing and the issue has not, for that reason, been squarely addressed by the Service at either the hearing or in its post-hearing brief. I further decline the request that I order the Service to cease and desist from using non-OTDL carriers to work overtime off of their own assignments and/or on their non-scheduled days prior to using all OTDL carriers to the maximum extent possible. As noted in the opinion above, there may be circumstances in which the Service would have a legitimate operational need to simultaneously schedule OTDL and non-OTDL carriers for overtime, even though such circumstances were not proved in this case. Each case must therefore be evaluated on its own facts to determine whether the circumstances that would justify such simultaneous scheduling existed. Finally, at the request of the Union, I will retain jurisdiction over this matter for a period of 60 days to resolve any questions regarding the remedy in the event that the parties are unable to do so.