

C#00161

Attachment # 3

A.P.W.U.

In the Matter of the Arbitration)
Between)
AMERICAN POSTAL WORKERS UNION, AFL-CIO)
 -and-)
UNITED STATES POSTAL SERVICE)
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)
)
)

Case No. AB-C-341

INTERPRETATION OF
NA ARTICLE VIII, SECTION 4

ARBITRATION

OPINION AND AWARD
FORT WAYNE, IND.

Appearances:

For the Union: Donald M. Murtha, Esq.

For the U.S.P.S: Stanley Mestel, Esq.

Background:

Pursuant to the pertinent provisions of the July 21, 1973, collective bargaining agreement between the above-named parties, the undersigned was designated as arbitrator to hear and decide an issue in dispute regarding the proper interpretation and application of certain provisions of said Agreement by the United States Postal Service. For this purpose, a hearing was held at the offices of the Service in Washington, DC, on March 13, 1975. At that time, both parties, who were represented by counsel as indicated above, were given full opportunity to present testimony and other evidence in support of their respective contentions. The parties agreed to submit post-hearing briefs and this was done in timely fashion. The testimony and other evidence as well as the argument presented were duly considered in reaching the findings and conclusion below.

The Issue:

The parties did not agree upon a formulation of the issue or issues to be decided in this proceeding.

The Union proposed that three questions be answered:

- 1) Can an employee on a regular schedule be required to work outside of his schedule without overtime compensation?
- 2) Can an employer make individual agreements with employees in violation of Article VIII, Section 4, or the seniority, bidding, assignment and

overtime provisions of the National Agreement?

- 3) Can an employee waive part of compensation provided by the Collective Bargaining Agreement?

The spokesman for the Management did not agree that the issues as posed by the Union fully reflected the action that had been taken or the matter in dispute. In fact, that spokesman conceded that the answers to all the questions set forth above would have to be answered in the negative.

During the course of the hearing, the USPS submitted two proposed issues:

1. Does the announcement of July 16, 1973, by the Fort Wayne, Indiana, Post Office constitute a violation of the National Agreement?
2. If a full-time bargaining unit employee requests a temporary schedule change for his convenience, or otherwise volunteers for a detail to an assignment which has scheduled hours outside of, and instead of, the regular schedule of such an employee, is there any obligation under the National Agreement to pay the employee at the overtime rate for the hours worked outside his regular schedule where the employee does not work over eight hours in any one service day or 40 hours in any service week?

The Union, in turn, took issue with the way in which the Postal Service sought to frame the issue. In its post-hearing brief, the USPS made another effort to define the matter in dispute. It read, "Basically, the question raised by the grievance is, does Article VIII, Section 4B, require the employer to pay overtime where the employee volunteered to work outside his regular schedule." The USPS also made an additional effort to define the issue at a later point in the brief as follows:

"Thus, the issue here is whether premium pay is due when management invites employees to indicate in advance whether and what types of temporary assignments they may desire, and offers such assignments to employees on a voluntary basis as and when they become available."

The issue to be determined will become more apparent from the following discussion of the facts of the case, as it arose at the Fort Wayne Post Office, and the contentions of the parties regarding the grievance initiated at the Fort Wayne Post Office.

HEADING: INTERPRETATION OF NA, ARTICLE VIII, SECTION 4

Statement of the Case:

On February 27, 1973, the following text of a notice was posted on the bulletin board at Fort Wayne and signed by Eugene J. Gabriel, SCF Manager/Postmaster. It was addressed to all clerical craft employees and was to be posted in all units through March 10, 1973:

"From time to time, opportunities are available for temporary detail to higher level positions or reassignments, for example, P.S.D.S. Technicians or Distribution & Window Clerks (Window Service pool).

"Employees, who wish to be considered for such opportunities should submit a written statement to their immediate supervisor our Tour Superintendent indicating their interest in such detail or reassignment.

"It should be understood that these requests for consideration as they regard detail to higher level and/or reassignments could involve temporary changes in schedule and such changes will be considered 'made at the request of the employee'."

On July 16, 1973, a subsequent bulletin, almost identical in content was also placed in the same places and addressed to the same group of employees. It was to be posted through July 25, 1973. It was this publication of the bulletin which led to the filing of the grievance which resulted in this proceeding. On August 12, 1974, still another bulletin to the same effect and employing the same text was posted and was to remain posted in all units through August 22, 1974. As discussed during the course of the hearing, the grievance was filed not on behalf of specific individuals who felt aggrieved by or disadvantaged, under the agreement, by this posting and the subsequent action taken by the Postal Service, but was filed as a "group grievance" on behalf of all the clerical unit employees who were allegedly adversely affected by the terms and results of the posting. In point of fact, the testimony at the hearing indicated that three full time clerical employees responded to the July 1973 Notice which raised this grievance and eight full time employees indicated an interest in the opportunities for temporary detail outlined in the August 1974 Bulletin.

It was the position of the Union that when, pursuant to the terms of July 1973 Bulletin, the Postal Authorities assigned on a temporary detail certain clerks to work outside of their regular schedules these employees should have been paid at overtime rates when so employed. To work them outside of the hours of their regular schedules and not pay them premium pay, according to the APWU, was in violation of the terms of the collective bargaining agreement. The Union spokesman indicated that such payments were not only required by the language of the Agreement, but the purpose and intent of this language as well as

its statutory antecedent was clearly spelled out in the decisions of the various Courts concerned with the Groettum litigation.

The position of the Postal Service is that when the employees involved at Fort Wayne volunteered to accept the temporary assignment opportunities, and thus worked at hours and on days outside their regularly assigned schedule on these temporary assignments, the USPS did not incur any liability to pay these employees at premium rates for such work outside of their regular schedule. These employees, according to the spokesman for the Postal Service, voluntarily changed his or her work schedule. These employees were neither coerced nor required to work outside of their regular schedules. These employees were not inconvenienced by such a change in schedule. In fact, for some of them there were definite advantages gained by the change in the hours and days of their assignment while on the temporary duty which was offered. For all of these reasons, the Postal Service believed that the employees involved were not entitled to nor required to receive premium pay for the time spent on these temporary assignments at hours outside their regular scheduled hours and days of work.

In response to the Management argument that the concept of voluntarism was decisive in the determination of this case, the Union asserted in effect that the type of "voluntary" response to the July 1973 Bulletin cannot be regarded as an employee convenience case which relieved the employer of an overtime payment obligation.

Opinion of the Arbitrator:

Article VIII, Section 4-B of the 1973 Agreement as well as the 1971 Agreement, which was in effect when the July 16, 1973 Bulletin was issued at Fort Wayne reads as follows:

B. Overtime shall be paid to employees for work performed only after eight (8) hours on duty and 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.

Of course placed in issue by the conflicting contentions of these parties is the interpretation to be placed upon the second sentence of that provision and more specifically was the work performed by these Fort Wayne employees, in response to the invitation contained in the Bulletins under review, at the request of the Employer....

The USPS argued that the purpose of the Bulletins under review was to allow employees to give management advanced and standing notice that they were interested in temporary details to higher level or reassignments. In fact, the spokesman for the Service contended that this is why such Bulletins were issued initially at the request of the Union.

This commentary with regard to the origin of the practice of soliciting such standing offers from employees, prior to the passage of PL 89-301, may be of some historical interest but it does not throw any helpful illumination on the practice that existed in July of 1973, after the passage of that statute and the incorporation of language of Article VIII-4-B into two successive labor agreements. A more current scrutiny of the practice even more certainly appears in order in view of the extensive litigation known as the Groettum Case, the full implications of which still very much concerned these parties at the time that the July 1973 Bulletin was issued at Fort Wayne.

The testimony at the hearing established that these bulletins were issued at Fort Wayne in February of 1973, July of 1973 and as late as August of 1974 because supervision wanted to know who would be interested and possibly available to fill temporary assignments when they arose. The existence of a list of potential volunteers made it easier to conduct a canvas of those available than to have to make inquiries of all eligible employees at the time that a temporary vacancy had to be filled. Of course, it was and still is the Postal Service's view that if a note to the effect that an employee was interested in such an assignment was on file, then there certainly could not be any overtime liability undertaken if such employee were to be assigned temporarily to a schedule outside his own regular hours of work. If such a list of potential volunteers did not exist, the Postal Service, in order to avoid an overtime situation would have to find someone else on the same tour and working the same days and hours to fill in for the absent employee. If the assignment was going to be of some duration, and the handling of the assignment required additional help, then the Service could assign an unassigned full time employee to this job. In the event that an unassigned regular were not available, then the Service could employ a part time career employee, or flexi, to fill the spot.

From the recitation in the paragraph above, it is apparent that having a list of stand-by volunteers to canvas was a more convenient and efficient method of finding a substitute to fill a temporary vacancy than the other procedures available to fill the spot without incurring an overtime obligation. Of course, the Service could also fill the temporary vacancy by assigning a full time employee to work outside his regular schedule and pay him overtime for so doing.

The Union had a further objection to this method of filling vacancies from the list of those who had written to their superiors to express an interest in the opportunity that was to be offered. The Union contended that employing this method might subvert the obligation imposed upon management in Article XXV of the Collective Bargaining Agreement as expressed in Subparagraph 5:

5. Detailing of employees to higher level bargaining unit work in each craft shall be from those eligible, qualified and available employees in each craft in the immediate work area in which the temporarily vacant higher level position exists.

The testimony of a Union witness indicated that at least one employee was detailed to a temporary vacancy higher level position outside of his immediate work area. The USPS did not offer any testimony to show that qualified. eligible and available employees in that work area, the Annex, were canvassed before the employee on the standing list was so detailed.

The Union also made more general references as to how the procedure adopted by the Postal Service at Fort Wayne could violate the bidding, assignments and seniority provisions of the Agreement. Although the Union did not specify with illustrations which of these provisions were violated and the manner in which this was accomplished, the thrust of the Union argument was to employ volunteers solicited by management in advance to fill unknown vacancies as they might arise would destroy the procedure set forth in the collective bargaining agreement for the establishment of regular schedules through the assignment of such schedules by posting and bidding of and for same.

The Union also expressed its concern over the possibility that the use of so-called volunteers might provide a method of circumventing the overtime and other provisions of the Agreement. In this regard, the Union pointed to the recognized fact that individual employees could not relinquish rights and protection afforded to all members of the bargaining unit under that Agreement. Requiring some to give up premium pay that other full time employees would receive for performing the same work appeared to the Union to be tantamount to entering into individual agreements with employees in contravention of the requirements of the Agreement.

However, although much testimony and argument were concerned with the contentions reviewed above, with the USPS spokesman pointing out that only "volunteers" relinquished premium pay and those employees did so for reasons which these employees regarded to be in their own best interest, the main Union claim was that, under the circumstances which existed as a result of the bulletins, the USPS was in violation of Article VIII-4-B, when it failed to pay overtime premium pay to the employees who worked outside of their regular schedules.

The Union argued that filling temporary details in that manner could not be considered a temporary change in assignment made for the convenience of and at the request of the clerk and thus relieve the Service of its overtime pay obligation. The Union asserted that to require employees to "volunteer" in advance to be available for possible temporary details could not be regarded as an employee convenience assignment.. Because the request for volunteers was initiated by the Employer for purposes advantageous to the Employer, these "volunteers", according to the Union, were being asked to work these temporary details at the request of the Employer.

The Service contested this claim and allegation. It was pointed out that the employees at Fort Wayne were verbally assured that their failure to volunteer would not have an adverse effect upon their chances for advancement. These employees, according to Management witnesses, were frequently told that they did not have to accept such assignments when

offered. According to Management, even if an employee accepted the assignment for which he or she had volunteered, that employee could quite the temporary detail anytime. The volunteer could return to his or her regular schedule without fear of offending supervision and even without stating any reason why the employee desired to leave the temporary detail.

During the course of this proceeding, protesting the issuance of the Bulletin in July of 1973 at Fort Wayne, the Service offered in evidence a Memorandum issued to the field on March 3, 1975 concerning Article VIII, Section 4-B and voluntary details. Although this is an after-the-fact declaration as far as this proceeding is concerned, it is interesting to note that the Employer was, at that time, still attempting to provide a definition of voluntary details as against Employer requested details and in so doing to justify the right not to pay overtime for out of schedule work.

Without at this time passing on the adequacy of this later attempt to justify these details as being for employee convenience, it can be noted that these instructions issued to the field do require much more substantial assurances to volunteering employees and these assurances were to be reduced to writing and actually contained in the Bulletin posted on the subject of volunteering for details rather than issued verbally as was done at Fort Wayne.

It must be found that the March 3, 1975 Memorandum, referred to above, including the contents of instructions to management, the sample notice attached, and the acknowledgment and disclaimer that is provided for the volunteer to sign do stand as testimony to the fact that the Service itself had some doubts about the adequacy of the Fort Wayne efforts to meet the requirements of Section 4-B of Article VIII and avoid overtime payments. Most specifically it should be noted that the proposed Notice to Employees contains a written statement that by volunteering for an out of schedule detail the employee was foregoing the right to receive overtime for working other than hours of the employee's regular schedule while on such detail. Although the Fort Wayne notices which caused this grievance to be filed stated "such changes will be considered made at the request of the employee" the loss of overtime was not spelled out as it was in the later proposed sample notice issued by Headquarters. It must also be noted that the July 1973 and other Fort Wayne notices also did not include a disclaimer of the right to overtime payments, that were to be part of the procedure approved and published by Headquarters in March of 1975, to be signed by employees who volunteered.

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 convenience 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 convenience, 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 encourage 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. . . .

As for the appropriate remedy, under the circumstances existing in this case, it must be considered that no individual employee filed a grievance. Such information as the Employer had regarding the dissatisfaction of the three employees, who responded to the July 1973 Bulletin and were subsequently assigned, was first made available in Step 3 of the grievance procedure. The full facts regarding their individual claims were not available at a time that the Postal Service could have minimized its premium pay obligation to them. The grievance itself, as first presented in July of 1973, requested the rescinding and/or modification of the Bulletin of July 16, 1973, and retroactive payment to unnamed individuals or to the Union as of February of 1973 when the first Bulletin was issued.

From the record of the processing of this grievance, presented as APWU Exhibit A 1-thru 58, incl. it is apparent that the Union was mainly concerned with getting the procedure adopted modified to provide premium pay for employees who were called to work out of regular schedule. The grievance record does not contain specific information about members of the class of employees affected nor the amounts of premium pay to which they may have been entitled.

The spokesman for the USPS made reference to the holdings of several judges who had under review the premium pay obligation of the Employer in various stages of the Groettum litigation as well as instructions issued to provide compliance with decisions of the Court. A careful review of those citations did not lend support to the Postal Service's interpretation as to how Section 4-B of Article VIII should be viewed in this case.

To dispose of the issue as effectively raised and processed, the undersigned issues the following

THE ARBITRATOR RULED:

A W A R D

1. 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.
2. The Employer at the Fort Wayne Post Office shall cease recruiting so-called volunteers in this fashion, and he shall fill temporary vacancies in the manner presecribed in the pertinent sections of the Collective Bargaining Agreement.
3. Nothing in this Award shall preclude the Employer from accomodating requests for reassigments for personal reasons received from individual employees and for the convenience of such employees when condoned and agreed to by the collective bargaining agent. Such employee convenience assignments will relieve the Employer of a premium payment obligation if said employee thus works outside his or her regularly scheduled work week.



Howard G. Gamser, Arbitrator

Washington, DC
July 27, 1975