

C#03212 COPY

In the Matter of the Arbitration between	:	Arbitration Case No.
NATIONAL ASSOCIATION OF LETTER CARRIERS,	:	N8-NA-0003
AFL-CIO	:	Washington, DC
:		
-and-		
UNITED STATES POSTAL SERVICE	:	<u>OPINION AND AWARD</u>
:		
:		

APPEARANCES:

For the NALC - Cohen, Weiss & Simon
by: Keith E. Secular, Esq.

For the APWU - Cafferky, Powers, Jordan & Lewis
by: Daniel B. Jordan, Esq.

For the Mail Handlers - James S. Ray, Esq.

For the USPS - Richard A. Levin, Esq.

BACKGROUND:

This case was properly processed through the steps in the grievance procedure found in the pertinent collective bargaining agreement. The Parties stipulated that it was in form before the Arbitrator for final and binding determination. The hearing was held at the offices of the USPS in Washington, DC, on October 9, 1979. At that time, the NALC, as the grieving Union, was represented as indicated above. Counsels for the APWU and the Mail Handlers appeared and requested leave to intervene pursuant to Article XV of the Agreement. The NALC and the USPS agreed that they should be afforded status as intervenors and they were represented as also indicated above.

During the course of the hearing, the Parties were given full opportunity to present testimony, other evidence and argument in support of their respective contentions. By agreement, post-hearing briefs were filed. These were received from the NALC and the USPS on January 25, 1980, and their contents were duly considered.

THE ISSUE:

As stipulated:

When the USPS involuntarily assigns an employee to a limited duty assignment outside of his or her regular work schedule, pursuant to the F-21 and F-22 Handbook and the 1978 National Agreement, must the employee receive out-of-schedule premium pay?

STATEMENT OF THE CASE:

February 2, 1979, in Case No. NC-S-10828, which arose in Tulsa, Oklahoma, the Undersigned was presented with the following issue:

Is the USPS obligated to pay overtime compensation, under the provisions of Article VIII, Section 4-B of the 1975 National Agreement, to an employee who is assigned to work hours outside his regular schedule to perform a temporary limited duty assignment while partially incapacitated due to a work related injury or illness?

Obviously, the case presently under consideration and the previous one referred to above are closely related. In the Tulsa case, the NALC argued successfully that Article VIII-Section 4-B entitled the Grievant to premium pay for the out-of-schedule limited duty assignment. The Union contended that such a result had to follow in order to be consistent with a still earlier Award in Case No. AB-C-341, issued in a Fort Wayne, Indiana Case, which was decided on July 27, 1975.

The Union, in the Tulsa Case, argued that any provision to the contrary regarding liability for overtime payment in the F-21 and F-22 Handbooks, which were issued in 1978, could not have any impact upon the validity of the Union's claim which was advanced in a grievance filed on October 6, 1977. Pursuant to the terms of Article XIX of the National Agreement, concerning the applicability of all handbooks, manuals and published regulations of the USPS, the specific requirements of these two Handbooks relating to out-of-schedule limited duty assignment pay calculations could not be given retroactive force and effect.

The Award in the Tulsa Case, as indicated above, sustained the Union's position that, pursuant to Article VIII, Section 4-B of the 1975 Agreement, the Grievant was entitled to be paid at the overtime rate for the hours which he worked outside his regular schedule. However, in the earlier Case it was noted that we were dealing with a provision filed prior to the issuance of the F-21 and F-22 Handbooks which took effect in April and early May of 1978, and which had been under consideration from December of 1977, in the case of the F-21, and from February of 1978, in the case of the F-22 Handbook. In this regard, the Undersigned stated:

"In this proceeding, where we are dealing with a grievance filed prior to the issuance of either of these Handbooks, the question of whether the Union is bound by the terms of such Handbooks now possibly incorporated by reference into the National Agreement pursuant to the provisions of Article XIX is not presented. Nothing in Article XIX suggests that the terms of such Handbooks be given retroactive application. At the same time, it must also be noted that in this proceeding no finding will be made as to whether or not the Union has placed in contention subsequent to their

publication under the provisions of Article XIX, or properly challenged, the incorporation by reference of the above-quoted provision of these Handbooks thereafter."

The language in both Handbooks referred to above provides that overtime pay shall not be required for an out-of-schedule assignment under the following circumstances:

"Where the employee's schedule is temporarily changed because he was given a light duty assignment pursuant to Article XIII of the National Agreement or as required by the Federal Employee Compensation Act, as amended."

In this proceeding, the Unions have challenged the contention of the USPS that they failed to prevent the incorporation by reference of this provision in the 1978 Agreement, and for that reason the Service is no longer obligated to make such overtime payments. The Unions have also contended that, contrary to the assertion in that provision of the Handbooks, the Federal Employee Compensation Act does not now require that the Postal Service provide partially disabled employees, who were so disabled by an on-the-job injury or illness, with light or limited duty assignments when such assignments can be made available.

CONTENTIONS OF THE PARTIES:

As indicated above, the Unions claim that the provisions of Article XIX of the National Agreement are not applicable to this dispute since the Unions had already challenged the Service's right to deny overtime payments for limited duty assignments outside of an employee's regular scheduled hours in the Tulsa Case and even earlier. For that reason, a failure to process a challenge to this announced pay practice within 30 days after receipt of the notice of proposed change cannot be regarded as acquiescence.

With regard to this 30 day time limitation in the Agreement, the Unions contended that by practice the Parties had agreed that this requirement could be ignored and had been ignored without penalty. For this reason, discussions between the parties was an open ended process making this appeal to arbitration a timely challenge to the incorporation of this pay practice found in the Handbooks into the National Agreement.

The Unions also claimed that a failure to appeal a handbook revision to arbitration within 30 days does not permit the USPS to change the specific terms of the collective bargaining agreement. Since this failure to provide overtime payments would be contrary to the specific requirements of Article VIII-4-B, such provision could be grieved under the normal provisions of Article XV of the National Agreement. In addition, the Unions raised certain equitable considerations which they alleged warranted consideration in any determination of whether such overtime payments could be avoided.

Finally, the Union claimed that the Federal Employee Compensation Act does not require that the Employer put a partially disabled employee back to work, and implementing regulations issued by the Department of Labor and the Office of Personnel Management also do not impose such a requirement upon the Employer. For this reason, Section 233.23b of the Handbooks cannot be construed to permit the USPS to avoid its overtime obligation to such employees who are returned to duty in an out of schedule assignment.

The USPS made one principal argument with regard to the applicability of the provisions of Section 233.23b of the F21 Handbook. The Employer argued that by ratifying and signing the

1978 National Agreement, with knowledge of the provisions of the F21 and F22 Handbooks denying such overtime payments, the Unions accepted those provisions as being engrafted into the Agreement and not subject to further challenge as to their terms. According to the USPS, Article XIX of the Agreement clearly provides for such a result.

The Postal Service also contended that by operation of the terms of Article XIX the specific provisions of these Handbooks took precedence over the general provisions of Article VIII-4-B, which by their terms did not deal with the subject of out-of-schedule assignments for employees only capable of performing limited or light duty.

The Service also pointed out that the F21 and F22 Handbooks were published while the 1975 Agreement was in effect. Before that Agreement was superseded, the USPS served the notice that it intended to change the terms of the Handbooks upon the Union as required by Article XIX. The Union then had an additional 30 days in which to take those proposed changes to arbitration. Since the Union failed to do so, it must be concluded that it regarded the changes as not inconsistent with the requirements of Article VIII-4-B. There is no question, according to the Postal Service, that the Union knew of the change in pay practice which would result from the implementation of this provision in the Handbooks. It was discussed on numerous occasions, and the Union contended that the dispute over its implementation would be taken to arbitration. This did not happen in timely fashion.

The Postal Service also alleged that the fact it did discuss the implementation of Section 233.23b with certain attorneys

who represented various plaintiffs in a Fair Labor Standards Act proceeding more than 30 days after the time to file a request for arbitration under Article XIX could not be regarded as a waiver of the right to impose such a time limit on the Union which was the party with the right to request arbitration. From statements made by spokesmen for the NALC, it was apparent that the Union recognized it had to challenge the implementation of Section 233.23b in arbitration if the Service would not reconcile the terms of that provision with the language in Article VIII-4-B, and the subsequent discussions did not relieve the Union of this obligation.

In responding to the Union's claim that the question of the propriety of denying overtime payments to light duty assignees working out-of-schedule was being controverted at the time that the F-21 and F-22 changes were transmitted to the Union and a subsequent additional demand for arbitration was unnecessary, the Postal Service pointed out that even as late as February of 1978, when the F-22 revisions were sent to the Union, the fourth step decision in the Tulsa Case had not been issued. That was transmitted two months later. For that reason, at least at the National level, pursuant to Article XIX, the Union's objections to the changes in the Handbook should have been made known.

Finally, the USPS asserted that it believed it had an obligation imposed upon it to provide partially disabled employees with limited duty assignments in addition to other good reasons why it should do so. According to the Postal Service, based upon the authority under 5 U.S.C. Section 815(b), when read in conjunction with 5 C.F.R. 353.306, which imposed an obligation to "make every effort" to provide such employment, coupled with 5 C.F.R. 353.401, an employee

could appeal to the Merit System Protection Board if the USPS did not offer such an employee a limited duty assignment. To prove that an employee waived his or her restoration rights, the USPS would be obliged to demonstrate a job offer was made and the employee did not avail himself or herself of that opportunity. For these and other reasons, which it advanced, the Employer claimed that the Federal Employee Compensation Act imposed a duty upon the Postal Service to "immediately and unequivocally" restore an employee who has recovered sufficiently within one year to perform work in his or her own pay grade.

OPINION OF THE ARBITRATOR:

As stated earlier, this Arbitrator has on previous occasions required the Postal Service, pursuant to the provisions of Article VIII-4-B, to pay overtime to employees for time worked outside of their regularly scheduled work week at the request of the Employer. In the Tulsa Case, that duty was imposed when the employees involved were given such out-of-schedule assignments temporarily while performing limited duty because of a partial physical incapacity due to a work related injury or illness.

In the Tulsa Case, the Arbitrator discussed the beneficial results which could be achieved from the rehabilitative effects of such assignments for the employee. Also considered were the considerable savings which might result from getting employees to work at jobs they were capable of handling rather than sitting at home and receiving compensation payments. Regardless of the obvious advantages to the employee and the Service, as well as adherence to the government policy stated in the Federal Employees Compensation Act and implementing regulations of

the Civil Service Commission, now Office of Personnel Management, and the Department of Labor, the Undersigned was of the opinion that the clear language of Article VIII-Section 4-B precluded consideration of these other factors as then urged by the Postal Service. The Award had to take its "essence" from the terms of the Agreement.

The National Agreement provides in Article XIX as follows:

HANDBOOKS AND MANUALS

Those parts of all handbooks, manuals and published regulations of the Postal Service, that directly relate to wages, hours or working conditions, as they apply to employees covered by this Agreement, shall contain nothing that conflicts with this Agreement, and shall be continued in effect except that the Employer shall have the right to make changes that are not inconsistent with this Agreement and that are fair, reasonable, and equitable. This includes, but is not limited to, the Postal Service Manual and the F-21 Timekeeper's Instructions.

Notice of such proposed changes that directly relate to wages, hours, or working conditions will be furnished to the Unions at the national level at least thirty (30) days prior to issuance. At the request of the Unions, the parties shall meet concerning such changes. If the Unions, after the meeting, believe the proposed changes violate the National Agreement (including this Article), they may then submit the issue to arbitration in accordance with the arbitration procedure within thirty (30) days after receipt of the notice of proposed change. Copies of those parts of all new handbooks, manuals and regulations that directly relate to wages, hours or working conditions, as they apply to employees covered by this Agreement, shall be furnished to the Unions upon issuance.

In the case at hand, there is no dispute that the Unions were furnished with a copy of the proposed F-21 Handbook as revised, pursuant to the requirements of Article XIX, on December 15, 1977. The Parties met on January 13, 1978 to discuss the proposed Handbook contents. On February 16, 1978, the Postal Service transmitted the proposed F-22 Handbook along with certain revisions now proposed to the

F-21 Handbook. The Parties met on March 17, 1978 to discuss the proposed contents of the two Handbooks. In the two Handbooks was the following language in Section 233.23b, excusing overtime payment:

"Where an employee's schedule is temporarily changed because he was given a light duty assignment pursuant to Article XIII of the National Agreement or as required by the Federal Employee Compensation Act, as amended."

At that meeting, according to the testimony in this record, the spokesman for the NALC specifically brought up the Union's objections to making an exception out of involuntary out-of-schedule light duty assignments. He also argued that the Federal Employees Compensation Act did not require the USPS to make limited duty assignments. In the earlier Tulsa Case, this same witness indicated that he believed he told the Postal Service at the time he would arbitrate the issue and that arbitration was subsequently demanded. Before testifying in the present case, he learned that meetings had been requested but arbitration proceedings had not been invoked. Although this witness testified that he was of the opinion that the contentions made in the Tulsa Case covered the Union's position in this dispute, he obviously believed that the Postal Service was changing something because he indicated that an implementation of the Service's proposal to comply with Section 233.23b warranted processing a grievance on such an issue to arbitration. None of the Unions followed up their request for an Article XIX meeting with a request for arbitration when the Postal Service would not meet the objections to the inclusion of Section 233.23b in the Handbooks.

If the Unions believed that the changes in the payroll computation contemplated by this Section were in conflict with the terms of the then existing National Agreement, particularly Article VIII-4-B, than a grievance should have been raised and processed to a

resolution. If the contention of the Unions was that this change was neither fair, reasonable, nor equitable, a right to grieve also existed under the terms of Article XIX.

Parenthetically, it should be noted that the F-21 Handbook is singled out for specific mention in the provisions of Article XIX.

Examining the testimony offered at this hearing and the record of the Tulsa Case, which was incorporated by agreement of the Parties, the conclusion must be reached that the Postal Service did comply with the procedural requirements found in the second paragraph of Article XIX. The Unions were properly placed on notice, in a timely manner, that this limitation upon entitlement to overtime pay was going to be implemented under the terms of the Handbooks as it had under previous practice of the Service which the Union's had contested in the Tulsa Case.

While the discussions with a number of attorneys representing employees were underway concerning the USPS' financial obligation to a large number of employees under a decision issued applying Fair Labor Standards Act, the Unions were also questioning the Service's right to implement the payroll practice discussed in the Handbooks. At that very same time, in the Spring of 1978, negotiation of the new National Agreement began looking toward the renewal of the National Agreement due to expire on July 20, 1978. During the time that those negotiations were underway, there is no dispute about the fact that the Unions were aware of the contested provision contained in the Handbooks. The 30 day period provided for in Article XIX had long past before the new Agreement was consummated. That Agreement was made effective July 21, 1978. It contained the identical Article XIX language which was contained in the 1975 Agreement, including a specific reference to the

the F-21 Handbook provisions. No effort was made to modify that language at the time although the F-21 and F-22 were by then fully implemented nationwide and controlled time, attendance and payroll accounting procedures. The negotiators for the Unions, at the National level, thus agreed to continue in effect the terms of these Handbooks by their acceptance of the unaltered Article XIX requirements. It was not until April 19, 1979, more than a year after the transmission of these Handbooks, as revised, to the Unions, that the Union filed the grievance which led to this proceeding.

For reasons more fully explored in the Tulsa Case Award, the Undersigned is of the opinion that the language of the pertinent provisions of the Federal Employee Compensation Act as implemented by the regulations issued by the Office of Personnel Management and the Labor Department not only are designed to encourage employees to seek out and accept suitable work assignments for therapeutic reasons and to discourage malingering, but those same directives obligate the Postal Service to make every effort to find suitable employment, within a disabled employees physical capabilities, or be prepared to successfully explain why it was unable to do so. For that reason, the provision of Section 233.23b of the F-21 and F-22 Handbooks which indicates that such an obligation upon the Employer is a requirement of the FECA accurately reflects the intent of the draftsmen as well as those who were entrusted to administer the program and write the implementing regulations.

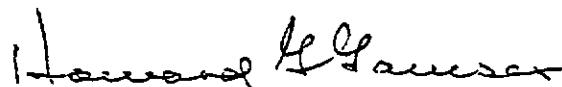
For the reasons set forth above, the Undersigned is of the opinion that this record supports the contention of the USPS that the current language of the F-21 and F-22 Handbooks governing eligibility for overtime payment for partially disabled employees has been engrafted into the National Agreement by virtue of the application of the provisions

of Article XIX.

Having reached this conclusion it must finally be determined that the grievance raised protesting the practice of not making overtime payments for out-of-schedule assignments to employees who are partially disabled because of an on-the-job injury or illness must be denied. Having so concluded, it is necessary to add that this determination does not give the USPS an unbridled right to make an out-of-schedule assignment when the disabled employee could be offered such a work opportunity during the hours of his or her regular tour.

A W A R D

The grievance filed in Case No. N8-NA-0003 must be and hereby is denied.



HOWARD G. GAMSER, ARBITRATOR

Washington, DC
March 12, 1980