

C#03226

UNITED STATES POSTAL SERVICE

CASE NOS. NC-C-7933  
and  
NC-N-10521

and

NATIONAL ASSOCIATION OF LETTER  
CARRIERS, AFL-CIO

ISSUED:

January 8, 1979

BACKGROUND

This grievance from the Goldsboro, North Carolina Post Office involves interpretation of Article VIII, Section 5-E of the July 21, 1975 National Agreement. It arose when the Postal Service excused Carrier G. C. Forehand from working an overtime turn on Saturday, April 23, 1977 while requiring Carrier W. T. Dunkin to work at overtime. Neither man had been scheduled, originally, to work on April 23, 1977 and neither was on the "Overtime Desired" list. Dunkin had more seniority than Forehand and did not wish to work the overtime shift, although he did so as directed and filed his grievance in protest. Forehand is a member of the World Wide Church of God. It is a basic tenet of this church that a member may not work on the Sabbath, which is from sunset Friday to sunset Saturday. Forehand was excused from working the overtime turn on Saturday in order to accommodate his religious beliefs.

The stipulated issue is:

2

"Did the U.S. Postal Service violate Article VIII of the 1975 National Agreement on Saturday, April 23, 1977 by requiring Mr. Dunkin to work on his non-scheduled work day in order to accommodate the religious needs of another employee, Mr. Forehand."

The relevant provisions in Article VIII of the 1975 National Agreement include:

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"ARTICLE VIII - HOURS OF WORK

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"Section 5. Overtime Assignments. When needed, overtime work for regular 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. Two weeks prior to the start of each calendar quarter, full-time regular employees desiring to work overtime during that quarter shall place their names on an 'Overtime Desired' list.
- "B. Lists will be established by craft, section, or tour in accordance with Article XXX, Local Implementation.

- "C. 1. Except in the letter carrier craft, when during the quarter the need for overtime arises, employees with the necessary skills having listed their names will be selected in order of their seniority on a rotating basis. Those absent, on leave or on light duty shall be passed over.
2. Only in the letter carrier craft, when during the quarter the need for overtime arises, employees with the necessary skills having listed their names will be selected from the list. During the quarter every effort will be made to distribute equitably the opportunities for overtime among those on the list. In order to insure equitable opportunities for overtime, overtime hours worked and opportunities offered will be posted and updated quarterly. Recourse to the 'Overtime Desired' list is not necessary in the case of a letter carrier working on his own route on one of his regularly scheduled days.
- "D. If the voluntary 'Overtime Desired' list does not provide sufficient qualified people, qualified full-time regular employees not on the list may be required to work overtime on a rotating basis with the first opportunity assigned to the junior employee.

"E. Exceptions to C and D above if requested by the employee may be approved by local management in exceptional cases based on equity (e.g., anniversaries, birthdays, illness, deaths)."

(Underscoring added.)

The present issue arose because the Goldsboro voluntary overtime desired list for regular Carriers (under Article VIII, Section 5) did not provide sufficient qualified Carriers to work on April 23, 1977. Under Article VIII, Section 5-D regular Carriers not on the overtime desired list thus became subject to the requirement, if needed, to work the overtime turn "on a rotating basis with the first opportunity assigned to the junior employee." 4

Forehand was not a member of the World Wide Church of God when first employed by the Postal Service, but after his affiliation with the Church he specifically requested, in July of 1974, that he be excused from work on Saturdays. Postmaster Simmons replied that-- 5

"... There is no provision that I can find to grant a permanent exemption from Saturday overtime work. Article VIII, Section 5 of the National Agreement describes the procedure for overtime assignments. To follow any other procedure would be a violation of the contract.

"I can assure you, however, that the Foreman, Collection and Delivery, with your cooperation, will make every effort not to work you on Saturday. Your willingness to perform other duties is appreciated and will be considered in making assignments."

During processing of the grievance, the Service 6  
stressed that Article VIII, Section 5-E permits excusing an employee from working overtime "in exceptional cases based on equity," and that the Civil Rights Act of 1964, as amended [42 USC Section 2000e-2(a)(1) and 42 USC Section 2000e(j)] require the Service to accommodate the religious beliefs of its employees absent "undue hardship" to the employer.

#### THE ARGUMENTS

##### 1. NALC

The NALC sees clear violation of Article VIII, Section 5-D, on the basis that the accommodation granted Forehand was neither sanctioned under Article VIII, Section 5-E nor required under law. Federal law, it stresses, does not require the USPS to vary the terms of the National Agreement. 7

Further, the NALC holds that judicial decisions 8  
fully support its position. Initially it cites Dawson v. Mizell, 325 F. Supp. 511 (E.D. VA. 1971), where a discharged

Postal employee claimed that his First Amendment right to free exercise of his religion had been violated by his discharge for refusing to work on Saturday, his Sabbath. It also cites Johnson v. United States Postal Service, 364 F. Supp. 37 (N.D. Fla. 1973), aff'd., 497 F.2d 128 (5th Cir. 1974), where another discharge of a Sabbatarian who refused to work on Saturday was upheld. There the discharged employee was a part-time flexible Clerk in a small post office which did not have the manpower to grant the grievant's request.

Finally, the NALC places great weight upon the 1977 decision of the U.S. Supreme Court in Hardison v. Trans World Airlines and IAMAW, 432 U.S. 63 (1977) where the Supreme Court refused to construe the reasonable accommodation requirement of Title VII [42 USC Section 2000e(j)] to require an employer to discriminate against some of its employees in order to enable others to observe their Sabbath. Since the Union there was not "willing to violate the seniority provisions set out in the contract" to accommodate the Sabbatarian the Court held that TWA need go no further in attempting to accommodate him, observing that the agreed "seniority system represents a neutral way of minimizing the number of occasions when an employee must work on a day that he would prefer to have off." After detailed analysis, the NALC brief concludes that Hardison establishes that the Service not only is not required to vary the terms of the National Agreement to accommodate Forehand, but also that it was discriminatory for the Service to have accommodated him. Such an accommodation, it says, was constitutionally improper under the First Amendment.

The NALC has no doubt that the language of Article VIII, Section 5-E supports its view largely because, it says, this language was included initially in the 1973 National

Agreement primarily because it was pressed by the NALC itself and drafted by NALC representatives. Since the NALC consistently has opposed granting any preference to employees on religious grounds--as particularly attested in several U.S. District Court Opinions--it is inconceivable that the Union negotiators could have intended to authorize the Service to excuse an employee from working on Saturday in order to accommodate a religious conviction.

In conclusion, the NALC discounts the USPS view that its action was proper under Article VIII, Section 5-E. If this provision is not limited solely to anniversaries, birthdays, illnesses, or deaths, in its application, this would render Section 5-D of Article VIII meaningless. Any local Postmaster could base excuses on a claim of equity so as to "leave application of the involuntary overtime provisions entirely at the whim of the Postmaster. Moreover, it says Section 5 is written so as to provide with "utmost specificity the particular circumstances which may warrant an exception to the strict application of Section 5-D." The elaboration of examples of exceptions in Section 5-E is introduced by "e.g.," which the NALC characterizes as notice that the examples listed include the "entire set of exceptions" so that citation of any other examples would not be useful. In support of this proposition it cites "A Uniform System of Citation" (14th ed., 1978).

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## 2. USPS

The USPS emphasizes that the Supreme Court did not declare in Hardison, that the religious accommodation provision in the Civil Rights Act was unconstitutional. To the

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contrary, the Court stated "the employer's statutory obligation to make reasonable accommodation for the religious observances of its employees, short of incurring an undue hardship, is clear, ...."

The Service thus believes that it was under a statutory obligation to try to accommodate Forehand's religious beliefs, except to the extent that it could not thereby violate an otherwise valid seniority provision in the National Agreement. 13

In the USPS analysis, Article VIII, Section 5-E thus is the controlling provision here since it grants local management discretion to grant exceptions to the overtime work requirement. Given this contractual discretion, it would appear that the Civil Rights Act requires the USPS to grant an exception in order to accommodate an employee's religious belief. 14

On its face Article VIII, Section 5-E allows local Management to excuse an employee to attend a birthday celebration, and it is at least as equitable to grant an employee an excuse to accommodate his religious requirements. The Postal Service stresses that it never has interpreted "anniversaries, birthdays, illnesses, deaths" to be an exclusive list, and always has regarded it as providing simply examples of types of excuses. Indeed, a long planned fishing trip with a brother, arriving from a distant location, easily could warrant granting an excuse from working overtime on a particular day. Finally, says the Service, even if Forehand had been ordered to report for work he would not have worked and it would have been necessary to require Grievant Dunkin to work in any event. 15

FINDINGS

Among the various judicial decisions noted by the parties only the Hardison case warrants comment here. In Hardison the Supreme Court characterized the effect of the definition of religion included in Section 7(j) by the 1972 amendments to Title VII as--

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"... to make it an unlawful employment practice under Section 703(a)(1) for an employer not to make reasonable accommodations, short of undue hardship, for the religious practices of his employees ..." (432 U.S. at 74)

The Court also noted that neither the Congress nor the EEOC as yet had undertaken to provide guidance for determining the degree of accommodation that is required of an employer.

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In Hardison, the Eighth Circuit Court of Appeals had found that TWA could have excused the Sabbatarian from Saturday work, and assigned another bargaining unit employee or a supervisor in his place, or arranged a "swap between Hardison and another employee." The Supreme Court ruled that each of these alternatives would have involved an "undue hardship" on TWA because they either would have entailed violation of seniority provisions of the applicable collective bargaining agreement, or required the payment of overtime which otherwise would not have been paid. For present purposes, one key observation by the Court was:

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"Hardison and the EEOC insist that the statutory obligation to accommodate religious needs takes precedence over both the collective-bargaining contract and the seniority rights of TWA's other employees. We agree that neither a collective-bargaining contract nor a seniority system may be employed to violate the statute, but we do not believe that the duty to accommodate requires TWA to take steps inconsistent with the otherwise valid agreement. Collective bargaining, aimed at effecting workable and enforceable agreements between management and labor, lies at the core of our national labor policy, and seniority provisions are universally included in these contracts. Without a clear and express indication from Congress, we cannot agree with Hardison and the EEOC that an agreed-upon seniority system must give way when necessary to accommodate religious observances."

(432 U.S. at 79. Emphasis supplied.)

Against this background it seems reasonably clear that the USPS is obliged under Title VII, as amended, to accommodate an employee's religious belief except where such action would entail "undue hardship" to the Service. Under the present facts such an "undue hardship" would exist only if the accommodation granted to Grievant would entail violation of Article VIII, Section 5.

Grievant should have been directed to work on Saturday, April 23, 1977 under VIII-5-D unless it was proper to grant him an exception under VIII-E, reading in relevant part--

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"Exceptions which may be approved by local management in exceptional cases based on equity (e.g. anniversaries, birthdays, illness, deaths)."

The NALC would read this exception very narrowly. It holds that term "e.g.," introducing the parenthetical listing of examples of exceptions, must be deemed to mean that only the four listed types of exceptions may be granted.

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This argument cannot prevail. The term "e.g." itself commonly is taken to mean "for example" or "such as," contrary to the NALC suggestion. Indeed, the parenthetical tabulation which is introduced by the term "e.g." is preceded by (and is explanatory of) the broad phrase "exceptional cases based on equity." It would have been entirely illogical for the draftsmen to embrace this broad phrase if they in truth had intended to grant only the four specific exceptions thereafter listed.

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There is more. The four listed types of exceptions in themselves are by no means precise in their meaning, or narrowly limited in possible application: --What is an "anniversary"? Whose birthday, illness, death or anniversary may provide a legitimate exceptional case "based on equity"?

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The inescapable conclusion is that the language of VIII-5-E on its face reflects an intent to confer relatively broad discretion on local management to excuse employees from overtime work for any one of a number of legitimate reasons "based on equity." If, as the NALC now suggests, its draftsmen had intended a different result in the 1973 negotiations, this thought was not communicated to other participants in the negotiations. In accepting the Union proposal, therefore, the USPS was entitled to rely upon the reasonable meaning of the language of VIII-5-E when read objectively.

It follows that Postmaster Simmons did not violate Article VIII, Section 5 in the present case.

It should be clear that this decision rests on the precise facts in hand. In particular, it is notable that Postmaster Simmons specifically cautioned Grievant Forehand in 1974 that there was no way that he could grant him a "permanent exception" to the requirement to work on Saturday. This advice correctly reflects that a proper application of the "equity" test in VIII-5-E entails consideration of each individual request for an exception on the basis of the facts which exist at the time each request is made. No flat and continuing exemption from Saturday work, for religious or other reasons, would seem permissible.

A few final words seem in order. The NALC urges that the First Amendment, in the last analysis, would bar granting an excuse to a Sabbatarian wishing to avoid Saturday work. The Supreme Court's Opinion in Hardison lends no support to this argument, however, and the Impartial Chairman sees no need to analyze it in this particular case.

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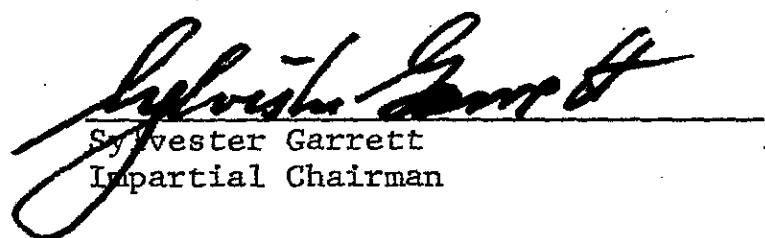
Finally the parties have agreed to hold Grievance NC-N-10521 in abeyance pending decision of the present case. NC-N-10521 involves holiday scheduling under Article XI, Sections 5 and 6, where the relevant contractual language differs materially from that now under review. Nothing in this Opinion, therefore, is addressed to potential interpretive problems under Article XI, Section 6.

28

AWARD

The grievance is denied.

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Sylvester Garrett  
Sylvester Garrett  
Impartial Chairman