IN THE MATTER OF ARBITRATION BETWEEN

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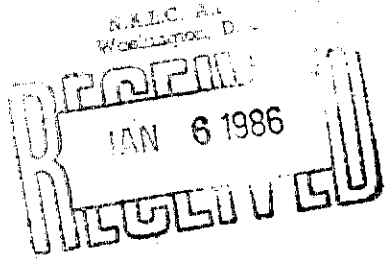

United States Postal Service,
Cloquet, Minnesota,

Employer

and

National Association of Letter Carriers
AFL-CIO
Cloquet Branch, No. 1243,

Union

Class Action Grievance
Case No. C4N-4C-C-63

APPEARANCES:

For the Employer: Mr. Dennis R. Hughes
MSC Director
Employee and Labor Relations
U.S. Post Office
Duluth, MN

For the Union: Mr. Barry Weiner
Regional Administrative Assistant NALC
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DECISION AND AWARD

Preliminary Statement and the Issues

MAX ROTENBERG, Arbitrator: The issues before me stem from the Employer's assigning to part-time flexible employees in the Clerk-Craft (PTFS clerks) work in the Letter Carriers' Craft during times when full-time employees in the Carriers' Craft

were on the Overtime Desired List (OTD list). The Union claiming the Employer's action is violative of contract Article 7, Section 2 invoked the grievance procedure on January 24, 1985,[1] which culminated in this arbitration. The Employer denies that its action violates the contract and claims that it acted in full conformity with the contract. At the hearing of the dispute in Cloquet, Minnesota on September 12, the parties were afforded full opportunity to present evidence, examine and cross-examine witnesses and to present argument in support of their respective positions. The Employer's post-hearing brief with several arbitration cases received September 30 and the Union's submission of several arbitration cases received October 1, which I found helpful, were duly considered. The parties did not agree on the precise language of the issues involved. Upon full consideration of the entire record, I believe the issues may best be stated as follows:

The Issues

1. Is the Employer's assigning to part-time flexible schedule (PTFS) employees in the clerk-craft work of full-time letter carriers (carriers) during the times when some full-time carriers were on the Overtime Desired List and available for work, violative of contract Article 7, Section 2?

2. If so, what is an appropriate remedy?

1/ All dates here are in 1985 unless otherwise indicated.

Relevant Contract Provisions

"ARTICLE 1

UNION RECOGNITION

Section 1. Unions

The Employer recognizes each of the Unions designated below as the exclusive bargaining representative of all employees in the bargaining unit for which each has been recognized and certified at the national level:

National Association of Letter Carriers, AFL-CIO-
City Letter Carriers

Section 4. Definition

Subject to the foregoing exclusions, this Agreement shall be applicable to all employees in the regular work force of the U.S. Postal Service, as defined in Article 7, at all present and subsequently acquired installations, facilities, and operations of the Employer, wherever located.

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:

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C. To maintain the efficiency of the operations entrusted to it;

ARTICLE 7

EMPLOYEE CLASSIFICATIONS

Section 1. Definition and Use

A. Regular Work Force. The regular work force shall be comprised of two categories of employees which are as follows:

1. Full-Time. Employees in this category shall be hired pursuant to such procedures as the Employer may establish and shall be assigned to regular schedules consisting of five (5) eight (8) hour days in a service week.

2. Part-Time. Employees in this category shall be hired pursuant to such procedures as the Employer may establish and shall be assigned to regular schedules of less than forty (40) hours in a service week, or shall be available to work flexible hours as assigned by the Employer during the course of a service week.

Section 2. Employment and Work Assignments

A. Normally, work in different crafts, occupational groups or levels will not be combined into one job. However, to provide maximum full-time employment and provide necessary flexibility, management may establish full-time schedule assignments by including work within different crafts or occupational groups after the following sequential actions have been taken:

1. All available work within each separate craft by tour has been combined.

2. Work of different crafts in the same wage level by tour has been combined.

The appropriate representatives of the affected Unions will be informed in advance of the reasons for establishing the combination full-time assignments within different crafts in accordance with this Article.

B. In the event of insufficient work on any particular day or days in a full-time or part-time employee's own scheduled assignment, management may assign the employee to any available work in the same wage level for which the employee is qualified, consistent with the employees' knowledge and experience, in order to maintain the number of work hours of the employees' basic work schedule.

C. During exceptionally heavy workload periods for one occupational group, employees in an occupational group experiencing a light workload period may be assigned to work in the same wage level, commensurate with their capabilities, to the heavy workload area for such time as management determines necessary.

Section 3. Employee Complements.

A. The Employer shall staff all postal installations which have 200 or more man years of employment in the regular work force as of the date of this Agreement with 90% full-time employees.

B. The Employer shall maximize the number of full-time employees and minimize the number of part-time employees who have nofixed work schedules in all postal installations.

ARTICLE 8

HOURS OF WORK

Section 2. Work Schedules

B. The employee's service day is the calendar day on which the majority of work is scheduled. Where the work schedule is distributed evenly over two calendar days, the service day is the calendar day on which such work schedule begins.

C. The employee's normal work week is five (5) service days, each consisting of eight (8) hours, within ten (10) consecutive hours, except as provided in Section 1 of this Article. As far as practicable the five days shall be consecutive days within the service week.

Section 3. Exceptions.

The above shall not apply to part-time employees. Part-time employees will be scheduled in accordance with the above rules, except that they may be scheduled for less than eight (8) hours per service day and less than forty (40) hours per normal work week.

Section 4. Overtime Work.

A. Overtime pay is to be paid at the rate of one and one-half (1-½) times the base hourly straight time rate.

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 30, Local Implementation.

C. 2.a. 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.

b. During the quarter every effort will be made to distribute equitably the opportunities for overtime among those on the list.

c. In order to insure equitable opportunities for overtime, overtime hours worked and opportunities offered will be posted and updated quarterly.

d. Recourse to the "Overtime Desired" list is not necessary in the case of a letter carrier working on the employee's own route on one of the employee's 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.

Section 8. Guarantees.

B. When a full-time regular employee is called in on the employee's non-scheduled day, the employee will be guaranteed eight hours work or pay in lieu thereof.

C. The Employer will guarantee all employees at least four (4) hours work or pay on any day they are requested or scheduled to work in a post office or facility with 200 or more man years of employment per year. All employees at other post offices and facilities will be guaranteed two (2) hours work or pay when requested or scheduled to work."

Summary of Evidence

This summary is based on stipulations or a preponderance of the evidence. The Employer at the Cloquet, Minnesota Post Office has nine full-time city carrier routes and one 4¼ hour auxiliary route which are serviced for six days, Monday through Saturday each service week. In the two categories of employees involved in this case, there are 11 full-time carriers, two part-time flexible carriers, three full-time clerks and two part-time clerks. In the city Letter-Carrier Craft there are 76¼ hours of daily work assignments and in the Clerk-Craft there are 31 hours of daily work assignment. PTFS employees have no fixed work schedule; their hours are as assigned by the Employer during the course of the service week. The contract does not require the Employer to maximize the employment of PTFS employees. The only guarantee the PTFS employees at the Cloquet location have is that when they are called in to work, they will receive two hours week or two hours pay. There have been assignments by the Employer of PTFS employees of the Clerk-Craft to work in the Carrier Craft on each of the work days in the period from January 10 through September 7, for a total of 977.54 hours work.

Contention of Parties

The Employer claims several defenses and in substance contends: (1) The Employer's assignment to PTFS Clerk-Craft employees work functions of the letter carrier craft is justified under contract Article 7, Section 2.B. (2) At the Cloquet, Minnesota location "part-time flexible employees in the Clerk-Craft have the greatest degree of probability of maintaining the basic work schedule by performing within the majority employment opportunity of the letter carrier craft." (3) Contract Article 3 "provides the Employer with the exclusive right "to direct employees of the Employer in the performance of official duties" and to "maintain the efficiency of operations entrusted to it." (4) The Cloquet, Minnesota Post Office has had a past practice of many years "which has provided part-time flexible schedule employees regardless of craft, opportunities to maintain a regular work week, has been accepted by both parties as a correct and customary means of doing business." (5) As to the remedy in the event the Union prevails the Employer contends that the back pay period should be limited to 14 days beginning with January 10, 1985.

The Union in substance contends: (1) the Employer has engaged in flagrant violation of the contract by assigning PTFS clerks to carriers' work during periods when full-time carriers were on the "Overtime Desired List." (2) The fact that the Employer's Cloquet, Minnesota location is a relatively small operation is no justification for craft crossing under the

contract. Had the contracting parties intended that size of the operation be a factor in determining when craft crossing should be permitted they would have expressed this intent. (3) As to appropriate remedy, the Union contends that this is a continuing grievance, that the back pay period should be from January 10, 1985 to the date of the Award and that the total hours worked by the PTFS clerks during the back pay period be divided equally among the letter carriers on the "Overtime Desired List."

Analysis and Conclusions

With Respect to Defense (1) - Craft Crossing Justified by Section 2.B.

The only provision in the contract that deal with cross-craft assignments is Article 7, Section 2 consisting of parts A.B.C. Part B states in part that: "Normally, work in different crafts, occupational groups, or levels, will not be combined into one job." Parts A, B and C provide for limited exceptions, the occurrence of which triggers the permission to deviate from the normal prohibitions against craft crossing. As indicated above, the Employer's first defense relies only on Section 2.B. Therefore, a determination of the validity of defense (1) depends upon whether the Employer's action, the subject of the grievance, satisfies the conditions under Section 2.B. The Employer justifies its action thusly: "Simply stated 76¼ hours of daily work assignments are available within the City Letter Carrier Craft. Clerk Craft daily work assignment provides only 31 hours of employment opportunity. Part-time flexible employees, in

order to maintain their regular work schedule, have the greatest degree of probability in maintaining a basic work schedule by performing within the majority opportunity craft of the City Letter Carrier." National Arbitrator Richard Bloch in Case No. A8-W-0656 (April 7, 1982) had occasion to interpret Section 2.B. in a fact situation essentially the same as the one in this arbitration. That decision involved a grievance based on the Employer's assigning a PTFS employee to work in a craft other than his own. In concluding that the assignment violated Section 2.B. the arbitrator in his decision on pages 6-7 states:

> "Taken together, these provisions support the inference that Management's right to cross craft lines is substantially limited. The exceptions to the requirement of observing the boundaries arise in situations that are not only unusual, but also reasonably unforeseeable. There is no reason to find that the parties intended to give Management discretion to schedule across craft lines yearly to maximize efficient personnel usage; this is not what the parties have bargained. While an assignment across craft lines might enable to avoid overtime in another group for example, is not, by itself, a contractually sound reason. It must be shown either that there was 'insufficient work' for the classification, or, alternatively, that work was 'exceptionally heavy' in one occupational group and light, as well, in another."
>
> Inherent in these two provisions, as indicated above, in the assumption that the qualifying conditions are reasonably unforeseeable or somehow unavoidable. To be sure, Management retains the right to schedule tasks to suit its needs on a given day. But the right to do this may not fairly be equated with the opportunity to, in essence, create "insufficient work through intentionally inadequate staffing. To so hold would be to allow Management to effectively cross craft lines at will merely by scheduling work so as to create the triggering provisions of subsections S, B and C. This would be an abuse of the reasonable intent of this language, which exists not to provide means by which the separation of crafts may be routinely ignored, but rather to provide the Employer with certain limited flexibility in the face of pressing circumstances."

Applying the tests used by Arbitrator Bloch to the facts in

this arbitration, the conclusion is inescapable, that the exception contemplated by Section 2.B. that will justify a deviation from the "normal" prohibition of craft crossing is not present here. The frequent occasions of work assignments that involved craft crossing may hardly be characterized as "unusual" and/or "reasonably unforeseen." Rather they were most usual, clearly foreseeable and routine. To adopt the Employer's position would be tantamount to ignoring the part of Section 2.B. "in the event of insufficient work on any particular day or days." Accordingly, I find that the craft crossing assignments here are inconsistent with Article 7, Section 2.B. See also National Arbitrator Richard Mittenthal's arbitration decision of August 23, 1982, Case No. H8C-2F-C-7406 at page 5, paragraph 2.

The Employer cites decisions of Arbitrators Linda Klein (August 20, 1985) and John Caraway (September 20, 1979) as supporting the Employer's position. Both of these cases are clearly distinguishable from the case before us. In the Klein case, the arbitrator's conclusion that an assignment of Special Delivery craft work to a PTFS carrier was not violative of contract Article 7, Section 2, was based on Section 723M-41 Handbook provision that "Delivery may be made by special delivery messenger or by <u>any other employee</u>." In the Caraway case, the Union protested the Postmaster's requirement that job No. 10 - Window Clerk - should have an additional requirement (SF-46 - a government's driver's license) claiming in effect that the Postmaster's requirement was unreasonable and was changing standard position descriptions into "individual positions." The

Union in the Caraway case did not claim that the change constituted improper craft crossing. In that case Arbitrator Caraway concluded that Job No. 10 standard position concluded the duty of setting "postage meters at the location of the customer," that to perform this function the employees were required to drive a vehicle to the location of the customer, and therefore the requirement of an SF-46 was reasonable.

With Respect to Defense (2) - Small Size of Postal Operations

The essence of this defense appears to be that the interpretation of Section 2.B. should depend on the size of the operation so that in a relatively small operation, as is involved in this case, facts that would constitute a violation of the contract in a large post office would not be so in a location as Cloquet, Minnesota. This problem, if it is a problem, should be addressed to the contract negotiators of the parties. The Arbitrator's contract interpretation task is to ascertain the intent of the parties. It is assumed that the experienced contract negotiators did not intend the result implied in defense (2). Had they intended it, they would have expressed that intent as they have done in other parts of the contract, e.g., Article 1, Section 6.B.; Article 7, Section 3.A.; Article 8, Section 8.C.; Article 15, Section 2, Step 2(a); Article 17, Section 2.C.

With Respect to Defense (3) - Management Rights

The Employer is correct that under contract Article 3, the Employer has the exclusive right "to direct employees of the Employer in the performance of official duties" and to "maintain the efficiency of operations entrusted to it." Article 3 also states that these rights are "subject to the provisions of the Agreement..." and not independent of them.

With Respect to Defense (4) - Past Practice

The Employer argues that there exists a past practice of more than 30 years in the Cloquet, Minnesota location of PTFS craft-crossing to provide work opportunities to these employees to increase their hours of work. The effect of a past practice has been a frequent issue in arbitration cases. Elkouri, How Arbitration Works, 4th ed., 1985, devotes 20 pages and 109 footnotes of case citations to it. Arbitrators generally hold that to establish a past practice which is binding on both contracting parties, it must meet three standards (variously expressed) to the effect, (1) the practice is clear and consistent; (2) has existed for a reasonable length of time, and (3) has been accepted by the parties. When these conditions exist, the practice is held to be binding upon the parties with the same force as if the practice had been expressed in the contract. The rationale of this principle is that the acquiescence in the practice for a reasonable length of time is an assent resulting in an implied contract. The evidence in this case reasonably satisfies standards (1) and (2) but is clearly insufficient as to

standard (3). The fact that the Cloquet, Minnesota local branch No. 1243 had knowledge of and accepted the practice is not sufficient a basis for attributing acceptance of the past practice by the national NALC. The record reveals no significant evidence that the national Union, which is a party to the contract, has the sole recognized and exclusive bargaining representative of the letter carrier employees acquiesced and accepted the practice, or that it was even aware of the practice. Moreoever, the Cloquet, Minnesota branch's knowledge and acceptance of the past practice is not sufficient to establish a binding practice on the national Union. Elkouri, etc., 4th ed., at page 439, states:

> "Where national policy of a federal agency employer governed a matter, local departure from that policy could not result in a binding practice. Immigration & Naturalization Ser., 77 LA 638, 643 (Weckstein, 1981) where higher management had been unaware of the local departure."

This is so especially in view the proviso in contract Article 30, Part B, "that no local memorandum of understanding may be inconsistent with or vary the terms of the 1984 National Agreement. See also Regional Arbitrator's Decisions, Marvin J. Feldman (December 28, 1979), Case No. 1071; Marshall Seidman (May 4, 1983), case number not indicated. In these circumstances I conclude that the Employer's defense of past practice has not been established.

With Respect to Appropriate Remedy

As indicated above, the parties disagree on the appropriate remedy, particularly on the back pay period. The Union contends that the back pay period should be from January 10, 1985 to the

date of the Award. The Employer contends that the back pay period be limited to 14 days from January 10, 1985 citing Arbitrator Mittenthal's decision referred to above under Analysis of Employer's defense (1). I believe the Employer is in error in relying on the Arbitrator's statement regarding the 14 day limitation. That statement was in the context of time limits for filing of the grievance in that case. The reference was to the limit to 14 days before February 11, the date of the grievance submission, and not to a period after February 11. Arbitrator Mittenthal makes this clear in a footnote on page 9 of the Decision. Having found that the work assignments to PTFS Clerks for craft-crossing is violative of the contract, the Award will provide that the employees adversely affected by the assignments shall be made whole for any loss of earnings they have suffered as a result of these assignments.

The Award

1. The grievance is sustained.
2. The Employer shall make whole those letter carriers who were on the "Overtime Desired List" and available for work on the days and times that PTFS Clerks performed carrier work, by paying to the letter carriers at overtime rate for the hours the PTFS Clerks performed carrier work from January 10, 1985, to the date of this Award, less earnings from any overtime work which the affected letter carrier employees would not have received

had not the improper craft-crossing work assignments been made.

3. In lieu of the remedy here provided, the parties by mutual agreement may fashion an appropriate remedy within 30 days from the date of this Award.

4. The Arbitrator will retain jurisdiction of this case for 30 days from the date of this Award to assist the parties in effecting compliance with the Award in the event it becomes necessary.

Dated at Minneapolis, Minnesota, December 31, 1985.

Max Rotenberg, Regional Arbitrator