27329

REGULAR ARB ITRATION

In the Matter of the Arbitration

between

UNITED STATES POSTAL SERVICE

and

NATIONAL ASSOCIATION OF LETTER CARRIERS, AFL-CIO

Grievance: Class Action

Post Office: Chino, California

USPS Case No. F01N-4F-C06215863
NALC DRT NO. 01-068834

BEFORE: Donald E. Olson, Jr., Arbitrator

APPEARANCES:

For the U.S. Postal Service: Ms. Eileen T. Lewis

For the NALC: Mr. Charlie Miller

Place of Hearing: Chino, California

Date of Hearing: September 19, 2007

AWARD: The grievance is sustained. The Union's motion for summary judgment is granted.

Date of Award: October 7, 2007

PANEL: Pacific Area

Donald E. Olson, Jr., Arbitrator

OPINION OF THE ARBITRATOR

PROCEDURAL MATTERS

This proceeding was conducted in accordance with the provisions set forth in Article 15 of the parties' 2001-2006 National Agreement. A hearing was held before the undersigned on September 19, 2007, in the postal facility located on Walnut Street in Chino, California. The hearing commenced at 9:00 a.m. and concluded later that afternoon. The case numbers assigned this dispute were: ***F01N-4F-C06215863*** and ***CH2272-06C***

The hearing proceeded in an orderly manner. There was a full opportunity for the parties to make opening statements, to submit evidence, to examine and cross-examine witnesses, and to argue the matter. All witnesses testified under oath as administered by the arbitrator. The advocates fully and fairly represented their respective parties.

There were no challenges to the substantive or procedural arbitrability of the dispute, and the parties stipulated that this case had been properly submitted to arbitration. The parties submitted the matter on the basis of evidence presented at the hearing. Furthermore, the

parties stipulated the issue(s) to be determined by this arbitrator.

Ms. Eileen T. Lewis, Labor Relations Specialist, represented the United States Postal Service, hereinafter referred to as "the Employer". Mr. Charlie Miller, President of Branch 1100 represented the National Association of Letter Carriers, AFL-CIO, hereinafter referred to as "the Union". The parties introduced two (2) joint exhibits, both of which were received and made a part of the record. The Union introduced four (4) exhibits, all of which were received and made a part of the record. The Employer introduced two (2) exhibits, both of which were received and a made a part of the record. During the hearing the Union made a motion that the arbitrator grant summary judgment in its favor. The Employer argued against the Union's request for summary judgment. The arbitrator notified the parties' representatives that he would give consideration to the Union's request for summary judgment, however, only after having an opportunity to review the entire evidentiary record. Furthermore, the arbitrator informed the parties' representatives that if he found insufficient evidence to support the summary judgment request, he would so notify the parties, giving them an opportunity to submit post-hearing briefs on a date

mutually agreed upon between themselves. This opinion and award will serve as this arbitrator's final and binding decision involving this dispute.

ISSUE(S)

The stipulated issue(s) are:

> Did management violate Articles 3, 5, 8.5 and 19 of the National Agreement, the Letter Carrier Paragraph, and Pacific Area MOU on Daily Overtime Violations (04/14/2003) when they unilaterally changed practices and established a policy that required non-ODL regulars to continually and repeatedly work mandatory overtime when assistance was otherwise available, and if so, what is the appropriate remedy?

RELEVANT PROVISIONS OF THE 2001-2006 NATIONAL AGREEMENT

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 operation are to be conducted;

ARTICLE 5
PROHIBITION OF UNILATERAL ACTION

The Employer will not take any actions affecting wages, hours and other terms and conditions of employment as defined in Section 8(d) of the National Labor Relations Act which violate the terms of this Agreement or are otherwise inconsistent with its obligations under law.

ARTICLE 8
HOURS OF WORK

Section 5. Overtime Assignment

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 shall place their names on either the "Overtime Desired" of 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.

B. "Overtime Desired" lists will be established by craft, section or tour in accordance with Article 30, Local Implementation.

C.1. (Reserved)

C.2.a When during the quarter the need for overtime arises, employees with the necessary skills having list their names will be selected from the "Overtime Desired" list.

b. During the quarter every effort will be made to distribute equitably the opportunities

for overtime among those on the "Overtime Desired" list.

c. In order to insure equitable opportunities for 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. It the voluntary "Overtime Desired" list does not provide sufficient qualified people, qualified full-time regular employees not on 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).

F. Excluding December, no full-time regular employees 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.

MEMORNADUM 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 interest 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 parties have agreed to certain additional restrictions on overtime work, while agreeing to continue the use of overtime desired lists to protect the interest of those employees who do not want to work overtime, and the interest of those who seek to work limited overtime. The parties agree this memorandum does not give rise to any contractual commitment beyond the provisions of Article 8, but is intended to set forth the underlying principles which brought the parties to agreement.

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 here 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.

The parties agree that Article 8, Section 5.G.1., does not permit the Employer to require employees on the overtime desired list to work overtime on more than 4 of the employee's 5 scheduled days in a service week, over 8 hours on a nonscheduled day, or over 6 days in a service week.

Normally, employees on the overtime desired list who don't want to work more than 10 hours a day or 56 hours a week shall not be required to do so as long as employees who do want to work more than 10 hours a day or 56 hours a week are available to do the needed work without exceeding the 12 hour and 60-hour limitations.

In the Letter Carrier Craft, when 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.

In the event these principles are contravened, the appropriate correction shall not obligate the Employer to any monetary obligation, but instead will be reflected in a correction to the opportunities available within the list. In order to achieve the objectives of this memorandum, the method of implementation of these principles shall be to provide, during the 2-week period prior to the start of each calendar quarter, an opportunity for employees placing their name on the list to indicate their availability for the

duration of the quarter to work in excess of 10 hours in a day. During the quarter the Employer may require the employees on the overtime desired list to work these extra hours if there is an insufficient number of employees available who have indicated such availability at the beginning of the quarter.

The penalty overtime provisions of Article 8.4 are not intended to encourage or result in the use of any overtime in excess of the restrictions contained in Article 8.5.F.

BACKGROUND

This dispute arose shortly after the Santa Ana District management notified the local union Presidents on May 26, 2006, that they desired to meet to discuss "our commitment to continue improvements of customer services, and to get our carriers off the street by 1700." That meeting was held on May 31, 2006. Prior to this meeting being held, the Employer had received numerous customer complaints in Southern California concerning late deliveries, inadequate customer service, which had been raised in public newspapers, as well as complaints being registered with members of Congress. After the District held its meetings with the local union Presidents representing employees working at various postal facilities in the Santa Ana District, a new "window of operation" was instituted, which mandated carriers to be off the street by 1700. On June 4, 2006, Mr. Charles Miller, President of

Branch 1100 sent a letter to Mr. Jerry Ahern, the Santa Ana District Manager, pertaining to perceived problems with the new "window of operation", as proposed by management. In addition, Mr. Miller extended an invitation to management to meet for the express purpose of working out a minor adjustment agreement, so as to fairly level the work load. The new window of operation was implemented in early June 2006.

Thereafter, the Union filed the instant grievance at the Chino Post Office, as well as several other postal facilities within the Santa Ana District. The Union contended that after the Employer unilaterally established a new "window of operation" mandating that letter carriers be off the street by 1700, that this policy required non-OTDL regular carriers to continually and repeatedly work mandatory overtime when assistance was otherwise available. Moreover, the Union argued such action was a violation of Articles 3, 5, 8.5, and 19 of the National Agreement, the Letter Carriers Paragraph, and the Pacific Area MOU on Daily Overtime Violations dated April 14, 2003. The grievance was properly and timely processed through formal Step A. The Employer denied the grievance at Step A., and the Union then appealed the grievance to the Dispute Resolution Team, which received the grievance on September

8, 2006. The Step B representatives met and subsequently issued an impasse decision on May 24, 2007. At this point in the process the Union contended that management had failed to abide by the provisions contained in Article 8.5 of the National Agreement, by requiring letter carriers who are not on any overtime list to continually and repeatedly work mandatory overtime when assistance was otherwise available. Moreover, the Union argued that from June 1, 2006 and thereafter, management mandated non-OTDL carriers to work overtime on their assignments and failed to maximize all available auxiliary assistance as required by the Letter Carrier paragraph, and further required non-OTDL carriers to work overtime off of their assignment, as well as failing to work the OTDL carriers up to 12 hours as required by Article 8.5.G. Furthermore, the Union alleged that those actions by management were willful and deliberate. Additionally, the Union claimed it was grieving the on-going and repetitive Article 8 violations brought on due to the District's unilateral 5:00 p.m. window of operations that management cannot justify. Likewise, the Union maintained that the initiation of the 1700 "window of operation" was not their issue, but rather the residual effect of that window that resulted in the

management's failures to abide by Article 8.5 of the National Agreement.

On the other hand, the Employer contended that pursuant to the terms of Article 3 of the National Agreement and for good business practices, it has the inherent right to establish its hours of operation, that is, business hours, and that Article 3 also gives management the fundamental right to establish a "window of operation." Moreover, the Employer argued that once a "window of operation" has been established, then Article 8 must be applied. In support of that argument, the Employer claims Article 8.5.G is permissive. In addition, the Employer claims that there was no evidence to indicate the parties, that is, the Union and the Employer had failed to bargain in good faith. In support of that claim the Employer contends that management had notified the Union of its proposed change to its "window of operation" prior to its implementation on June 10, 2006. Further, the Employer insisted that establishing a "window of operation" is a reasonable exercise of managements rights under Article 3, and that Article 8 does not override the right of management to determine the most efficient and economical means to schedule carriers as long as the actions of management are not arbitrary or capricious. In summary,

the Employer contends the Union failed to make a prima facie showing of a contractual violation related to Article 3, 5, or 8 of the National Agreement.

DISCUSSION

This arbitrator has carefully reviewed the entire evidentiary record, pertinent testimony, and the parties oral arguments, as well as cited arbitration decisions in support of their respective positions regarding the Union's motion for summary judgment.

First, this arbitrator grants the Union's motion for summary judgment related to its claim that the Employer violated Articles 3, 5, and 8.5 and the Letter Carrier Paragraph of the National Agreement when they unilaterally changed practices and established a policy that required non-ODL regular letter carriers to continually and repeatedly work mandatory overtime when assistance was otherwise available. This arbitrator's review of the evidentiary record sustains a finding that the Union has carried its burden of proof to support its motion for summary judgment. In order to defeat the Union's motion for summary judgment, the Employer could not simply rely on its pleadings but must have presented some evidence on every material issue for which it would bear the burden of proof at the hearing. See ***Celotex Corp. v. Catrell*** 477

U.S. 317, 324 (1986). The Employer was unable to bear that burden of proof.

This arbitrator is aware that several grievances have been filed over basically the same fact situation that occurred at the Chino Post Office regarding the District's change in its "window of operations." Clearly, the fault for so many grievances having been filed and the challenging of same, should not be attributed to the local postmasters of the affected postal facilities, or for that matter with the Employer's labor relations personnel, but, in fact, should squarely be assigned solely to decisions made by the Santa Ana District top management staff.

Obviously, as this arbitrator has concluded in other cases, the Employer has the right to establish a "window of operation" pursuant to its managerial rights outlined in Article 3 of the National Agreement. However, this managerial right allowing the Employer to create a "window of operation", must only be implemented subject to other provisions of the 2001-2006 National Agreement, and consistent with applicable laws and regulations. Specifically, if the Employer's decision to implement a new "window of operation" during the term of the existing collective bargaining agreement, as happened in this case, the Employer must be sure it has complied with the

provisions set forth in Article 5 (Prohibition of Unilateral Action). Undeniably, in this case when the Santa Ana District management implemented its new "window of operation" in June 2006, that decision compressed the number of hours available for employees on the OTDL to perform overtime duties, and, of course, caused mandatory overtime to be consistently and repeatedly assigned to those employees not on that list. This decision created a drastic impact on the majority of bargaining unit employees hours, wages, and their working conditions. Moreover, the record is clear that this decision by management was unilaterally implemented after having received the President of Branch 1100's letter dated June 4, 2006, indicating his desire and willingness to meet with the district for the specific purpose of working out a minor adjustment agreement in order to fairly level the work load. This arbitrator concludes that President Miller's letter constitutes an offer to meet for the express purpose of attempting to negotiate a change or modification to the Employer's proposed changes to the existing "window of operation" affecting all postal installations in the Santa Ana District, including the Chino Post Office.

Clearly, Section 8(d) of the National Labor Relations Act requires the parties to mutually meet at reasonable

times and confer in good faith with respect to wages, hours, and other terms and conditions of employment. Moreover, this same section of the NLRA also obligates the parties to meet and confer in good faith during the term of an existing collective bargaining agreement regarding **any question arising there under**, but such obligation does not compel either party to agree to a proposal or require the making of a concession. (Emphasis supplied).

The Employer's invitation to the local Union Branch Presidents in the Santa Ana District to attend a short meeting on May 31, 2006, to discuss "improved customer service" does not meet the statutory requirements of Section 8(d) of the National Labor Relations Act. In fact, the unilateral implementation of the 5:00 p.m. "window of operation" by the Santa Ana District not only constituted a violation of Article 5 of the 2001-2006 National Agreement, but also did not meet its obligations under law.

Furthermore, top management of the Santa Ana District blatantly disregarded the spirit and intent of the Memorandum of Understanding pertaining to Article 8, which reads in pertinent part as follows:

> 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 necessitates the use of overtime from time to time. . . .

A review of the evidentiary file leads this arbitrator to conclude that there is a need for the Employer to serve the public in the Santa Ana District efficiently and productively, and the need for all employees to be committed to giving a fair day's work for a fair day's pay, however, such a philosophical believe does not justify actions that are abusive, unfair, or violate the express terms of the 2001-2006 National Agreement. In short, *"Making the numbers"* is not an excuse for the Employer to treat its non-ODTL employees at the Chino postal facility unfairly, and at the same time violate the express provisions set forth in Article 3, 5, and 8.5 of 2001-2006 National Agreement.

Hence, based upon the record and for the reasons set forth above, this arbitrator grants the Union's motion for summary judgment after having concluded that management violated Articles 3, 5, and 8.5 of the National Agreement, and the Letter Carrier Paragraph when they unilaterally changed practices and established a policy that required

non-ODL regulars to continually and repeatedly work mandatory overtime when assistance was otherwise available.

AWARD

The grievance is sustained. The remedy portion of this award is hereby remanded to the parties. A mutually agreeable remedy must be fashioned by the parties no later than 90 calendar days after October 7, 2007. If not, the arbitrator will render an appropriate award. This arbitrator will retain jurisdiction of this dispute.

Dated this 7th day of October 2007.
Tacoma, Washington

Donald E. Olson, Jr., Arbitrator