REGULAR ARBITRATION In the Matter of the Arbitration Between UNITED STATES POSTAL SERVICE and NATIONAL ASSOCIATION OF LETTER CARRIERS, AFL-CIO	GRIEVANT: Class Action Post Office: Grand Rapids, MI (Northwest) 49599 Case No: J06N-4J-C-12194593 NALC DRT No: 06-240884 Br Grievance No: B560401112

Before: ARBITRATOR BETTY R. WIDGEON

Appearances:

Athena Cronberg
Labor Relations Specialist

Kyle Inosencio
Arbitration Advocate

Place of Hearing: Greater Michigan District Office, Grand Rapids, MI 49504
Date of Hearing: November 4, 2013
Decision Date: January 21, 2014 (by permission Mr. J. Moore & Mr. P. Carroll)

Witnesses:
Gary Smith, NALC Branch 56 President
Teresa Mullins, Postmaster, Grand Rapids, MI
Carrie Morgan, Manager, Reno, NV

Issue

Did Management violate Article 8 of the parties' National Agreement by failing to equitably distribute overtime to city carriers at the Grand Rapids Northwest Station during Quarter 1, 2012? If so, what is the appropriate remedy?

Summary of the Decision

By a preponderance of the evidence, the Arbitrator finds that Management violated Article 8 of the parties' National Agreement when tracking overtime for Quarter 1 2012 at the Grand Rapids Northwest Station. Therefore, the Arbitrator sustains the grievance. The analysis is set forth beginning on page 6.

Background

Article 8.5.B of the parties' Collective Bargaining Agreement (CBA, National Agreement) establishes an overtime desired list (OTDL). For Grand Rapids, MI city letter carriers, the OTDL is done by zip code. The zip code involved here is 49504. For years, Management and the Union at the Grand Rapids installation have had a local binding agreement on how overtime hours applied to the quarterly overtime are to be tracked and equitably distributed. This agreement has been updated over the years, and the latest update occurred in the October 2011 Agreement. The underlying dispute revolves around how *missed opportunities* for overtime should be charged.

The Union filed a class action grievance for carriers in the 49504 zip code alleging that Management violated Article 8 in Management's tracking of overtime hours for Quarter 1, 2012. The recorded incident date is April 1, 2012. Step A was initiated on May 4, 2012. The Step A Meeting was held on June 6, 2012. The grievance was received at Step B on June 20, 2012, and the Step B Decision is dated July 12, 2012. The DRT reached declared Impasse on July 20, 2012. The arbitration hearing was held on November 4, 2013 before the undersigned Arbitrator.

At the hearing, the parties presented their positions and supporting evidence. The representatives affirmed that there were no questions regarding arbitrability or other outstanding issues that would prevent the case from going forward. Each side had full opportunity to present an opening statement, examine and cross-examine witnesses, and submit a post-hearing brief and supporting cases. The Arbitrator received 3 Joint Exhibits and 1 Union Exhibit. The Union presented 1 witness and Management presented 2 witnesses. The matter is now ready for the Arbitrator's Decision and Award.

Language regarding OTDL Equalization

The National Agreement

Article 8.5.2(b) states that "every effort will be made to distribute equitably the opportunities for overtime" among those on the OTDL. Section 2(b) states that "in order to insure equitable opportunities for overtime, overtime hours worked and opportunities offered" will be posted and updated quarterly.

The JCAM

The JCAM specifies that under Article 8.5.2(b), for those carriers who sign the OTDL, "overtime opportunities must be distributed 'equitably' (i.e. fairly)." The JCAM explains that this does not mean that actual overtime hours worked must be distributed equally.

The October 2011 Agreement

In 2007, the parties agreed to a Standard Operating Procedure (SOP) regarding the OTDL. The October 2011 Agreement was the updated version of parties' long-standing OTDL Equalization document. It follows the JCAM definitions and specifications for addressing the following categories of carriers:

a) non-available carriers;
b) carriers on a week of A/L;
c) T6 carriers;
d) carriers requesting to be excused from assisting another route;
e) carriers submitting a change of schedule for the sole purpose of not taking a lunch;
f) carriers working overtime on their own routes; and
g) carriers refusing overtime.

The portions of the agreement in the dispute are highlighted here:

> An OTDL carrier will be charged the average hours of overtime worked within the 'OTHER ROUTE' category for any day he/she is not available. The average hours are calculated using all hours worked on routes other than the carrier's daily assignment, divided by the total number of carriers working on that service date. If no 'OTHER ROUTE' opportunities existed within the entire

> zone, a carrier who was determined to be unavailable would receive no charge for the day…
>
> Opportunities shall be recorded for all work related to 'OTHER ROUTE' and SDO. A running opportunity count should be used during end of quarter reviews.

Grand Rapids Postmaster, Theresa Mullins (Mullins), and NALC President, Gary Smith (Smith) were signatories to the October 2011 Agreement.

The Union's Position

The Union claims that Management violated Article 8.5.2 of the National Agreement when it did not distribute overtime hours equitably according to the October 2011 Overtime Equalization SOP agreement. Specifically, the Union contends that Management's overtime distribution for Quarter 1, 2012 (zone 49504) is in violation of the JCAM because Management did not distribute overtime opportunities fairly; instead, it double-counted unavailable opportunities. The Union argues that it already keeps track of all opportunities on a daily basis as provided for in the SOP. Carriers who missed the opportunities receive the average number of overtime hours worked that day. Then carriers who were unavailable are charged the number of hours they were unavailable—whether the missed opportunity is due to annual leave, sick leave, working one's own route, or for any other reason that an employee makes himself unavailable—up to the average. The Union argues that, in this way, the opportunities where the carrier was not available are not counted as missed opportunities, and Management is not asked to make them up. The Union challenges that at the end of the quarter, when Management considers the opportunity count, Management is essentially counting those unavailable hours as opportunities for a second time. Thus, the Union maintains that Management failed to make every effort to equitably distribute overtime for the quarter.

Management's Position

Management stresses the fact that it is not required to make up missed opportunities when the carrier was unavailable. Management focuses on the language of the October 2011 Agreement which specifies that "a running opportunity count should be used during end of quarter reviews." Management suggests that there is some discrepancy between the requirements of the JCAM and the definitions in the October 2011 Agreement and that the Union is electing to follow the SOP instead of the JCAM. Management believes that the Union assigns a value to a "missed opportunity" and tries to apply it to when a carrier is "non-available" instead of following the contract that says a missed opportunity does not have to be made up. It maintains that the appropriate measure is taking into account a tally of tracked opportunities when discussing equitable distribution of overtime during the quarter. Therefore, it feels that it should be able to take those unavailable opportunities into account at the end of the quarter.

Testimony

Gary Smith

Smith was the formal Step A representative on this grievance. Smith testified that the Union's position is that the tracking method agreed to by the parties in the October 2011 Agreement is all that should be considered during the quarter. He testified that, in order to ensure equalization of overtime, the Union adds up every hour that is worked on other routes and scheduled days off. Smith further testified that the Union's calculations take into consideration any time the carrier was not available based on his or her own doing by taking leave. Smith further testified that at the end of the quarter, if a carrier is outside the 10 hours, he is deemed not equitable.

On cross-examination, Smith conceded that there might be a few typographical errors in the Union's calculations but opined that this does not invalidate the whole process. When asked if the Union had decided to follow the SOP instead of the JCAM, Smith disagreed and corrected that the Union was following both documents. He explained the procedure this way: "When a carrier is not available, it is not considered an opportunity missed, and it is not made up; we're not making it up, because we charge them for how much they miss."

Teresa Mullins

Mullins testified that even though the paper reads that *opportunities* refers to "OTHER ROUTE and SDO," she does not believe that these were the only two things to be taken into the running opportunity count. Because the clause does not contain the word "only," she interprets the provision to mean that "OTHER ROUTE" and "SDO" are just two of the things that are to be considered as opportunities. Mullins agreed on cross-examination that unavailable carriers are charged for missed opportunities according to the Agreement. She also admitted that missed opportunities have already been accounted for in the Agreement.

Analysis

Burden and Standard of Proof

In this case the Union bears the initial burden of establishing a prima facie case of inequitable distribution. The burden then shifts to Management to show equitable distribution. The standard of proof is the preponderance of the evidence.

I. The JCAM and the SOP

The terms of the SOP and JCAM, though different in some regards, both control in this situation. The JCAM states that Article 8.5.C.2.b provides that

> "during the quarter, every effort will be made to distribute equitably the opportunities for overtime among those on the 'Overtime Desired' list."

It further clarifies that

> "missed opportunities for overtime must be made up for with equitable distribution of overtime during the quarter unless the bypassed carrier was not available (i.e. the carrier was on leave or working overtime on his/her own route on a regularly scheduled day, etc.)"

Also,

> "overtime worked on a letter carrier's regularly scheduled day is not counted or considered in determining whether overtime has been equitably distributed among carriers on the list....Additionally, overtime not worked because a carrier is working overtime on his/her own route on a regularly scheduled day is not considered an "opportunity missed" and is not made up to maintain equitability. This is because the carrier was not available to work the overtime."

The SOP provides the following definitions:

> Average: "the average hours are calculated using all hours worked on routes other than the carrier's daily assignment, divided by the total number of carriers working OT on that service date."
>
> Non-Available: "...should be used for carriers on Annual leave, Sick leave, military Leave, LWOP/AWOL and Change of Schedule."
>
> Overtime on Own Route: "When a carrier works overtime on their own route, overtime charged for the day should be equal to or less than the "other route" average. The carrier should not be charged for time greater than the daily average worked on other routes."

Evidence established that the parties have long adhered to a local binding agreement on how overtime hours applied to the quarterly overtime are to be tracked and counted. From time to time over the years, that agreement has been tweaked. The October 2011 installment of the agreement was in effect at the time of the present grievance.

As Arbitrator Edward Levin summarizes, "Agreements in labor relations are a (sic) important and purposeful practice. They are the cement upon which the relationship is built. If the parties are unable to rely upon agreements freely arrived at, the motivation for making agreements is damaged if not destroyed. Agreements may not be set aside except by showing of extreme circumstances that demonstrate unreasonable duress, fraud, deceit, or some equally

sinister cause."

II. Equitable Pay Need Not Be Equal

Management repeatedly argues that the JCAM requires distribution to be "equitable, not equal." Based on the language of the JCAM and the general usage of the words, the Arbitrator does not find that the words "equal" and "equitable" are mutually exclusive. That is, a distribution scheme can be equitable even though it is also equal. Management's reading of the language of JCAM offers no contradiction to this interpretation. It is inconsistent for Management to first argue that opportunities are only "Other Route" and "SDO" because the word "only" is not there, and then to argue that the JCAM definition of "equitable" must mean "not equal" *even though* those words are not there. From a contract interpretation standpoint, Management cannot be correct in both of these assertions. However, the Union never attempts to assert that the distribution should be equal. It persuasively argues that it is not using an equal distribution scheme. Instead, it argues that the 10-hour variance that both parties agreed to prevents the distribution from being equal. Under the variance, it does not appear possible for all carriers to have the same number of hours.

The Union claims that its use of 10-hour variances and daily averages provides the equitable distribution required by the JCAM within the guidelines provided by the SOP. Management argues that the desired outcome of JCAM is equitable distribution, and that it achieved this by considering opportunities at the end of each quarter. Management argues that Union's use of averages would give way to an equal pay structure, not the equitable one prescribed in JCAM. Management cites a case by Arbitrator Karen H. Jacobs (Jacobs) (May 4, 2010): "With the number of variables, and their unique impact of different individuals, exact equality of hours of Overtime Desired List overtime is extraordinarily unlikely. Therefore, a

showing of unequal overtime hours worked does not establish a prima facie showing of inequitable distribution of overtime opportunities." Jacobs mentions that Union claimed to be using a 16-hour variance, but (1) Management claimed never to have heard of or agreed to it and (2) it did not relate to the possible variations in ability. "The Union presented a case based on the number of hours worked based on their calculations. The underlying equity of opportunities was not explored."

In this case, however, there is a 10-hour variance in place that Management is aware of and did agree to. More importantly, in that case, the Union was alleging that the fact that there were unequal overtime hours worked established a prima facie showing of inequitable distribution of overtime opportunities. That is not the situation in this case. In this case, the Union's focus is on the calculation of opportunities, not the total (or average) number of hours worked.

Arbitrator Walter H. Powell (Feb. 27, 1995) wrote that "equitable distribution means fair and even-handed distribution of overtime to all eligible carriers who are ready, willing and able to work....Management's contractual obligation is to assure equitable opportunities for overtime, overtime hours worked and opportunities offered. There is no requirement for equalization of overtime hours worked, or opportunities offered." Management quotes Arbitrator Powell to support its case that it is not required to provide equal opportunities to all carriers. As stated above, however, this Arbitrator does not find that what the Union is requesting here is an equal distribution. Instead, it is asking for a fair and even-handed distribution to the eligible carriers who were ready, willing, and able to work. The Union believes and claims that after the process of applying a daily average of opportunities to workers who missed out and then charging unavailable workers for the amount of their unavailability, it would be unfair for

Management to once again penalize those carriers who were unavailable for the opportunities. This Arbitrator agrees.

Arbitrator Bernstein answered the question of why carriers placed their names on the OTDL in the first place. He decided that they got on the list for an obvious reason – to earn extra money: "therefore, the fairness of overtime opportunity distribution must be appraised in terms of its impact on the distribution of the resulting overtime pay....Under 8.4A, overtime pay is earned on the basis of hours worked; therefore, if the hours of overtime worked or offered are divided equally, the resulting pay earned (or available to be earned) should also be substantially equal."

The Union offers Arbitrator Bernstein's opinion in support of what must be looked at when one is considering equitability. Bernstein observed: "On the other hand, there is no substantial correlation between relative number of overtime opportunities offered and overtime compensation. One carrier could have gotten ten 8-hour opportunities while another was awarded ten 1-hour assignments. The first carrier would have been able to earn eight times as much as the second. All other things being equal, no one other than the first carrier would regard that result as "fair" or equitable." Management's suggestion, that opportunities are the biggest indicia of fairness is less persuasive.

III. Missed Opportunities and Unavailables

With respect to Article 8.5.C.2.d., the JCAM states that "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." Management points to a decision by Arbitrator Linda Klein Aug 17, 2007) for support of its position. Arbitrator Klein found that "the "formula" as explained at the hearing, is inconsistent with the contract and the JCAM for

several reasons. Significantly, the process utilized for years does not specifically track "opportunities" offered; without a showing of the number of opportunities offered and the number of overtime hours worked, it cannot be demonstrated that there was an inequitable distribution of overtime." The situation before this Arbitrator is different. The formula that the Union uses does track opportunities. It gives an average for opportunities of the day. Management's argument is that it tracks more opportunities than it should (unavailable opportunities). And that issue is dealt with in the record.

Management references another decision by Arbitrator Klein in which she points out that "also significant to fewer overtime opportunities is the number of days of sick leave and annual leave used by the grievant during the quarter in question. As acknowledged by the parties, this amounts to nine full days and three partial days where he was unavailable for overtime opportunities." She also writes that "based upon the evidence, a substantial number of the "missed" overtime opportunities were due to circumstances dirtily related to the grievant and not at all related to the fairness and equity of the distribution of overtime hours. Under such circumstances, the grievance cannot be granted." The circumstances before the Arbitrator today, however, are different because the Union is distinguishing between available missed opportunities and unavailable missed opportunities in its calculations.

The Union explains that Management is responsible to make up missed opportunities generally and that there is an exception for when the carrier is unavailable. The Union's procedure in the case of missed opportunities is to average the number of overtime hours worked that day and to apply that average to each carrier who missed the opportunity. In the case where the carrier was unavailable, the carrier is charged that daily average up to the amount of his unavailability. In this way, carriers who were completely unavailable for overtime that day will

end up with a balance of no overtime hours to be made up. Workers who were partially unavailable would end up with the amount of the daily average minus the amount of that person's unavailability.

Management contends that the Union improperly conflates worker available missed opportunities with worker unavailable opportunities. But this Arbitrator finds that the Union's interpretation of the contract both recognizes and accounts for the difference in these two situations and Management's responsibility in each. If the amount of overtime hours a carrier receives each day is reflective of his availability to work overtime hours, the amount of overtime hours presented at the time of the quarterly review reflect the number of opportunities missed for which the carrier was not unavailable.

Willful Disregard

Finally, the Union argues that that Management knew the weekly hours but did not attempt to remedy them and that this shows willful disregard. The Union cites Arbitrator Jonathan Klein's reasoning in support of this position:

> "The arbitrator notes that the weekly overtime tracking lists prepared by Management specifically indicate both the number of overtime opportunities afford OTDL letter carriers were receiving more overtime work than other carriers. Accordingly, Management was in a position to have adjusted the distribution of overtime worked going forward in order to comply with its obligation to make every effort to equitably distribute overtime opportunities during the quarter. However, it failed to do so."

Testimony by both Mullins and Smith confirmed that at the time they signed the October 2011 SOP they agreed with its content and both believed that the SOP followed the National Agreement and the JCAM. Recently their interpretations of portions of it has differed, but the overall facts and circumstances of this case do not persuade this Arbitrator that willful disregard by Management has been demonstrated.

Decision and Award

For all the reasons stated herein, the Arbitrator finds that the Union sustained its burden of showing by a preponderance of the evidence that Management violated Article 8 of the parties' National Agreement when tracking overtime for Quarter 1 2012 at the Grand Rapids Northwest Station. Therefore, the Arbitrator sustains the grievance. Management shall pay each carrier listed by the Union formal step-A representative (p. 14 of the case file) for the hours specifically listed therein at the appropriate overtime rate.

Betty R. Widgeon — 1-21-14

Betty R. Widgeon — January 21, 2014