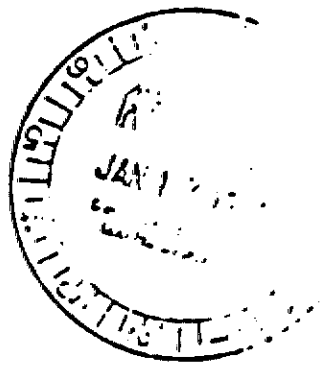
USPS 54-65412

C#13902

NATIONAL ARBITRATION PANEL

In the Matter of the Arbitration	
between	GRIEVANT: APWU President
UNITED STATES POSTAL SERVICE	CASE NO. H4C-NA-C 30
-and-	
AMERICAN POSTAL WORKERS UNION	



BEFORE: Richard Mittenthal, Arbitrator

APPEARANCES:

For the Postal Service:	Lynn D. Poole Senior Attorney Office of Labor Law
For the APWU:	Arthur M. Luby Attorney (O'Donnell Schwartz & Anderson)
Place of Hearing:	Washington, D.C.
Dates of Hearing:	April 17, 1990 and October 11, 1990
Date of Post-Hearing Briefs:	December 17, 1990
AWARD:	The grievance is denied.

Date of Award: January 14, 1991.

Richard Mittenthal
Arbitrator

BACKGROUND

The Article 8 Memorandum in the 1984 Agreement referred to the simultaneous scheduling of overtime work for employees on the overtime desired list (ODL) and employees not on this list. The APWU insists that the parties agreed in negotiating the Memorandum to limit simultaneous scheduling to situations where "such scheduling is necessary to meet the dispatch schedules, service standards, and other time critical requirements identified in the facility operating plan." The Postal Service insists there was no such agreement, no such limitation placed on simultaneous scheduling. It believes that the Memorandum intended only to confirm that Management was free to continue "existing practices" with respect to simultaneous scheduling as of December 1984.

In order to understand this case, some history of the 1984 negotiations is necessary. The Postal Service and the larger Unions, APWU and NALC, reached an impasse in their negotiations in mid-1984. They took their dispute to interest arbitration pursuant to federal law. However, they sought to resolve all of the so-called non-economic issues before the arbitration began. Overtime proved to be a particularly troublesome problem. But during early December, the parties thought they had reached an agreement establishing new restrictions on the assignment of overtime and a new category of penalty pay for certain overtime work.

The parties instructed their respective attorneys to meet and prepare a draft of these overtime understandings. The attorneys did so, their product being the new overtime rules found in Article 8, Section 5F and G. The Postal Service and NALC were prepared to accept the draft although Management apparently had some reservations. APWU, however, found the draft unacceptable and sought further language changes. The Postal Service was unwilling to make such changes but was persuaded later to return to the bargaining table to discuss these matters with APWU. Indeed, the Postal Service was itself concerned about an ambiguity in Article 8 that might encourage APWU to protest Management's simultaneous scheduling of ODL and non-ODL employees for overtime work. Management believed that it had always had the right to schedule such employees simultaneously and that this right had not been surrendered through the new language in Article 8. APWU, as indicated earlier, had other concerns about the new language.

The Postal Service and APWU resolved their differences through a series of meetings between December 10 and 17.[1] They executed an Article 8 Memorandum to express the understandings reached at these meetings. The Memorandum sought to explain the "underlying principles" behind the new Article 8 language but was not intended to change such language. It reads in part:

> 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 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 interests of those employees who do not want to work overtime, and the interests of those who seek to work limited overtime. <u>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</u>.
>
> The new provisions of Article 8 contain different restrictions than the old language. <u>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</u>, if there are five available employees on the overtime desired list and five not on it, and if ten workhours 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... (Emphasis added)

APWU asserts that during the discussions which led to the

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[1] NALC did not participate in these meetings.

Memorandum, the parties cited various examples of when simultaneous scheduling would be justified and when it would not. It claims that Management's examples all involved situations in which the scheduling of only ODL employees for overtime would have meant a failure "...to meet the dispatch schedules, service standards, and other time critical requirements identified in the facility operating plan." It concedes, as it apparently did in late 1984 as well, that Management is free in these circumstances to simultaneously schedule both ODL and non-ODL employees for overtime. But it argues that absent these time critical requirements related to an operating plan, simultaneous scheduling would be a violation of the Agreement. It maintains that this view is supported not just by what the Memorandum negotiators said to one another but also by the language of the Memorandum, the "existing practices" with respect to non-ODL people, and the need for some objective standard for determining the propriety of simultaneous scheduling.

The Postal Service's view of this controversy is quite different. It contends that the Memorandum did nothing more than "preserve...the status quo" with respect to simultaneous scheduling. It believes that Management's right to schedule both ODL and non-ODL employees at the same time, however that right may be defined, was unaffected by the Memorandum. It concedes that it must have "legitimate reasons to simultaneously schedule..." and that time critical requirements in the facility operating plan may typically be the "legitimate reason..." for such scheduling. It seems to concede also that the examples discussed in the Memorandum negotiations emphasized time critical requirements. But it asserts that Management "never agreed to limit its use of simultaneous scheduling only to [such] situations..." Its position is that any "valid operational reasons", whether time critical or not, could properly justify the use of simultaneous scheduling and that disputes over such scheduling involve questions of fact to be resolved in regional arbitration.

DISCUSSION AND FINDINGS

The parties acknowledge that simultaneous scheduling must be supported by "legitimate" or "valid" reasons. Their quarrel is whether the Memorandum negotiations, specifically, the examples discussed in those December 1984 negotiations, resulted in an agreement that simultaneous scheduling was warranted only where "...necessary to meet the dispatch schedules, service standards, and other time critical requirements identified in the facility operating plan." APWU

alleges there was such an agreement. The Postal Service says there was not.

APWU's case does not rest upon an express understanding reached during the Memorandum negotiations. It does not claim its representatives then specifically proposed that simultaneous scheduling be limited to time critical requirements found in an operating plan or that the Postal Service representatives specifically consented to this limitation. Rather, its argument rests on the examples discussed by the negotiators. It stresses that all the Postal Service examples of what Management considered to be proper simultaneous scheduling involved situations in which time critical requirements could not otherwise have been met. It insists that its representatives relied on these examples and had good reason to believe that the examples described what was, for both parties, the basis upon which Management would thereafter use simultaneous scheduling. It urges that this shared understanding should be grounds for granting this grievance.

There are several difficulties with APWU's argument. During the course of any negotiation, the parties discuss proposed contract language. One side or the other may cite examples to show what is (or is not) intended by such language. Those examples may prove useful in resolving an ambiguity which later surfaces in administering this contract language. But the significance of the examples may itself pose a problem. Consider the possibilities. On the one hand, examples may merely have been offered as illustrations of some principle which itself transcends the illustrations. That would be the Postal Service view in the present case. On the other hand, examples may be offered as a means of identifying the precise scope of a principle in which event the examples could well be regarded as all-inclusive. That would be the APWU view in this case. Neither view is, on its face, unreasonable.

However, in both of the above situations, the examples would serve to clarify some perceived ambiguity in contract language. Here, there is no such ambiguity. Nowhere in the Memorandum did the parties establish a new standard for determining when simultaneous scheduling was justified and when it was not. The parties simply stated that "the new language [in Article 8] is not intended to change existing practices relating to the use of employees not on the overtime desired list when there are insufficient employees on the list available to meet the overtime needs." These words do not create a new criterion for simultaneous scheduling. They do nothing more than embrace "existing practices." Thus, the

parties agreed that whatever "...practices" were in existence on this subject before December 1984 would continue in effect after December 1984.

The Memorandum accepted the status quo in this area, whatever that might mean. It asserted, in clear and unmistakeable terms, that "the new language [in Article 8] is not intended to change..." the customary ways of handling simultaneous scheduling. Nor can the Memorandum support any new contract obligation. Its limited scope could not have been made any plainer, "...this [M]emorandum does not give rise to any contractual commitment beyond the provisions of Article 8..." If that is true of the Memorandum, it must also be true of the negotiations which led to the Memorandum. In face of these statements of purpose, it cannot be said that the Memorandum negotiators intended the examples they cited to constitute a new obligation with respect to simultaneous scheduling. Or, to express the point more directly, the examples of time critical situations which the parties believed would justify simultaneous scheduling cannot reasonably be regarded as the only situations which could possibly justify such scheduling. What can or cannot be justified, according to the Memorandum, depends on "existing practices." Given the parties' sophistication in bargaining, they could hardly have meant the term "existing practices" to be limited to the negotiators' examples.

These observations should not come as a surprise to the APWU. One of its Memorandum negotiators testified as follows about the significance of the examples offered by the Postal Service:

> Q. ...Do you recall any other circumstance that the employer articulated when they needed to simultaneously schedule, aside from operational windows or time-critical dispatches?
>
> A. I don't believe there was any other example used, and I don't think that it was intended to foreclose the possibility that there might [be]... [O]f those of us participating...only Mr. Gervais would be what I regard as an expert on Article 8... [A]t least three out of the four of us weren't experts...and couldn't say with a certainty that there couldn't be any other circumstance that would be similar enough to what we were contemplating [the Postal Service examples] that it would also fit

within the employer's right...[W]e were not trying to spell out every circumstance, but it had to be a time-critical dispatch or something just like it... (Tr. pp. 44-45, Oct. 11 hearing, Emphasis added)

Clearly, the examples were not meant to be all-inclusive. There was no agreement that the examples would be the sole basis for simultaneous scheduling.[2]

For all of these reasons, APWU's claim cannot be accepted.

AWARD

The grievance is denied.

Richard Mittenthal, Arbitrator

[2] This point is illustrated also by the APWU post-hearing brief. The brief states that several Memorandum phrases - among them, "bona fide operational requirements", "existing practices", and the "need to get out the mail" - serve to "describe or at least allude to standards or criteria for simultaneous scheduling." These Memorandum phrases are broad enough to encompass circumstances other than time critical requirements, assuming of course that such circumstances had as a matter of "...practice" prompted simultaneous scheduling in the past.