C-26768

REGULAR ARBITRATION PANEL

In the Matter of the Arbitration	) GRIEVANT: Class Action
between	) POST OFFICE: Norwich, CT
UNITED STATES POSTAL SERVICE	) CASE NO:
	) USPS # B01N-4B-C 06079858
-and-	) Union #14-048822
NATIONAL ASSOCIATION OF LETTER CARRIERS, AFL-CIO	)

Before:	Barbara C. Deinhardt, Esq., Arbitrator
Appearances:	
For the U.S. Postal Service:	Ed Tierney Labor Relations Specialist
	Charles Corso Technical Assistant
For the Union:	Paul Daniels President, Branch 20
Place of Hearing:	Norwich, CT
Date of Hearing:	July 26, 2006
Briefs received:	October 13, 2006
Date of Award:	November 12, 2006
Relevant Contract Provision:	Articles 3 and 8
Type of Grievance:	Contract

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John J. Casciano, NBA
NALC - New England Region

Award Summary

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VICE PRESIDENT'S OFFICE
NALC HEADQUARTERS

Barbara C. Deinhardt, Esq.
Arbitrator

Pursuant to the Agreement between the National Association of Letter Carriers and the United States Postal Service, I was designated by the parties to hear and determine this dispute under the Regional Level, Regular Arbitration provisions of the Agreement. The parties agree that this case is the representative case for a number of other similar cases.

ISSUES PRESENTED

The issue as agreed to by the parties is "Did management violate the National Agreement Article 3 and, concomitantly, Article 8.5.D and G when they established a 5:00 'Window of Operation' in the Norwich, CT Post Office? If so, what shall the remedy be?"

BACKGROUND

On February 3, 2006, Acting Manager Operations Programs Support David J. Donnelly sent a memo to local NALC presidents that read as follows:

> The Connecticut District will be establishing a window of operations for delivery of mail for all Post Offices in Connecticut. The Postal Service is well aware that our customers want consistency of delivery. To achieve that objective, all Post Offices are now required to manage their deliver units so that all carriers return to the office by 1700 each day. The daily processing and delivery cycle begins with the collection of mail. Early arrival of collection mail at our Distribution Centers provides for efficient and timely cancellation and processing of mail to successfully achieve service objectives.

Prior to this memo, carriers in Norwich had to return to the office no later than 7:00 PM. Following the implementation of this 5:00 window of

operations in Norwich, employees who were not on the Overtime Desired List (ODL) and employees on the ODL were sometimes scheduled to work simultaneously in an attempt to get all mail to get delivered before 5:00. Thus non-ODL employees were more often required to work some overtime even though the ODL carriers had not yet worked their maximum of 12 hours per day and, conversely, some employees on the ODL were not given as much overtime as they had before.

The Union filed a grievance on February 18, 2006. By Decision dated March 17, 2006, the Step B Dispute Resolution Team reached Impasse.

POSITIONS OF THE PARTIES

The Postal Service initially moved to dismiss the grievance on the basis that an earlier National Award of Arbitrator Mittenthal Award H4C-NA-C 30 has ruled on this very issue and is binding on the parties. According to the Postal Service, in the Mittenthal decision, "the arbitrator upholds the Service's rights under the [Overtime] Memorandum to simultaneously schedule overtime and non-overtime list employees to meet operational windows that the Service has determined. His decision is clear that when a sufficient number of OTDL (overtime desired list) employees are available to meet the operational window they will be used. Only when the OTDL does not have enough employees to finish the work, can management simultaneously schedule overtime and non-overtime desired list employees. As long as OTDL employees are available during the window of operation they will be utilized first. It does not state that the

Service has to set operational windows to meet the language contained in Article 8."

On the merits the Postal Service argues that the Union has not met its burden of proving that the Service violated the National Agreement by the establishment of the 5:00 return time. Article 3 gives it the right to direct employees in the performance of their duties, to hire employees, to maintain the efficiency of the operations and to determine the methods, means and personnel by which such operations are to be conducted. The Deputy Postmaster General has established a 24-hour clock to ensure the timely delivery of mail. The clock includes a series of linked deadlines, including a 6:00 deadline for carriers to be back from the street and an 8:00 deadline for canceling 80% of collection mail. The Connecticut District appropriately determined that a 5:00 window of operations was necessary to enable to the District to meet the deadline for canceling of mail, as required by the 24-hour clock initiative.

The Union asserted that the Mittenthal award is not determinative of the issue in this case. "There is no contract provision, nor any National Level Arbitration award that allows, permits or authorizes management to exercise their Article 3 rights 'unequivocally' as they wrote in their Line 18 contentions, to create an unconditional or arbitrary 'window of operation' without regard to existing bono [sic] fide service needs or its impact on other existing negotiated contract provisions." According to the Union as set forth in its brief, the Mittenthal award merely states that the Overtime Memorandum did not change the practice of the parties related to "simultaneous scheduling of overtime in facilities as it existed prior to 1984. For the letter carrier craft, in cases that would otherwise have been a

contractual violation, this would only refer to emergency situations as per Article 3.F." The Union continued, "NALC has never accepted an operational window, nor any form of simultaneous scheduling, which requires non-ODL employees to work overtime unless all available employees on the ODL are worked in accordance with Article 8.5.G. Simply put, the Postal Service can implement operational windows, service goals, or any other program so long as its implementation does not violate the provision of the National Agreement."

On the merits, the Union does not dispute that management has certain rights under Article 3, but argues that those rights must be exercised consistent with other provisions of the Agreement, including Article 8 related to overtime. The window created by management was arbitrary. Management repeatedly refused the Union's requests for evidence and documentation to support its claims that there was a legitimate need and that the window would not violate Article 8, but none was provided. Management may not provide such evidence in the first instance at the arbitration, when the Union has no opportunity to respond. The Arbitrator should award a pecuniary remedy to correct this serious violation of the contract.

DECISION AND AWARD

The parties requested that I first address the threshold issue of arbitrability. I found by decision dated September 13 that the Mittenthal National Award H4C-NA-C does not preclude arbitration of the instant grievance because that decision held that simultaneous scheduling of ODL

and non-ODL employees is permitted under the National Agreement when there is valid, legitimate operational necessity for such scheduling, in accordance with practices existing at the time of the 1984 overtime negotiations. The question of whether the window as created was legitimate, under all the circumstances, including the likelihood that it would result in the overtime scheduling of non-ODL carriers and limit the overtime of ODL carriers in a manner arguably inconsistent with the negotiated intention of the parties to "protect the interests of employees who do not wish to work overtime," is still validly the subject of the dispute resolutions processes of the Agreement.

While I found that the legitimacy of the window remains to be arbitrated, it can only be arbitrated as prescribed by Article 15. In its brief, the Postal Service cites the discussions that took place in 1985 among the Service, the APWU and the NALC concerning the new provisions of Article 8. "One of the matters discussed was the simultaneous scheduling of overtime work for employees on the overtime-desired list and employees not on this list. During those discussions the parties acknowledged that simultaneous scheduling must be supported by legitimate or valid reasons. Specific examples of valid operational reasons discussed include but are not limited to, failure <u>to meet dispatch schedules, service standard and other time critical requirements identified in the facility operation plan</u>. (emphasis added)" Similarly, as the Postal Service advocate conceded in his Opening Statement, "There is no argument that the Postal Service cannot set windows of operation without a legitimate business reason, it cannot be arbitrary and capricious in doing so and <u>the testimony by today's witnesses will explain thoroughly what those business reasons are</u>." (emphasis added) However, the Postal Service did not explain those business reasons or cite any "failures

to meet dispatch schedules, service standards or other time critical requirements identified in the facility operation plan" during the processing of the grievance. The Service now relies on the Deputy Postmaster General's 24-hour clock to provide the business justification for its window of operation. However, at most, that 24-hour clock provides the justification for a 6:00 window of operations, not a 5:00 window. During the course of the grievance procedure the Service gave no evidence that a 6:00 window would not be sufficient to meet its needs in Norwich. The only justifications presented by the Service during the grievance procedure were:

- "our customers want consistency of delivery"
- "an 'Operations Window' is established to have customers receive their mail as close to the same time everyday and to make every effort to get carriers back into the office so as to make evening dispatches times to the mail processing plant on the earliest trips possible. Dispatching the majority of mail on the last dispatch causes a hardship to the processing plant which in turn can cause dispatches into offices the next morning to run late."
- "early arrival of collection mail at our Distribution Centers provides for efficient and timely cancellation and processing of mail to successfully achieve service objectives."
- "managers use the 'Operating Window' as a guideline for planning their daily delivery operation, so as to make every effort to accommodate the needs and expectations of our customers."

These general proclamations, unsupported by the kinds of detailed testimony the Service sought to offer in the arbitration, do not serve to provide sufficient business justification for the 5:00 WOO.

The Union objected at the hearing and in its brief to the attempt by the Service to introduce testimony at the arbitration for the first time to "explain thoroughly [its] business reasons," as promised by the Service in its opening statement. The Union argues, rightly I believe, that under Article 15, both parties must present all of their arguments and evidence before the B Team and the arbitration should generally be limited to those issues and to the parties positions on those issues. The Postal Service correctly argues that the Arbitrator has the authority to make exceptions to this rule if persuaded of the necessity. Here, however, I find no basis to do so, as the Postal Service has offered no explanation as to why it could not have presented its justification to the Union during the grievance procedure.

The Postal Service argues that the evidence in question is not really new argument or evidence, but merely an explanation or clarification of the arguments presented in the B Team decision by both the Union and the Service and the Union's exhibits at the arbitration. Arguing that the detailed testimony about dispatch times and percentages of dedicated and carrier collection mail returned at particular times and particular customer complaints about delivery times is just a clarification of the general justification provided in Donnelley's letter is like arguing that detailed evidence of specific misconduct that led to a proposed removal is a clarification of just cause. The purpose of the requirements in Article 15 is to prevent "arbitration by ambush" and to allow the parties to fully understand the merits of each other's positions so that resolution might be reached at the earliest steps of the grievance procedure. The general justification provided by management did not give the parties that opportunity.

I made clear to both parties that I was prepared to resume the arbitration hearing to give both parties an opportunity to present its

witnesses and evidence, but with the understanding that only those arguments and evidence that had already been presented during the grievance procedure would be accepted. The Carrier does not argue that it has additional such evidence. It does object to the consideration of the 24-hour clock offered as Union's Exhibit 1, since that was not discussed during the Step B process. While the Service did not object to the introduction of that exhibit during the arbitration and while I do not believe that it hurts the Service's position, I have disregarded the exhibit in making my determination. The Union did cite in its Step B argument the March 1, 2006 USPS News Link referring to the national USPS goal of all carriers back by 1800 (6PM). Thus, that has been considered.

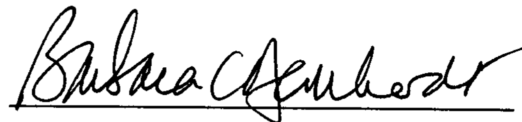
On the merits, therefore, I find that the Postal Service has the right to determine the hours of operation necessary to effect the timely delivery of mail. That right under Article 3 does not, however, give it the unfettered right to abrogate the terms of Article 8. Here the Union presented evidence that following the establishment of the 5:00 window of operations, on a regular basis, employees not on the ODL are being required to work overtime before employees on the ODL have maximized their overtime. Thus the burden shifted to the Postal Service to prove that the 5:00 window was supported by valid, legitimate operational necessity that justified the simultaneous scheduling. The Postal Service was not able to prove this with evidence and arguments offered during the grievance procedure. Therefore the grievance is sustained.

As a remedy, I order that the 5:00 window of operations be rescinded. If management finds that it is unable to deliver mail in a timely manner or is unable to meet nationally mandated time limits, it is not precluded from taking whatever steps are necessary to effect such timely delivery or to meet

such mandates, so long as it does so consistent with the requirements of the National Agreement. Carriers not on the ODL who were required to work overtime hours as a result of the 5:00 WOO shall be granted that same number of administrative leave hours. Carriers on the ODL who were denied those overtime hours that were assigned to non-ODL carriers as a result of the 5:00 WOO are entitled to be paid that number of hours, at the overtime rate.

I shall retain jurisdiction to ensure compliance with this Award.

SO ORDERED.



Barbara C. Deinhardt, Esq.

STATE OF NEW YORK)

: ss

COUNTY OF KINGS)

On this the 12th day of November 2006, I, Barbara C. Deinhardt, affirm, pursuant to Section 7507 of the Civil Practice Law and Rules of the State of New York, that I have executed and issued the forgoing as my Decision in the above matter.

Barbara C. Deinhardt, Esq.