

ARBITRATION Award

January 27, 1982

UNITED STATES POSTAL SERVICE

~~H8C 49C 13985~~

C 580

Case Nos.  
A8-W-939; A8-C-0768  
A8-S-712; H-8C-2F-C-6521  
A8-C-0767; H-8C-4B-C-20836  
A8-W-0776; A8-C-0626  
A8-W-951; A8-C-0638  
A8-C-0766 A8-C-637

-and-

AMERICAN POSTAL WORKERS UNION

APPEARANCES:

On behalf of the United States Postal Service:

NANCY T. FORDEN, Esq.

On behalf of the American Postal Workers Union:

JAMES I. ADAMS  
Administrative Aide  
Maintenance Craft, APWU  
817 Fourteenth Street, NW  
Washington, D.C.

Subject: Temporary Supervisors - Right to Out-of-Schedule  
Overtime Premium - Past Practice

State of the Issue: Whether the Postal Ser-  
vice's action in denying out-of-schedule overtime  
premium to employees working as temporary super-  
visors on and after January 12, 1980, was a vio-  
lation of the National Agreement?

Contract Provisions Involved: Article I, Section 2;  
Article V; Article VIII, Section 4-B; Article  
XIX; and Article XLI, Section 1-A-2 and Section  
2-A-2 of the July 21, 1978 National Agreement.

Grievance Data:

	Date
Case Heard:	September 25, 1981
Transcript Received:	October 15, 1981
Briefs Submitted:	November 22, 1981
Exhibits Filed:	January 10, 1982

Statement of the Award: The grievances are granted.  
The employees in question were entitled to receive the  
out-of-schedule overtime premium when applicable  
under Article VIII, Section 4-B. They should be com-  
pensated for their loss of earnings.

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INDUSTRIAL  
RELATIONS

## BACKGROUND

These grievances protest the Postal Service's action in denying out-of-schedule overtime premium to employees serving as temporary supervisors on and after January 12, 1980. The APWU insists this denial of the premium was a violation of Article V, Article VIII, Section 4-B, and Article XIX. The Postal Service disagrees.

Supervisors are absent for a variety of reasons. They may miss a day or two because of illness; they may be gone a week or more because of vacation; they may be away even longer because of a special detail. Management ordinarily replaces them with craft employees. The latter become temporary supervisors.\* While working in that capacity, they have the authority to adjust grievances on behalf of Management and to discipline employees. Appointment to such a temporary supervisor's position is strictly voluntary on the part of the employee.

The employee who becomes a temporary supervisor may perform work outside of his regularly scheduled work week. For example, if his regular schedule as an employee had been 7:00 a.m. to 3:00 p.m. and if his schedule as a supervisor was from 11:00 a.m. to 7:00 p.m., he would be working outside of his regular schedule from 3:00 p.m. to 7:00 p.m. The issue here is whether he is entitled to an out-of-schedule overtime premium for such work. The applicable contract language is found in Article VIII, Section 4-B of the 1975 and 1978 National Agreements:

"Overtime shall be paid to employees for work performed only after eight (8) hours on duty in any one service day or forty (40) hours in any one service week. Nothing in this Section shall be construed by the parties or any reviewing authority to deny the payment of overtime to employees for time worked outside of their regularly scheduled work week at the request of the Employer." (Emphasis added)

\* They are also known as 204(b) supervisors, a reference to Section 204(b) of the Postal Field Service Compensation Act of 1955.

Arbitrator Gamser decided Case No. AB-C-341 in mid-1975. He ruled that employees who volunteered for and filled temporary vacancies were entitled to an overtime premium under Article VIII, Section 4-B "for time worked outside of their regularly scheduled work week..." He ruled also that the fact that they had volunteered did not mean they were not filling temporary vacancies "at the request of the Employer." He made no mention whatever of employees serving as temporary supervisors.

The Postal Service, referring to this Gamser award, issued the following directive to its Employee & Labor Relations personnel on October 10, 1975:

"A recent arbitration award interpreted the last sentence of Article VIII, Section 4B... Pursuant thereto the following principles should be applied in determining the overtime obligations under this provision of the Agreement...

"1. Except under certain circumstances discussed herein, full-time employees are entitled to the payment of overtime for work performed outside of, and instead of, their regular schedule on a temporary basis even though such employees have volunteered for such temporary schedule changes. Except for details to certain positions enumerated in number 3 below, this general principle extends to temporary details of full-time bargaining unit employees both to vacancies within the bargaining unit and to vacancies in positions outside the bargaining unit (this includes, therefore, details to acting supervisor)..." (Emphasis added)

Thereafter, for more than four years, the Postal Service applied the last sentence of Article VIII, Section 4-B to "employees" serving as temporary supervisors. It paid them an overtime premium for "time worked outside of their regularly scheduled work week..."

Apparently two decisions caused the Postal Service to reconsider its position. The first was an award issued in Case No. NB-S-6859 by Arbitrator Fasser, approved by Impartial Chairman Garrett, on June 30, 1977. Fasser recognized that an employee, while serving as a temporary supervisor, has certain contract rights. He referred specifically to his "duty assignment" being "held open and available

to him for up to six months."\* He added that if his supervisory detail lasts beyond six months, "he also has residual rights in the bargaining unit which would guarantee him a position as an unassigned carrier."\* He observed too, "What other contract rights may be extended to employees in this situation is not clear." He suggested, however, that such rights might be established through practice. In the case before him, he could find no evidence that the Postal Service "customarily had permitted carriers detailed to supervisory positions to bid on available openings in the bargaining unit..." He held, accordingly, that a letter carrier filling in as a temporary supervisor did not have a right to bid for a vacancy in the unit.

The other decision was by the National Labor Relations Board in Case No. 5-CB-2121(P) dated February 5, 1979. The Board dismissed "unfair labor practice" charges filed by the Postal Service against NALC. Those charges arose from NALC's action (1) in amending the membership eligibility provisions of its constitution to provide that "...any regular member of the NALC who is temporarily...promoted to a supervisory position...will not be eligible to continue their membership in the NALC" and (2) in later interpreting this provision to mean that anyone accepting a temporary supervisor's position would not be eligible to participate in the NALC health benefits plan. The Board's ruling noted that "once he [a letter carrier] becomes a temporary supervisor, he is no longer an 'employee' within the meaning of Section 2(3) of the Act", that the "collective bargaining agreement excludes permanent supervisors from the bargaining unit", and that the "Postal Service has repeatedly taken the position that temporary supervisors are not a part of the bargaining unit." On the other hand, the Board also stated that a "letter carrier...while serving as a temporary supervisor, is not deprived of any contractual benefits."

Given these rulings, the Postal Service issued the following directive to its Employee & Labor Relations personnel in November 1979:

"Recent arbitration and NLRB decisions hold that bargaining unit employees while temporarily assigned (detailed) to supervisory or other non-bargaining unit positions are not employees under the collective bargaining agreements; and therefore not governed by the provisions of, nor entitled to the benefits provided by, such agreements.

\* These rights were set forth in Article XLI, Section 1-A-2 of the 1975 Agreement.

"Our policy with respect to such assignments outside of the bargaining units will be to treat them as non-bargaining unit employees and to grant benefits consistent with those provided for other employees in the non-bargaining unit salary schedules to which assigned. Thus such employees will not be entitled to Out of Schedule Overtime [under Article VIII, Section 4-B]..."

"Such employees will assume the schedule for the non-bargaining unit position to which assigned but will not be eligible for Out of Schedule Overtime...due to a schedule change upon accepting the temporary assignment. They will, of course, be eligible for overtime and other special pay provisions applicable to their assigned non-bargaining position..." (Emphasis added)

This change in policy was made effective January 12, 1980.

Thereafter, the Postal Service refused to pay the out-of-schedule premium to employees serving as temporary supervisors. That refusal prompted a large number of grievances, twelve of which are before me in this arbitration. The Union contends that the Postal Service's unilateral change of policy with respect to the application of this out-of-schedule premium was a violation of the 1978 Agreement. It alleges violations of Article V, Article VIII, Section 4-B, and Article XIX.

#### DISCUSSION AND FINDINGS

The Postal Service insists that the APWU request for an out-of-schedule premium for employees serving as temporary supervisors rests on "the underlying fallacy that such employees are covered by the provisions of the contract." It believes, on the contrary, that such people "are not bargaining unit employees..." during their supervisory stint and hence cannot claim any rights under the National Agreement. It asserts that while the employee fills in as a temporary supervisor, "the payment for hours worked is exclusively a supervisory matter."

This argument ignores the essentially hybrid status of an employee working as a temporary supervisor. He may

then be part of supervision but he also has certain rights under the National Agreement. Only a few examples need be cited to make the point. The employee-supervisor has a right under Article XLI, Section 2-A-2 to accumulate seniority within his craft during such time as he serves as a temporary supervisor. His service in the letter carrier craft is considered to be "uninterrupted", notwithstanding his supervisory assignment.\* Moreover, the employee-supervisor has a right under Article XLI, Section 1-A-2 to return to his regular "duty assignment" within the bargaining unit any time within four months of his move to temporary supervisor. That "duty assignment" cannot be declared vacant or posted for bids within this four-month period. Under this same contract clause, he has a right to return to the bargaining unit after four months although he would then become an "unassigned regular."

None of this should come as a surprise to the Postal Service. For Arbitrator Fasser stated in Case No. NB-S-6859 that the employee-supervisor had certain contract rights and that the precise scope of such rights "is not clear." He held in effect that past practice is a legitimate means of determining what the employee-supervisor is entitled to under the National Agreement. His ruling was that an employee-supervisor could not bid on a vacancy within the bargaining unit so long as he was functioning as a temporary supervisor. But he made clear that his ruling would have been in the employee-supervisor's favor had the Postal Service been able to show that "it customarily had permitted carriers detailed to supervisory positions to bid on available openings in the bargaining unit..." Thus, the parties must look to well-established practices in deciding what contract rights are possessed by an employee-supervisor.

Here, Article VIII, Section 4-B speaks of "employees" receiving the premium in question "for time worked outside of their regularly scheduled work week..." The Postal Service paid this out-of-schedule premium to employee-supervisors between October 1975 and January 1980, a period of more than four years. It must have paid that premium to employee-supervisors on thousands of occasions. Indeed, it was paying that premium to employee-supervisors in July 1978 when the parties entered into a new National Agreement.

\* See my decision in Case No. N8-NA-0383. Although that case dealt with the letter carrier craft, I assume that the same accumulation of seniority would occur in the clerk craft.

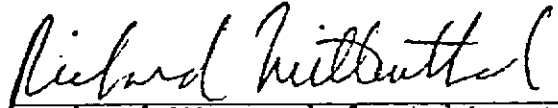
Thus, Article VIII, Section 4-B has been given its own special meaning through long-standing practice. The term "employees" in that contract clause has been read broadly to apply to employees even during the time they serve as temporary supervisors. The Postal Service has offered no sound basis for upsetting this accepted interpretation of the out-of-schedule premium. Past practice must prevail in this case. Surely, the Postal Service's change of policy cannot change the meaning of the contract clause. Only a revision of the contract language itself or a mutual understanding to modify (or nullify) the practice could effect such a change.

It follows that the employee-supervisors in these grievances are entitled to the out-of-schedule premium during their details as temporary supervisors.

The Postal Service contends too that it had no choice in this matter, that it was merely attempting to comply with arbitration and/or NLRB decisions both in October 1975 when it began to pay the premium to employee-supervisors and in January 1980 when it ceased such payment. However, a careful review of these decisions suggests a quite different story. Nothing in Arbitrator Gamsler's award commanded that the out-of-schedule premium be applied to employee-supervisors. Gamsler never touched on that subject. Nothing in Arbitrator Fasser's award commanded that the out-of-schedule premium not be applied to employee-supervisors. Fasser never touched on that subject. However, his opinion states that employee-supervisors do have rights under the Agreement and that past practice is a relevant and necessary guide in determining exactly what those rights are. Nothing in the NLRB decision dealt with the employee-supervisor's rights under the Agreement. That case turned on NALC's statutory obligations under the National Labor Relations Act. Thus, the Postal Service was not under any kind of obligation to act on the issue before me in October 1975 or January 1980. Its failure to act at either time would not have caused Management to be in violation of any arbitration or NLRB precedent.

AWARD

The grievances are granted. The employees in question were entitled to receive the out-of-schedule overtime premium when applicable under Article VIII, Section 4-B. They should be compensated for their loss of earnings.



Richard Mittenthal, Arbitrator