ARBITRATION CASE NO. AB-S-1659

C 938

IN THE MATTER OF THE ARBITRATION BETWEEN

AMERICAN POSTAL WORKERS UNION, AFL-CIO

-and-

UNITED STATES POSTAL SERVICE

OPINION AND AWARD

APPEARANCES:

For the Union - Donald M. Murtha, Esq.

For the USPS - Mason D. Harrell, Jr., Esq.

BACKGROUND:

On October 26 and 27, 1973, Union officials of the Johnson City APWU Local Union attended an "APWU Volunteer Seminar" at Chattanooga, Tennessee at which applications and interpretations of the 1973 National Agreement were discussed. According to the Union officials, who testified in this proceeding, this was the first time that they learned that an employee who is temporarily assigned to a higher level supervisory detail is entitled to overtime premium pay for time worked outside that employee's regular schedule. These Union witnesses claimed that, although they had attended a similar meeting in 1972, at about the same time, and although Article VIII, Section 4.B, which provides the basis for the overtime payment had been in the 1971 Agreement as well as the 1973 Agreement, this was the first time they were aware of this application of the National Agreement.

Upon returning from the seminar, these Union officials discussed this newly gained knowledge with Johnson City postal officials. These supervisory employees expressed suprise when they were told of

this interpretation of the National Agreement, and they checked with District representatives of the USPS. They, in turn, also claimed the were unaware that such overtime payments were required and indicated that was not a local practice to make such payments. However, they, in turn, checked with Regional Headquarters and learned that indeed there was an obligation to make such payments under the above-cited provision of the National Agreement. The Local Union officials also told Management that confirmation of this requirement was being forwarded to them in a Union publication known as the "Blue Book."

On November 8, 1973, the "Blue Book" arrived. It contained a reference to decisions at Step 4 which sustained claims of bargaining employees on 204-B details for out-of-schedule overtime pay. On the following day, November 9, 1973, the Local Union President filed a class action grievance on behalf of all employees represented by the APWU who had worked on such out of regular schedule details. In this grievance, the Local Union requested that such overtime payments be made retroactive to June of 1972. There was some discussion of the case at Step 1, and the USPS admitted liability for paying overtime, but the Union's request that the breach of the Agreement be remedied with such a retroactive payment proved a stumbling block to a settlement of the case. On November 16, 1973, the USPS denied the grievance at Step 1.

On that same day, Larry Young, who had been assigned to such out of schedule details since July of 1972, filed his individual grievance. In his grievance, which is the subject matter of the instant proceeding, Larry Young asserted that he was entitled to retroactive overtime payments for all hours which he worked out of schedule since

July of 1972.

There was some discussion between the Local Union officials and Local Management concerning a possible settlement of the case as well as the class action grievance, mentioned above, but finally the parties agreed that no settlement was possible. Management immediately began to make proper payments of overtime to those employees who were required to work 204-B details in out of regular schedule hours, but Management's retroactive liability to all affected employees remained in issue.

THE ISSUE:

Although these parties did not execute a written stipulation of the matter in issue in this proceeding, at the outset of the hearing they agreed that the disposition of the Larry Young grievance would be employed to dispose of the retroactivity issue raised in the class action grievance filed on November 9, 1973 as well as in his case. Thus, the issue presented for decision is what is the appropriate remedy for this conceded breach of the National Agreement.

CONTENTIONS OF THE PARTIES:

The Union conceded that, under the provisions of Article XV, Section 2 of 1973 National Agreement, under which these cases arose, there is a time limit for initiating a grievance. That provision reads:

> The employee must discuss a grievance with his immediate supervisor within fourteen (14) days of when the employee or Union has learned or may reasonably have been expected to have learned of its cause.

The Union alleged, however, that under the provisions of Section 2 of the Award issued by the undersigned Impartial Arbitrator

on May 15, 1975, the grievants were entitled to full retroactivity going back to the initial date of the improper assignments without overtime payments, i.e., in Young's case, July of 1972.

The Union alleged that, under the terms of that Award, this amount of retroactivity is warranted because the Employer misled these employees into believing they did not have a claim and caused them to sleep on their rights. The Union argued that it was apparent from the testimony adduced in this proceeding that the Local Postmaster and the District Director were not informed of the USPS' policy of making such overtime payments. That policy had been adopted in 1971 in the Watson case. Thereafter, at least at Step 4, such overtime payments were routinely awarded. Since the field was not made aware of this policy, the Union charged that the responsibility for these employees sleeping on their rights must be laid at Management's doorstep.

The Union contended that Management has the further responsibility for computing the amount of pay due and owing to each employee correctly and in accordance with interpretations of the collective bargaining agreement issued by the courts or by arbitrators. The USPS created the confusion that led to these improper payments at Johnson City by not issuing clear and definitive instructions to those responsible for preparing the payroll. This was, according to the Union, gross neglect or gross negligence which required that the Postal Service be held responsible for the full period under consideration in these cases.

The Employer claimed that there should be no dispute that Larry Young and the employees covered by the class action are precluded by the time limit provisions from collecting back pay beyond the 14 da

prior to the time that these grievants, or their representatives, became aware that there was a grievable issue. ... Management argued that it did not mislead employees or encourage them to sleep on their rights with regard to their entitlement to overtime premium pay.

The Employer as well as the Union relied upon a portion of the above-cited Award of this Impartial Arbitrator in support of its claim that the retroactivity claimed should be denied. The USPS alleged that in the Award it was recognized that there had to be adherence to the time limits of the grievance procedure except under very special circumstances, i.e., the misleading of the grievants causing them to sleep on their rights. The Employer claimed that in this case any delay in filing of these grievances cannot be held to be caused by any act of commission or omission by National or Local postal authorities.

The Employer also argued that it had gained no windfall by having these employees assigned under 204-B working out of schedule. Had Management known about the overtime liability that was being incurr it would have assigned such employees to this type of detail only durir their regularly scheduled hours of work. In addition, the Service argued that Larry Young was on such assignment at his specific request. Equitable considerations would dictate barring a recovery of this nature for Young under such circumstances.

OPINION OF THE ARBITRATOR:

Because both parties quoted from and relied upon the directive contained in my Award in Case No. AB-NAT-2541, the terms of that Award are quoted in full below:

AWARD

1. The Union's grievance, insofar as it proposes that a general waiver of the time limits contained in Article XV of the National Agreements reached in 1971 and 1973 is in order for the alleged violations of Article VIII, Section 4-B, of each of those National Agreements is hereby denied.

2. The Union's charge that the Employer misled employees or encouraged them to sleep on their rights in certain cases, so that the right of these employees to grieve alleged violations of Article VIII, Section 4-B was considered untimely under the National Agreements, may be progressed on a case by case basis where a prima facie case in support of this charge against the Employer can be made. This Award specifically does not rule upon the applicability of time limits contained in the National Agreements under review in such cases.

3. In cases where it is alleged that a continuing violation of Article VIII, Section 4-B, is occurring by reason of an out-of-schedule assignment which has not resulted in overtime payment, a grievance will be considered timely which is filed within five or fourteen days of the date on which a specific violation of the National Agreement is alleged, depending on whether the five day requirements of the 1971 Agreement or the fourteen day time limit under the 1973 Agreement is applicable. In such cases the Employer's liability is retroactive for only the five or fourteen day period specified in the pertinent National Agreement.

There is no dispute that this case is concerned with a continuing violation which began in approximately June of 1972 and continued until approximately November 9, 1973, when Management made an effort to assign employees, under the provisions of Article VIII, Section 4-B only during the hours of their regular work schedule. There is also no dispute that, under the terms of Section 2 of Article XV, quoted above, the grievant and his Local Union knew of the cause of this grievance on October 26, 1973. For that reason, barring the intervention of the circumstances discussed in Section 2 of the Award

quoted above, the grievances with which we are herein concerned could not have a retroactive effect beyond October 12, 1973.

The only issue to be determined in this proceeding is whether, under all the circumstances revealed by the evidence adduced in this case, "...the Employer misled employees or encouraged them to sleep on their rights" so the time limits of the 1973 Agreement, 14 days, should not be regarded as applicable.

From the very outset of the hearing, and as confirmed by all the competent testimony, it was clearly established that neither local Management nor local Union officials apparently were aware of the meaning and import of the language of Article VIII-Section 4-B, which had been in the Agreement since 1971, nor of the impact of the decision in the Groettum case and the Class Action which followed, as well as arbitration under the Agreement.

That being the case, it is difficult to make a finding that Management misled the employees or caused them to sleep on their rights when Local Management, at least, was unaware that these employees had any rights to the overtime payments here in contention. The Union charged that Management did not issue proper instructions to the field and this was the cause of the confusion. The evidence found in the testimony offered in this record establishes that whatever bulletins were issued by higher authority and misinterpreted by Local Management regarding the requirement to pay overtime for out-of-schedule Section 4-B assignments were available for perusal by Local Union officials as well, at first in an accessible looseleaf binder and later by posting of such bulletins on a readily accessible board for all to review. There is no evidence in this record that any effort was made locally or by higher authorities to conceal from Local and District Union official

that the Postal Service was liable for and would make such overtime payments. There was some evidence in this record that Management made a positive effort to indoctrinate all employees to read the contents of these pay bulletins and other directives as they appeared very carefully so there would be full compliance on the local level.

The Union did not specify in which specific bulletin, which the employees, their Union, and local Management all ignored, the directive to make such overtime payments appeared. However, the record does reveal that the APWU dutifully published and distributed that bulletin in its own news organs as a release issued by the APWU News Service on February 25, 1972. There is no question that National officers of the Union and Regional officers as well were fully aware of the Union's efforts to prosecute these claims in various postal installations around the Country, and these officials made an effort to inform the field in various publications about what progress was being made in settling such cases. The Postal Bulletin, referred to above, which was published by the APWU on February 25th, specifically noted that after January 7, 1972, claims for out-of-schedule overtime payments would be processed as grievances

While, as the Union pointed out in this case, the Postal Service is charged with preparing a correct payroll and making all payments to its employees required under the terms of the Agreement, court decisions and arbitration awards, it is equally true that the APWU, and its local officers, are charged with the responsibility for policing the agreement and the actions of the Postal Service so they are in compliance with the Agreement and other appropriate directives. As pointed out in Section 2 of the Award in Case No. AB-NAT-2541 quoted above, only under the very narrow and special

circumstances, when the Employer's actions can be clearly discerned as the direct cause of the Union's failure to abide by its obligation under the National Agreement to file its grievances in timely fashion as that obligation is set out in Section 2 of Article XV of the National Agreement, can a failure to do so not act as a bar.

Those very narrow or special circumstances, wherein the Employer misled the Union and caused the employees to sleep on their rights, cannot be found in the record established by the Union in this proceeding. For that reason, Larry Young as well as the Local Union in the class grievance filed on November 9, 1973, cannot hold the Employer liable for a retroactive overtime payment for out-of-schedule supervisory assignments beyond the fourteen day period prior to October 26, 1973, the date on which this record disclosed that the Grievant as well as the Local Union learned of the right to such overtime payments.

A W A R D

Larry Young, the Grievant herein, as well as those members of the APWU at the Johnson City Post Office on whose behalf the Local Union filed a class grievance on November 9, 1973, are entitled to retroactive overtime effective October 12, 1973, for any out-of-schedule Section 4-B assignment hours they may have worked.

HOWARD G. GAMSER, IMPARTIAL ARBITRATOR

Washington, DC
December 5, 1977