C# 03319

In the Matter of Arbitration

between

UNITED STATES POSTAL SERVICE

and

NATIONAL ASSOCIATION OF LETTER CARRIERS

Case No. H8N-5B-C 17682

APPEARANCES: Howard R. Carter, for the Postal Service; Cohen, Weiss and Simon, by Keith E. Secular, Esq., for the Union

DECISION

This grievance arose under, and is governed by, the 1978-1981 National Agreement (JX-1) between the above-named parties. The undersigned having been jointly selected by the parties to serve as sole arbitrator, a hearing was held on 19 November 1982, in Washington, D. C. Both parties appeared and presented evidence and argument bearing upon the following issue (Tr. 5-6):

> Did the employer violate Article VIII, Section 5 of the 1978 [-1981] National Agreement by calling in an employee not on the overtime desired list when employees who were on the list were on duty [?]
>
> If so, what shall the remedy be [?]

A verbatim transcript was made of the arbitration proceeding, and each side filed a post-hearing brief. Upon receipt

of both briefs on 15 February 1983, the arbitrator closed the record.

On the basis of the entire record, the arbitrator makes the following

AWARD

Under the particular facts of this case, the employer violated Article VIII, Section 5 of the 1978-1981 National Agreement by calling in an employee not on the Overtime Desired list when employees who were on the list were on duty.

The employer shall reimburse the following employees by paying them overtime pay for the indicated number of hours, respectively:

J. Ryan - 2.50 hours

D. Bowser - 1.50 hours

D. Arvin - 1.50 hours

A. Bowman - 1.50 hours

L. Sipe - 1.00 hour

Benjamin Aaron
Arbitrator

Los Angeles, California
12 April 1983

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OPINION

I

Article VIII (Hours of Work), Section 5 of the 1978-1981 National Agreement (JX-1) provides in pertinent part:

> Section 5. Overtime Assignments. When needed, overtime work for regular full-time employees shall be scheduled among qualified employees doing similar work in the work location where the employees regularly work in accordance with the following:
>
> A. Two weeks prior to the start of each calendar quarter, full-time regular employees desiring to work overtime during that quarter shall place their names on an "Overtime Desired" list.
>
> B. Lists will be established by craft, section, or tour in accordance with Article XXX, Local Implementation.
>
> C. 1. . . .
>
> 2. Only in the letter carrier craft, when during the quarter the need for overtime arises, employees with the necessary skills having listed their names will be selected from the list. During the quarter every effort will be made to distribute equitably the opportunities for overtime among

those on the list. In order to insure equitable opportunities for overtime, overtime hours worked and opportunities offered will be posted and updated quarterly. Recourse to the "Overtime Desired" list is not necessary in the case of a letter carrier working on the employee's own route in one of the employee's regularly scheduled days.

D. If the voluntary "Overtime Desired" list does not provide sufficient qualified people, qualified full-time regular employees not on the list may be required to work overtime on a rotating basis with the first opportunity assigned to the junior employee.

E. Exceptions to C and D above if requested by the employee may be approved by local management in exceptional cases based on equity (e.g. anniversaries, birthdays, illness, deaths).

F. Excluding December, only in an emergency situation will a full-time regular employee be required to work over ten (10) hours in a day or six (6) days in a week.

The instant grievance arose in the Torrance, California, Post Office, which employs about 220 carriers. Each carrier is assigned to one of five zip-code sections. There is a separate Overtime Desired list for each section. The section involved in this case is 90503, called the 03 section, for short. At the time in question, 12 carriers were on the Overtime Desired list of the 03 section.

On the morning of 27 February 1981, carrier Route No. 317 was vacant, and no part-time flexible or reserve carriers were available to deliver the route as a regular eight-hour, straight-time assignment. Consequently, in order to have the route delivered that day, management had to assign it as overtime.

On 27 February, of the 12 carriers on the Overtime Desired list of the 03 section, one had bid out of the section, one was an acting supervisor, one was on sick leave, and one was on annual leave. Of the eight remaining, all were already scheduled for work, and three were scheduled to work until 5:00 or 5:15 p. m. on their own routes. Management thus had only two options: (1) it could "pivot" the vacant route among the remaining five carriers, or (2) it could call in an employee not on the Overtime Desired list to work the route on overtime.

"Pivoting" is defined in Section 617.2 of the Postal Operations Manual (JX-3) as follows:

> .11 Pivoting is a method of utilizing the undertime of one or several carriers to perform duties on a temporarily vacant route or to cover absences. Non-preferential mail may be curtailed within delivery time standards on the vacant route and/or on the routes of the carriers being pivoted.
>
> .12 Pivoting is not limited to periods when mail volume is light and when absences are high but can be utilized throughout the year for maintaining balanced carrier workloads.

Management followed the second course, calling in Ronald Summers, the carrier regularly assigned to Route No. 317, who had the day off. Summers worked eight hours. The Union promptly filed a class grievance (JX-2), which was denied at the first step. On 13 March 1981, the Union appealed to step 2, asking for eight hours of pay to be divided among five carriers on the 03 Overtime Desired list. Management's step 2 answer, dated 27 March, read in part:

> It would be a poor management practice to split up a route on overtime when a regular is available. Additionally it would be a disservice to our customers to have them receive their mail in the late afternoon by carrier working on overtime.

The Union then appealed to step 3. Management's response, dated 3 June, read in part:

> It is Management's position that all contractual provisions have been met where all Carriers on the Overtime Desired List have been called into work. Management is not obligated to split up a route to be carried by those employees on the Overtime Desired List already at work and assigned to other duties.
>
> In our judgment, the grievance involves an interpretive issue pertaining to the National Agreement or a supplement thereto which may be of general application, and thus may only be appealed to Step 4 in accordance with the provisions of Article XV of the National Agreement.

At the step 4 meeting, Howard R. Carter, for the Postal Service, and Halline Overby, for the Union, jointly executed a statement, dated 10 August, that no national interpretive issue was presented by the grievance and that it should therefore be remanded to step 3. On the remand, management again denied the grievance; its answer, dated 15 September, was identical with that given on 3 June. The case was then appealed to arbitration.

II

Both James Hurst, the Union's sole witness, and Donald G. Talbert, the Postal Service's sole witness, agreed that the common practice at the Torrance Post Office when there are not enough part-time flexible carriers to cover vacant routes

on straight time has been, first, to assign carriers from the Overtime Desired list who are not scheduled on that particular day; second, to pivot the route among carriers on the Overtime Desired list who are already scheduled; and third, to assign carriers not on the Overtime Desired list. They also agreed that the rule of thumb has been that no carrier should be scheduled on the street "after dark," which in February would be 5:15 p. m. (Talbert) 5:30 p. m. (Hurst). Finally, they agreed that although Article VIII, Section 5-F provides that except in December, or in an emergency, no full-time regular carrier will be required to work more than 10 hours in a day, carriers frequently voluntarily work in excess of 10 hours per day.

During the processing of the instant grievance, the Union argued that the overtime in question could have been distributed as follows (JX-2):

J. Ryan - 2.50 hours preshift [i.e., call in early] to case route, has normal 10 am starting time.

D. Bowser - 1.50 hours carrying

D. Arvin - 1.50 hours carrying

A. Bowman - 1.50 hours carrying

L. Sipe - 1.00 hours carrying

As shown by the time cards this would have resulted in the entire route being completed by 5:30 pm, not an uncommon time for residential routes to be compled in this city.

Had these carriers been pivoted in the manner suggested

by the Union, they would have worked the following total number of hours, respectively: Ryan - 10½ , Bowser-9½, Arvin-9½, Bowman - 10½, Sipe - 10.

The Union's position is that management's failure to pivot the vacant assignment on 27 February 1981 was a prima facie violation of Article VIII, section 5-C-2 and 5-D, and that none of the exceptions in 5-E applied. Recognizing that in some circumstances it may be "impracticable or unreasonable to pivot an overtime assignment," the Union offers as a "fair and workable standard" that articulated by Arbitrator Neil N. Bernstein in a regional award dated 30 December 1981, in a similar case. The language alluded to by the Union (Bernstein award, P. 8), reads as follows:

> The Service does have the right in the first instance to schedule working hours, but the scheduling that it does must be "reasonable". The concept of reasonableness necessarily includes some recognition and protection of the overtime allocation principles contained in Article VIII. The avoidance of compulsory overtime by maximum utilization of the service of the employees on the "Overtime Desired" list is a factor that must be considered in any appropriate scheduling decision. However, that is not to say that avoidance of compulsory overtime is an overriding consideration; there are many other factors that also are relevant, and they may sometimes dictate a work schedule that involves more compulsory overtime than is absolutely necessary. However, if the Service does adopt such a schedule, it must have "good cause" for doing so.

The Union argues that the Postal Service has failed to satisfy the "good cause" standard. It points out that under

Article XV (Grievance-Arbitration Procedure) of the National Agreement, both parties must state all of the facts and contentions upon which they rely during the grievance procedure, and it cites an award by Arbitrator Richard Mittenthal, dated 21 September 1981, refusing to consider arguments of the Postal Service advanced for the first time at the arbitration hearing. It emphasizes that all of the specific circumstances relied upon by management to prove the reasonableness and just cause for assigning the overtime work to Summers were mentioned for the first time at the arbitration hearing, and urges that they should therefore be inadmissible.

In addition, the Union contends that even if those circumstances are considered, they do not sustain management's position. Specifically, the Union argues that Article VIII, Section 5-F does not impose a flat ban on working over 10 hours in one day, but only a ban on compulsory assignment of work in excess of 10 Hours. It also denies management's claim that it would have taken more time to pivot the overtime work among the five carriers than it took Summers to complete it. Finally, while admitting that pivoting the overtime would have delayed some mail deliveries, the Union insists that this was irrelevant. No business mail was involved, and there has always been a substantial variation in times of residential deliveries of mail in Torrance.

The position of the Postal Service is that under Article III (Management Rights) of the National Agreement, it has the

right to resort to compulsory overtime for the purpose of minimizing overtime, using it in the most efficient manner, and avoiding delay in the mails. It points out, further, that management had no way of knowing, in advance, whether any or all of the five carriers on the Overtime Desired list who were already scheduled would be willing to work in excess of 10 hours or, if so, whether they would be able to finish before dark. Finally, it asserts that the assignment of the vacant route to Summers was reasonable because it was his regular route, it could be completed in less time than would have been required if it had been pivoted, and the assignment resulted in no delay in the mail delivery.

III

The Postal Service says that the thrust of the Union's argument is that management must exhaust the Overtime Desired list to the maximum extent possible (up to two hours overtime for each carrier on the list) prior to using a carrier not on the list. I do not agree. As I understand the Union's position, generalizing from its arguments in this case, it is that management must exhaust the Overtime Desired list before compelling someone not on the list to work overtime, provided that those on the list are willing to work up to or beyond 10 hours, as may be required, and provided that street deliveries can be completed before dark. I also infer that the Union would probably agree that in some circumstances it might be unreason-

able to require that overtime be offered to a carrier on the Overtime List even if the time involved would not increase his total hours worked in the day to 10.

On the other hand, the position taken by the Postal Service throughout the four steps of the grievance procedure was that Article VIII, Section 5 does not require it to assign overtime work to carriers on the Overtime Desired list if they have already been called in to work, and that management has no obligation "to split up a route to be carried by those employees. . .already at work and assigned to other duties." This interpretation is predicated, mistakenly, on Article III, which is expressly made "subject to the provisions of this Agreement," including Article VIII.

The Postal Service advanced other, more credible arguments at the arbitration hearing to support the reasonableness of its decision to assign the disputed work to Summers, but none of these except the later delivery of mail had been raised during earlier steps of the grievance procedure. I am fully in agreement with Arbitrator Mittenthal that the provisions of Article XV requiring that all of the facts and arguments relied upon by both parties must be fully disclosed before the case is submitted to arbitration should be strictly enforced. In this case, therefore, I have given no consideration to any of the arguments advanced by the Postal Service other than those referred to specifically in this and the preceding paragraph. The interpretation of Article VIII, Section 5

relied upon by the Postal Service in its answers at steps 2 and 3 of the grievance procedure is plainly in error. The argument that by pivoting the vacant route assignment in the manner suggested by the Union would have delayed the delivery of some residential mail seems to me inconsequential, in the light of the evidence of past practice, and not amounting to good cause for not doing so.

Both parties seem to accept Arbitrator Bernstein's good cause standard. By its very nature, however, this standard must be applied on a case-by-case basis; it does not lend itself to embodiment in a per se rule. In this case the Postal Service relied almost entirely on its own per se rule during the grievance procedure, and I have concluded that this rule goes too far. The Union should not interpret this decision, however, as meaning that under any conceivable circumstances the Postal Service is forbidden to assign overtime work to a carrier not on the Overtime Desired list simply because another carrier or carriers on that list, who have already been scheduled for work, desire to perform some or all of the overtime involved.

Although there is some question in my mind that all of the overtime work in this case, if pivoted as the Union asserted it should have been done, could have been completed before dark, the Postal Service waived its right to dispute the Union's claim by failing to challenge it directly in the grievance procedure. Accordingly, I shall grant the remedy requested.

Benjamin Aaron
Arbitrator