

C#04543

IN ARBITRATION PROCEEDINGS PURSUANT TO ARTICLE 15 OF THE
NATIONAL AGREEMENT BETWEEN THE PARTIES

Case No. WIN-5G-C 24783
North Hollywood, California - November 11 1984
Regular Arbitration

NATIONAL ASSOCIATION OF LETTER)
CARRIERS, AFL-CIO,)

and)

UNITED STATES POSTAL SERVICE,)
Overtime opportunities grievance)
of Larry McKeighen)

WILLIAM EATON
Arbitrator

APPEARANCES:

FOR THE UNION:

Thomas H. Young, Jr.
Regional Administrative Assistant
National Association of Letter Carriers
1124 W. Chapman
Orange, California 92668

FOR THE SERVICE

Russ Davenport
Labor Relations Assistant
U.S. Postal Service
15701 Sherman Way
Van Nuys, California 91409

DEC 11 1984

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ISSUE AND EVIDENCE

This is an arbitration to determine whether the Postal Service violated the provisions of Article 8, Section 5C.2b or c of the National Agreement by failing properly to post overtime opportunities offered, and overtime worked, at the North Hollywood Post Office, and if so what the remedy shall be. Hearing was held at the North Hollywood Post Office on November 15, 1984. At that time the Grievant was fully and fairly represented by the Union, was present throughout the hearing, and testified in his own behalf. Following the introduction of additional testimonial and documentary evidence by both parties, the matter was submitted to the Arbitrator for final and binding determination upon presentation of oral argument at the close of the hearing.

This dispute involves the posting of overtime opportunities at the North Hollywood Post Office for the second quarter of the 1984 fiscal year. A previous grievance, WIN-5G-C-24090, involved the same question and the same Grievant at North Hollywood but a different quarter. The Postal Service agrees that there appears to have been a confusion between the present grievance and the prior grievance at Step 3 in the present dispute. The Step 3 answer had indicated that the prior grievance was dispositive of the present grievance, which the Postal Service agrees is not the case for the reason that a new grievance and a new fiscal quarter are now involved. The Grievant's contention in the present grievance is that during the second quarter he was given 55.18 hours of overtime, while a T6 carrier, Schwarz, assigned

to similar duties was given 85.63 overtime hours, while no list of opportunities had been posted as required by the cited provisions of the National Agreement.

Those provisions, as indicated, are contained in Article 8 and read in relevant part as follows:

Contract Provisions

ARTICLE 8

HOURS OF WORK

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 30, Local Implementation.

C.1.a. Except 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 in order of their seniority on a rotating basis.

b. Those absent, on leave or on light duty shall be passed over.

2.a. Only in the letter carrier craft, when during the quarter the need for overtime arises, employees necessary skills having listed their names will be selected from the list.

b. During the quarter every effort will be made to distribute equitably the opportunities for overtime among those on the list.

c. In order to insure equitable opportunities for overtime, overtime hours worked and opportunities offered will be posted and updated quarterly.

In addition, the Postal Service entered into evidence a Step 4 decision of May 19 1983, HIN-5F-C 9525, originating in Colorado Springs, CO. That decision, in relevant part, reads:

"Overtime opportunities offered to employees are not required to be listed in hours or units. Rather, the number of opportunities offered, not hours worked, is the criterion to determine equitable distribution of the "Overtime Desired List"."

This resolution represented full settlement of the case, which had presented the question "whether overtime opportunities must be listed in time units."

Posting Requirement

The 1983 decision referred to above, involving the Grievant and the same issue, but a different fiscal quarter, had resulted in agreement to pay to the Grievant a certain number of straight-time hours in settlement of the grievance. In a subsequent labor-management meeting of August 11 1983, the minutes indicate that management had agreed to begin posting opportunities offered for overtime beginning with the calendar quarter starting in October 1983.

In addition, a copy of the Step 3 decision awarding the Grievant a certain amount of pay was sent to the local Postmaster, with a typed notation added at the bottom. That notation indicated that payment of the liability for the contractual violation which had occurred "could have been avoided had management at the local level complied with the administrative requirement of maintaining a list of overtime opportunities as set forth under the provisions of Article 8." The note was signed by J. Carson Moore, Regional Labor Relations Representative who had represented the Postal Service at Step 3.

The Postal Service stipulates that the North Hollywood Office, as a consequence of these developments, was on notice that posting of overtime opportunities would be required in future.

Resulting Practice

Following the Step 2 decision in the instant grievance, dated May 21 1984, the Union requested a copy of the posted opportunities to substantiate management's contention that opportunities had been equitable as required by the National Agreement. The result was a memorandum dated May 29 1984 advising the Union that the only posted opportunities "at this time are those kept at the timekeeping office", and that the station was "currently preparing a proper posting of opportunities . . ."

It appears that the only information relating to this issue which was regularly posted was an overtime desired list which simply indicated the number of overtime hours worked by each of the eleven employees who signed the list during each bi-weekly pay period. In this dispute the Grievant cites only the overtime hours of Ms. Schwarz for the reason that others on the list are truck drivers, and perhaps in other respects have different licensing or other qualifications which would make their work in some respects dissimilar from that of Grievant, therefore not relevant to this present dispute. T6 Schwarz, by contrast, covers her five routes with the same scheduled days off as the Grievant, employing similar skills. Records indicate that, in performing overtime work, both the Grievant and Ms. Schwarz on some occasions covered the same routes.

A list of overtime work by the Grievant and Schwarz, compiled from the 3997 Forms, shows that most of the overtime performed by each carrier was done on their assigned routes, hence not subject to the overtime desired list. As it happened, the number of overtime opportunities for each carrier, apart from his or her assigned route, was 16 in each case. However, carrier Forman Edward Myles agreed that it could not be ascertained from available records whether such overtime was mandatory or had been derived through the overtime desired list.

Myles, who was not directly involved in the supervision of the Grievant or Ms. Schwarz, testified to the manner in which he manages the overtime desired list in his section. He maintains a list of opportunities offered, which is regularly posted. In addition, Myles testified that he keeps track of the number of hours each carrier on the overtime desired list has worked during the quarter, and assigns the next available overtime opportunity to the carrier with the least overtime hours.

Pursuant to this evidence, the Postal Service stipulated that the office involved in the dispute did not post overtime opportunities as required.

DISCUSSION

Union Argument

There is no dispute over the failure of the Postal Service to adhere to the posting portion of the Agreement. The dispute is settled to that extent. What remains to be determined is a penalty sufficient to prevent further violations.

The purpose of the posting requirement is to assure equal distribution of overtime. Whether this has been accomplished cannot be determined without the postings which admittedly had not been made. That issue was resolved in the grievance procedure concerning the present Grievant's previous grievance.

Still the Supervisors responsible for the present Grievant did not adhere to the settlement, even though a different Supervisor, Mr. Myles, did post overtime opportunities correctly, and kept track of overtime hours of each employee on the overtime desired list.

A penalty assessing a mere slap on the wrist is insufficient to gain compliance in this situation. A written grievance settlement has failed, so that monetary compensation must be assessed as the only available effective remedy. Even the Postal Service itself, in transmitting the Step 3 decision of the prior grievance to the North Hollywood Post Office, commented that liability could have been avoided by adhering to the National Agreement.

Despite these known requirements a 30 hour disparity was allowed to develop between the overtime hours of the Grievant and Carrier Schwarz. The Union therefore requests that Grievant be awarded 30 hours pay at the overtime rate in order to make him whole, and in order to secure compliance by the Postal Service in future.

Postal Service Argument

While the Grievant contends that he has been treated un-

fairly for the reason that someone else got more hours of overtime, the Step 4 settlement entered into evidence requires only that employees on the overtime desired list be afforded an equal number of opportunities for overtime, not an equal number of hours. Evidence introduced by the Postal Service demonstrates that, apart from overtime hours worked on their assigned routes, Carriers Schwarz and Grievant received the same number of opportunities during the quarter at issue, namely 16 each.

Nor does failure to post overtime opportunities necessarily tie the Union's hands. The Union can request a review of the 3996 and 3997 forms in order to determine whether there has been equity in affording overtime opportunities. It does not follow that failure to post is necessarily failure to give equity in overtime.

Further, the National Agreement does not provide for any penalty if the posting requirement is not met, nor does it authorize the arbitrator to impose a penalty. In view of the undisputed fact that both employees involved had an equal number of opportunities, the grievance should be denied.

Conclusions

The issue to be determined concerns only the posting question, and is not concerned with whether the actual number of overtime hours worked in a given quarter must be equal or approximately equal for all those on the overtime desired list. Evidence concerning the amount of hours actually worked by the Grievant and

Ms. Schwarz was admitted in order to establish a basis for fashioning a remedy, should that be appropriate.

In this regard, the argument of the Postal Service that the National Agreement does not provide for a remedy in the event of a violation of the posting requirement at issue, must be rejected. It is an ancient and accepted maxim of law in any form, be it common law, statutory law, or the law and practice of collective bargaining, that, "without a remedy, there is no right." The parties to the National Agreement did not fashion empty provisions, nor did they intend that violation of the rights therein provided should occur, or continue, without impunity.

Since at least the Steelworker Trilogy decision, it has been recognized by the highest authority that arbitrators charged with enforcement of collective bargaining agreements are necessarily vested with the right of fashioning reasonable and appropriate remedies where violations are found. This is a dispute which clearly requires a remedy for a repeated violation of the posting requirement at the North Hollywood Post Office.

Having reached that conclusion, the remedy which is most obviously suggested is one which takes into account the respective number of overtime hours worked by the Grievant and Ms. Schwarz, the only other employee on the overtime desired list whose work capabilities and assignments were comparable to those of the Grievant during the period at issue.

It is undisputed that the Grievant worked approximately 55 overtime hours during the quarter, and that Ms. Schwarz worked approximately 85 overtime hours. This does not suggest,

however, as the Union urges that the appropriate remedy would be 30 overtime hours pay for the Grievant. Rather, if we assume (for purpose of fashioning a remedy only) that the number of hours ought to have been more or less equal, the appropriate remedy would be 15 hours. That is, had the Grievant been assigned 15 more hours, and Ms. Schwarz 15 fewer hours, they would have worked the same number of hours. As a matter of equity, therefore, the Grievant can reasonably claim the 15 hours.

It must be emphasized that these comparisons are made only for the purpose of fashioning an appropriate remedy in the facts of the present dispute. The issue of whether overtime hours actually worked by employees in comparable assignments on the overtime desired list must be equal is not before this Arbitrator, and the decision in this dispute is in no way to be interpreted as addressing that issue.

The award is rendered accordingly.

AWARD

The Postal Service violated Article 8, Section 5C.2.c. by failing properly to post overtime opportunities offered at the North Hollywood Post Office during the period at issue. As a remedy for the instant violation, and to impress upon the management at this station the necessity for complying with posting requirements of the National Agreement, the Grievant is awarded fifteen (15) hours pay at the overtime rate which prevailed at the time the grievance was filed.



William Eaton
Arbitrator

December 6 1984