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ARBITRATION AWARD

June 26, 1986

UNITED STATES POSTAL SERVICE

-and-

Case No. H4N-NA-C-21
(5th Issue)

NATIONAL ASSOCIATION OF LETTER CARRIERS

Subject: Arbitrability - Remedy for Violation of Letter Carrier Overtime Distribution Rule in Memorandum

Statement of the Issues: Whether NALC's claim in this case is arbitrable? Whether a violation of the "letter carrier paragraph" of the Article 8 Memorandum (i.e., working a carrier overtime on his own route on his regularly scheduled day where he is not on the overtime desired list and has not signed up for such "work assignment" overtime and where someone on the overtime desired list could have handled such overtime) calls for a money remedy?

Contract Provisions Involved: Article 8, Sections 4 and 5; Article 15, Section 4; and the Article 8 Memorandum of the July 21, 1984 National Agreement. Also the Fritsch-Sombrotto May 28, 1985 Supplemental Agreement.

Appearances: For the Postal Service, J. K. Hellquist, General Manager, Labor Relations Division, Central Region; for NALC, Keith E. Secular, Attorney (Cohen Weiss & Simon).

Statement of the Award: The grievance is arbitrable. No money remedy is appropriate for a violation of the "letter carrier paragraph" of the Article 8 Memorandum.

BACKGROUND

This case involves a dispute as to what remedy, if any, is appropriate for a violation of the "letter carrier paragraph" of the Article 8 Memorandum. NALC insists that a money award should be granted to the two employees affected by each violation, the carrier who was required to work against his wishes and the carrier on the overtime desired list (ODL) who should have worked. The Postal Service believes that neither person is entitled to any money remedy and that the grievance is in any event not arbitrable.

Prior to the 1984 National Agreement, all of the overtime distribution rules were found in Article 8, Section 5. Before each calendar quarter, full-time regular letter carriers "who wish to work overtime...shall place their names on an 'Overtime Desired' list" (Section 5A). Those lists (ODLs) are "established by craft, section or tour..." (Section 5B). When overtime is needed, "employees with the necessary skills having listed their names will be selected from the list" (Section 5C2a). Management is obliged to make "every effort...to distribute equitably the opportunities for overtime among those on the list" (Section 5C2b). There is, however, one significant exception:

> "Recourse to the 'Overtime Desired' list is not necessary in the case of a letter carrier working on the employee's own route on one of the employee's regularly scheduled days." (Section 5C2d)

Thus, no ODL employee would have a legitimate complaint where a non-ODL employee worked overtime on his own route on his regularly scheduled day.

All of these provisions were carried forward into the 1984 National Agreement. In addition, an Article 8 Memorandum was negotiated by the Postal Service and APWU. Its terms were later accepted by NALC as well but only after the Postal Service had agreed to add to the Memorandum the following qualification of the Section 5C2d exception:

> "In the Letter Carrier Craft, where management determines that overtime or auxiliary assistance is needed on an employee's route on one of the employee's regularly scheduled days and the employee is not on the overtime desired list, the employer will seek to utilize auxiliary assistance, when available, rather than requiring the employee to work mandatory overtime."

The meaning of this clause is not really in dispute. A letter carrier is unable to handle all the work on his route within his eight-hour tour on his regularly scheduled day. He is not on the ODL. Management has agreed it "will seek" in this situation to "utilize auxiliary assistance... rather than requiring the employee [the regular carrier] to work mandatory overtime." This "auxiliary assistance" can take different forms. For example, Management may use a part-time flexible carrier or an unassigned regular at straight time to perform the extra work on the regular carrier's route. Or Management may "pivot" a portion of this route (i.e., reassigning the extra work) to some other carrier whose workload is relatively light that day. Or Management may assign the extra work at overtime rates to some carrier on the ODL. Whichever of these courses Management follows, it will have prevented the regular carrier from being "requir[ed]...to work mandatory overtime" on his own route.

This clause, the so-called "letter carrier paragraph" in the Memorandum, has itself been limited by a May 28, 1985 supplemental agreement. That agreement created another overtime list, unrelated to the ODL. It gave full-time letter carriers an opportunity to sign up for overtime on "their work assignment on their regularly scheduled days." After a carrier has signed up, he is expected to work overtime on his own route on his regularly scheduled days.* When this occurs, the "letter carrier paragraph" is inapplicable and no ODL carrier would have a valid complaint against a non-ODL carrier who signed for and performed his "work assignment" overtime.

The present case hence involves the following assumptions. A carrier, "X", is unable to complete all the work on his route on his regularly scheduled day. He is not on the ODL; he has not signed up for "work assignment" overtime. Management cannot provide anyone, i.e., a part-time flexible or an unassigned regular, at straight time rates to handle "X"'s extra work. Nor can it "pivot" a portion of his route. One or more carriers on the ODL are available to do the extra work. Management disregards them and requires "X", against his wishes, to perform this work at overtime rates. It thereby ignores its promise in the "letter carrier paragraph" that it "will seek...auxiliary assistance...rather than requiring...["X"] to work mandatory overtime." It has violated the Memorandum.

* Management can still use "auxiliary assistance" to avoid overtime.

The issue is what remedy, if any, is appropriate for this violation.

NALC urges that the carrier, "X", forced to work overtime on his own route when ODL employees were available, should receive an additional one-half of his straight time pay. It notes he was given time and one-half for the overtime in question. It asks that he be paid double time for this violation of his rights under the "letter carrier paragraph." It urges further that the ODL carrier who should have worked the overtime on "X"'s route should be paid time and one-half for the hours he lost. It believes this is a lost overtime opportunity from the standpoint of those on the ODL, an opportunity which cannot be regained through any administrative adjustment in the ODL.

The Postal Service disagrees. It contends that "X" was paid the correct contractual rate for overtime work on his route on a regularly scheduled day. It contends that no ODL carrier is entitled to any money remedy for Management's failure to abide by the "lettter carrier paragraph." It notes that Article 8, Section 4D calls for time and one-half for overtime work "after eight (8) hours on duty in any one service day..." It stresses that Article 8, Section 5C2d permits Management in any event to choose a regular carrier to work overtime on his own route instead of resorting to ODL carriers. It relies also on the following sentences in the Memorandum: "The parties agree this memorandum does not give rise to any contractual commitment beyond the provisions of Article 8..." and "In the event these [Memorandum] principles are contravened, the appropriate correction shall not obligate the employer to any monetary obligation..." Its conclusion is that no remedy whatever is appropriate here.

The Memorandum should be quoted because of its critical importance to an understanding of this dispute:

> "Recognizing that excessive use of overtime is inconsistent with the best interests of postal employees and the Postal Service, it is the intent of the parties in adopting changes to Article 8 to limit overtime, to avoid excessive mandatory overtime, and to protect the interests of employees who do not wish to work overtime, while recognizing that bona fide operational requirements do exist that necessitate the use of overtime from time to time. The parties have agreed to certain additional

restrictions on overtime work, while agreeing to continue the use of overtime desired lists to protect the interests of those employees who do not want to work overtime, and the interests of those who seek to work limited overtime. The parties agree this memorandum does not give rise to any contractual commitment beyond the provisions of Article 8, but is intended to set forth the underlying principles which brought the parties to agreement.

"The new provisions of Article 8 contain different restrictions than the old language. However, the new language is not intended to change existing practices relating to the use of employees not on the overtime desired list when there are insufficient employees on the list available to meet the overtime needs. For example, ...

"The parties agree that Article 8, Section 5.G.1., does not permit the employer to require employees on the overtime desired list to work overtime on more than 4 of the employee's 5 scheduled days in a service week, over 8 hours on a nonscheduled day, or over 6 days in a service week.

"Normally, employees on the overtime desired list who don't want to work more than 10 hours a day or 56 hours a week shall not be required to do so as long as employees who do want to work more than 10 hours a day or 56 hours a week are available to do the needed work without exceeding the 12-hour and 60-hour limitations.

"In the Letter Carrier Craft, where management determines that overtime or auxiliary assistance is needed on an employee's route on one of the employee's regularly scheduled days and the employee is not on the overtime desired list, the employer will seek to utilize auxiliary assistance, when available, rather than requiring the employee to work mandatory overtime.

"In the event these principles are contravened, the appropriate correction shall not obligate the employer to any monetary obligation, but instead will be reflected in a correction to the opportunities available within the list. In order to

achieve the objectives of this memorandum, the method of implementation of these principles shall be to provide, during the 2-week period prior to the start of each calendar quarter, an opportunity for employees placing their name on the list to indicate their availability for the duration of the quarter to work in excess of 10 hours in a day. During the quarter the employer may require employees on the overtime desired list to work these extra hours if there is an insufficient number of employees available who have indicated such availability at the beginning of the quarter..." (Emphasis added)

An arbitration hearing in this case was held in Washington, D.C. on January 8, 1986. Post-hearing briefs were submitted by the parties on February 7, 1986; reply briefs were submitted on February 28.

DISCUSSION AND FINDINGS

The Postal Service initially argues that this grievance is not arbitrable. It insists that NALC seeks the "creation of a new contract term", namely, a "general remedy" to be applied to each and every case in which Management ignores the principles set forth in the "letter carrier paragraph" of the Memorandum. It claims such a "blanket provision" can be properly achieved through collective bargaining or interest arbitration but not through grievance arbitration. It maintains also that the money remedy sought by NALC conflicts with what the parties stated in the Memorandum, "...the appropriate correction shall not obligate the employer to any monetary obligation..." It says the adoption of NALC's position would erase this language from the Memorandum, an act beyond the arbitrator's authority.

This argument is not persuasive. When Management does not "seek" anyone from the ODL and instead requires a carrier to work "mandatory overtime" on his route on his regularly scheduled day even though he has not signed up for such "work assignment" overtime, it has violated the Memorandum. Contract violations should, where possible, be remedied. The parties are free to urge whatever remedy they believe would be appropriate. NALC urges a uniform money remedy, time and one-half for the ODL carrier who should have performed the overtime work and an additional one-half of straight time

for the carrier who actually performed the overtime work. The Postal Service says this remedy conflicts with certain portions of Article 8 and the Memorandum. Whether this claim is correct depends upon how one interprets the relevant language of Article 8 and the Memorandum. This dispute thus raises "interpretive issues" under the National Agreement and is arbitrable. The Postal Service position, although couched in terms of arbitrability, really concerns the merits of the dispute, that is, the appropriate remedy for this Memorandum violation.

Assuming NALC's request does not produce the kind of conflict alleged by the Postal Service, then surely adoption of the uniform money remedy would not modify the National Agreement. For this remedy would simply announce in advance the money consequences of Management violating certain letter carrier rights under the Memorandum. Such an arrangement might be unwise because of the variety of circumstances under which the violation might arise and because of the need to allow arbitrators flexibility in formulating a remedy appropriate to the precise circumstances before them. But the money remedy would not exceed the arbitrator's powers under the National Agreement. Much the same question was raised and decided against the Postal Service in Case No. H4N-NA-C-21 (4th issue).

Turning to the merits, NALC contends that a money remedy is proper whenever the "letter carrier paragraph" is violated in the manner involved in this case. It asks for a money payment both for the non-ODL carrier who is improperly required to work overtime and for the ODL carrier who is improperly denied this overtime opportunity. The Postal Service disagrees. It believes no money remedy is proper for either carrier.

The Postal Service points to the first sentence in the sixth paragraph of the Memorandum, "In the event these principles are contravened, the appropriate correction shall not obligate the employer [Postal Service] to any monetary obligation..." (Emphasis added). These words demonstrate that the parties intended no money remedy for a violation of the Memorandum's "principles." The immediately preceding paragraph, the so-called "letter carrier paragraph", contains one such "principle." It states, when read in conjunction with the May 1985 supplemental agreement, that overtime on an individual carrier's route on his regularly scheduled day must be assigned in a certain manner. Thus, according to the sentence above, no money remedy would seem to be appropriate for a violation of this "letter carrier paragraph."

However, this sentence has not been fully quoted. It goes on to say that the remedy for a Memorandum violation "...will be reflected in a correction to the opportunities available within the list [ODL]." What the parties contemplated was a remedy for the improper assignment of overtime as between two or more employees "within the list." No "correction" of overtime opportunities "within the list" is possible for the kind of violation being discussed here. For an adjustment in the ODL cannot recapture for ODL carriers the overtime opportunity which they lost to the non-ODL carrier. That opportunity is lost forever. And, similarly, an adjustment in the ODL cannot recapture for the non-ODL carrier the overtime hours he should not have been required to work. The point is that the sentence barring a money remedy, when read in its entirety, does not seem applicable to the facts of this case. Here, our concern is not with two employees "within the list" but rather with the improper assignment of overtime as between a non-ODL employee and an ODL employee.

These observations are supported by other language in the sixth paragraph and by the Memorandum's bargaining history. The Memorandum was initially the product of negotiations between the Postal Service and the American Postal Workers Union. Their concern, in agreeing to the first sentence of the sixth paragraph, was to make clear the consequences of Management selecting the wrong person from the ODL in assigning overtime. They provided for an overtime make-up opportunity for the employee who had been improperly bypassed. They plainly did not have in mind the situation where the non-ODL employee is required to work. They had in the past agreed on a money remedy for the ODL employee who lost an opportunity to a non-ODL employee. NALC later agreed to the Memorandum, insisting upon the addition of the "letter carrier paragraph" as the price of its consent. But this additional paragraph did not alter the scope of the sentence barring a money remedy. That sentence applied to the assignment of overtime as between two or more employees "within the list."

This view of the sixth paragraph, the sentence barring a money remedy, does not mean the grievance must be decided in NALC's favor. For there is another, more crucial consideration. It supports the Postal Service's position.

A close comparison of Article 8, Section 5C2d and the "letter carrier paragraph" of the Memorandum is most revealing. Section 5C2d says Management may work a non-ODL carrier overtime on his own route on his regularly scheduled day without

having to resort to the ODL. Or, should Management so choose, it may work this overtime with someone from the ODL. Article 8 thus gives Management substantial discretion in assigning a carrier to overtime in this situation. The "letter carrier paragraph", when read along with the May 1985 supplemental agreement, establishes a quite different set of priorities. It requires Management to work a non-ODL carrier overtime on his own route on his regularly scheduled day if he has signed up for such "work assignment" overtime. If he has not signed up, then the Memorandum requires Management to "seek" people from the ODL before "requiring" the carrier in question to work "mandatory overtime" on his own route. In short, the very discretion granted Management by Section 5C2d is taken away by the "letter carrier paragraph."

All of this would be understandable if the parties had, in agreeing to the "letter carrier paragraph", eliminated Section 5C2d. But that was not done. Both provisions are presently part of the National Agreement. It should be stressed that the Memorandum states, in clear and unequivocal language, that "the parties agree this memorandum does not give rise to any contractual commitment beyond the provisions of Article 8..." The "letter carrier paragraph", as I have already explained, nullifies Management's discretion under Section 5C2d. It thus modifies Section 5C2d and goes "...beyond the provisions of Article 8." This would appear to mean that the "letter carrier paragraph" cannot be considered a "contractual commitment." But the Postal Service acknowledged at the arbitration hearing that the "letter carrier paragraph" is a commitment. To grant a money remedy for a violation of this commitment would penalize the Postal Service for exercising the discretion it still appears to possess under Section 5C2d. That would be a patently unfair result. Instead, the Postal Service should be ordered to cease and desist from any violation of the "letter carrier paragraph." Should the postal facility in question thereafter fail to comply with such an order, a money remedy might well be appropriate.

Accordingly, my conclusion is that no money remedy is justified for the assumed violation in this case.

AWARD

The grievance is arbitrable. No money remedy is appropriate for a violation of the "letter carrier paragraph" of the Article 8 Memorandum.

Richard Mittenthal, Arbitrator