C#06461
A-E

IN THE MATTER OF THE ARBITRATION

between

UNITED STATES POSTAL SERVICE	)	H1N-3U-C-10621 Carmel, Ind
	)	H1N-3U-C-11803 Dallas, TX
and	)	H1N-3U-C-12736 } Austin TX
	)	H1N-3U-C-12737
NATIONAL ASSOCIATION OF LETTER CARRIERS	)	H1N-3U-C-12739
	)	

Before
Neil N. Bernstein
Arbitrator

APPEARING:

FOR THE SERVICE: James G. Merrill
Field Director, Human Resources
United States Postal Service
San Jose Division
San Jose, CA 95101-9994

FOR THE UNION: Richard Gilberg, Esq.
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OPINION OF THE ARBITRATOR

This proceeding involves a conflict between the right of full-time reserve and part-time flexible letter carriers to use their seniority to select temporary duty assignments and the need of the Service to minimize payment of overtime compensation.

I

Article 8 of the current agreement contains the rules for determining when an employee is entitled to overtime compensation. Under Section 8.4, an employee receives overtime when he or she works more than forty hours in any "service week". In addition, Section 8.2A provides that a "service week" begins at 12:01 a.m., Saturday, and ends at midnight on the following Friday.

The other relevant provisions are Sections 3, 4 and 5 of Article 41.2.B which allow full-time reserve letter carriers and part-time flexible carriers to use their seniority to bid for craft duty assignments of five days or more. A successful bidder "shall work that duty assignment for its duration".

The interaction of these provisions can produce an anomalous result under the following circumstances: Letter carriers usually work a five-day week, but letter carrier work is available six days a week. Consequently, it is not unusual to find a reserve or part-time flexible carrier working a five-day schedule that includes work on a Saturday. If a carrier in that situation bids on a Monday through Friday work assignment for the following week, he or she may become entitled to overtime for one day, because he or she has worked six days during the relevant "service week" (Saturday through Friday night), even though he

or she did not work more than forty hours in either of the calendar weeks.

Four of the five cases consolidated in this proceeding involve a challenge to actions taken by the Service to avoid the payment of overtime under these circumstances. In three cases (10621, 12736 and 12739), the Service disqualified the senior bidder to avoid paying overtime. In the fourth case (12737), the senior bidder was awarded the route, but was not allowed to work the assignment on one of the scheduled days, to avoid the payment of overtime.

In the final case (11803), a reserve carrier was awarded a route that included off-days of Friday, Saturday and Sunday during the week he worked it. However, he was assigned to work on the non-scheduled Saturday of that week, to give him a full 40 hour work week. He is seeking overtime pay for being forced to work out of his assigned schedule.

II

With respect to all of the consolidated cases except 11803, the Union argues that Article 41.2.B allows reserve and flexible carriers to select temporary assignments on the basis of their seniority, and that the section contains no exception for the avoidance of overtime. The Union contends the language is clear and unambiguous. There is no evidence that the parties intended some different result and, even if there was, the Union contends that the arbitrator is obliged to enforce the clear and unambiguous language.

Secondly, the Union asserts that management's claim that an employee is not "available" to bid on a route if overtime would result is unpersuasive. The word "available" modifies not "employee" but

"assignment", and an assignment is "available" if it is vacant. Moreover, the Union asserts, a carrier is "available" even when he would earn overtime if he worked the assignment. Moreover, the Service argued in a different case that only scheduled work days should be considered in determining the days on which the assignment is available.

Finally, the Union argues that the Service's argument based on Section 41.1.C.4 should be rejected because it was never raised at the prior steps of the grievance-arbitration procedure. Also, the Union claims, that section has never been used to avoid putting full-time employees in an overtime situation.

III

The Service argues that Article 41 does not deprive management of its flexibility in assigning part-time employees or its right to avoid the incurring of overtime charges. The Service claims it has the right to bypass part-time employees who cannot work a given assignment on straight time or to nonschedule a part-time flexible due to lack of work. If the parties intended to modify the rules for working overtime, the Service argues, the modification would have appeared in Article 8, not in Article 41.

The Service also introduced a number of arbitration decisions that it claimed justified its right to assign part-time flexible employees flexibly in spite of Article 41. In short, it maintains that the entire agreement must be considered, not just Article 41.

IV

The Arbitrator appreciates the Service's interest in avoiding the payment of unnecessary premium overtime compensation, especially to people who have not worked more than eight hours per day or forty hours

per week. Nevertheless, it is also important that any actions taken be consistent with the rights and obligations that are set out in the collective bargaining agreement.

A

The Arbitrator is unable to find any contractual support for the action taken by the Service in cases 10621, 12736 and 12739, where it disqualified any bidders who were not eligible to work the vacant assignments without receiving overtime compensation.

In the most absolute terms, sections 3 and 4 of Article 41.2.B allow reserve and part-time flexible letter carriers to use their seniority to obtain five day assignments . There are no exceptions or qualifications in the language that would indicate that the sections apply only to potential bidders who can work the assignments without departing from straight time pay status.

The Service tries to rely on the fact that these provisions refer to bidding on "available" craft assignments, and contends that the assignment is not "available" to a carrier who will receive overtime pay for working it. As the Union points out, the term "available" modifies "assignment" and not "carrier"; it is a distortion of language to claim that an assignment is "available" for bidding by one carrier who will not receive overtime for working it, but not "available" to another, who will receive overtime. The only reasonable construction is that the word "available" in those sections carries its customary meaning of "open" or "vacant".

Moreover, it appears most unfair to deprive a senior letter carrier of the right to obtain one of those assignments merely because some unanticipated overtime might result. The anomalous overtime

situation can arise only once in any assignment selection, which would be during the first week of the appointment; on the other hand, the assignment itself can conceivably continue for a longer period. It seems unduly harsh to deny the entire work assignment to the senior bidder merely because four hours of extra pay would be involved.

The Arbitrator is forced to conclude that the Service is attempting to deal with a situation it regards (with some justification) as unsatisfactory by unilaterally amending the National Agreement. Moreover, that unilateral amendment does not provide a fair solution to the situation it finds to be unsatisfactory. Consequently, its actions in these cases cannot be sustained.

B

Case 12737 involves a different course of action selected by the Service to deal with the same problem. In this case, the senior bidder was assigned to the route, even though it was a Monday to Friday route and he had worked the preceding Saturday, which was part of the same "service week". However, he was not allowed to work on the Friday of that week, a regular work day of the route, to avoid paying him overtime. This solution is more attractive than the one selected in the first three cases, because it does not disqualify a senior bidder for the entire assignment. In addition, the Service claims that its action is justified by Article 41.1.C.4, which allows a temporary change in the duty assignment of a regular letter carrier, for "unanticipated circumstances". Consequently, the Service argues, a fill-in reserve or flexible carrier should receive no greater duty protection than the regular carrier he is replacing.

However, the Arbitrator concludes that this action by the Service is also contrary to the obligations imposed upon it by the National Agreement. He comes to this conclusion for several reasons:

In the first place, there is specific language in Article 41.1.C.4, authorizing the Service to make temporary changes in assignments of regular carriers because of "unanticipated circumstances". There is no comparable language in Article 41.2.B with respect to the assignments of reserve or part-time flexible carriers. The difference in language gives rise to a strong inference that the parties intended the two situations to be treated differently.

Secondly, when the Service makes a temporary change in the schedule of a regular carrier, it must pay a financial price for doing so. If the carrier is scheduled for another day, he will be compensated at overtimes rates for working out-of-schedule. If the carrier is not rescheduled, he will still receive the guaranteed 40 hours of pay. This monetary sanction provides a built-in limitation on the desirability to the Service of making such changes. However, in this case, the Service is trying to establish its right to make such temporary changes (which in fact are much less "temporary" in the context of five-day assignments) in the schedule of reserve and part-time carriers without a financial penalty. Thus, it is not accurate to say that the Service is merely trying to treat part-time and regular carriers identically.

Third, the Service's position appears to be contrary to the ruling of National Arbitrator Richard Mittenthal in his November 2, 1984 decision in Case No. H1N-3U-C-13930. Arbitrator Mittenthal specifically held that Section 41.2.B.5 bars the Service from taking an unassigned regular off a temporary bid assignment for any reason, including the

purpose of promoting efficiency. If a carrier cannot be removed for greater efficiency, he also should not be removable to save one day of overtime pay.

Finally, the Arbitrator acknowledges that there is some merit to the Union's contention that the Service should be barred from using this argument in national arbitration, because it did not raise the issue at any prior step in the grievance procedure. It is certainly preferable that an issue be thoroughly explored before it is presented for resolution at the national level.

C

The final case for resolution is 11803, in which a reserve carrier is seeking overtime solely because he was forced to work outside his assigned schedule.

The Union recognizes that this case has merit only if the Arbitrator decides that a reserve or part-time carrier who bids successfully on a five day vacancy thereby steps into the pay status of the carrier he or she replaced. The Arbitrator made no such ruling. Consequently, this grievance must be denied.

THE AWARD

The grievance in case 10621 is sustained. The Service is directed to pay the Grievant the difference between the wages he earned for the period from August 28, 1982 through September 11, 1982 and the wages he would have earned during that period if he had worked the hours that were worked by the carrier assigned to route C-11.

The grievance in case 12736 is sustained. The Service is directed to pay the Grievant in that case the difference between the wages he actually earned during the period from August 7 through

August 27, 1982, and the wages he would have earned during that period if he had worked the same hours as the carrier or carriers assigned to route 4602.

The grievance in case 12739 is dismissed as duplicative of case 12736.

The grievance in case 12737 is sustained. The Service is directed to pay the Grievant four hours of additional pay for July 31, 1982 plus eight hours of pay for August 6, 1982 at his standard rate.

The grievance in case 11803 is denied.

Jurisdiction is retained to resolve any controversies over the implementation of this Award.

Neil N. Bernstein
Arbitrator

Dated: Sept. 10, 1986