C# 06775

ARBITRATION AWARD

January 19, 1987

UNITED STATES POSTAL SERVICE

-and-

AMERICAN POSTAL WORKERS UNION

-and-

NATIONAL ASSOCIATION OF LETTER CARRIERS

Case Nos.
H4N-NA-C-21 (2nd Issue)
H4C-NA-C-23

Subject: Effect of Penalty Overtime Pay on Holiday Scheduling

Statement of the Issues: Whether Management may ignore the "pecking order" in holiday period scheduling, as established by Article 11, Section 6B or a Local Memorandum of Understanding, in order to avoid payment of penalty overtime pay under Article 8?

Whether Management may treat regular employees who have volunteered for holiday period work, pursuant to the holiday scheduling process, as having volunteered for up to twelve hours on whatever day(s) they are asked to work?

Contract Provisions Involved: Article 8, Sections 4 and 5; Article 11, Sections 1 through 6; and Article 30 of the July 21, 1984 National Agreement.

Appearances: For the Postal Service, J. K. Hellquist, General Manager, Labor Relations Division, Central Region; for APWU, Darryl J. Anderson, Attorney (O'Donnell Schwartz & Anderson); for NALC, Keith E. Secular, Attorney (Cohen Weiss & Simon) and Devon Lee Miller, Staff Attorney.

Statement of the Award: The grievances are granted. Management may not ignore the "pecking order" in holiday period scheduling under Article 11, Section 6 in order to avoid penalty overtime pay under Article 8. Management may not treat regular volunteers for holiday period work as having volunteered for up to twelve hours on whatever day(s) they are asked to work. The remedy for this violation, the question of who is entitled to back pay for Management's failure to honor rights under Articles 8 and 11, is remanded to the parties for their consideration. Should they be unable to resolve this matter, the back pay issue may be returned to the appropriate arbitration forum for a final decision.

BACKGROUND

These grievances involve interpretive questions with respect to Article 11, the holiday work and holiday scheduling language of the 1984 National Agreement. Article 11, Section 6B establishes a "pecking order" for scheduling employees during a holiday period. The Postal Service insists that if compliance with the "pecking order" would result in some employee receiving penalty overtime pay, Management is free to bypass that employee to avoid the penalty overtime pay. The Unions disagree. They urge that any failure to follow the "pecking order" is a violation of Section 6B.

Article 11 is the "holidays" clause. It states the holidays to which the employees are entitled (Section 1), the eligibility conditions for holiday pay (Section 2), and the payment made for a holiday (Section 3). It notes that when a holiday falls on an employee's scheduled non-workday, he takes his holiday on his "scheduled workday preceding the holiday" (Section 5B). That is referred to as his designated holiday. Because of this contract provision, a single holiday may embrace a two- or three-day period. For example, if the official holiday occurs on a Monday, anyone regularly scheduled that day will have Monday as a holiday. An employee whose scheduled off days are Sunday and Monday will have his designated holiday on Saturday; an employee whose off days were Monday and some later day would have his designated holiday on Sunday. These latter employees receive holiday pay for their designated holiday, not for the official holiday (Monday).

Article 11 also explains how employees are to be paid when they work on their holiday (Section 4) and how employees are to be scheduled for such holiday work (Section 6). In order to understand this dispute, these two provisions should be quoted at length:

> "Section 4. Holiday Work
>
> A. An employee required to work on a holiday other than Christmas shall be paid the base hourly straight time rate for each hour worked up to eight (8) hours in addition to the holiday to which the employee is entitled as above described.

B. An employee required to work Christmas shall be paid one and one-half ($1\frac{1}{2}$) times the base hourly straight time rate for each hour worked in addition to the holiday pay to which the employee is entitled as above described."

"Section 6. Holiday Schedule

A. The Employer will determine the number and categories of employees needed for holiday work and a schedule shall be posted as of the Wednesday preceding the service week in which the holiday falls.

B. As many full-time and part-time regular employees as can be spared will be excused from duty on a holiday or day designated as their holiday. Such employees will not be required to work on a holiday or day designated as their holiday unless all casuals and part-time flexibles are utilized to the maximum extent possible, even if the payment of overtime is required, and unless all full-time and part-time regulars with the needed skills who wish to work on the holiday have been afforded an opportunity to do so."

Some elaboration on the meaning of this contract language is necessary. Section 6A demands that a holiday work schedule be posted by a certain time. Section 6B establishes rules as to how the schedule is to be prepared. Its main purpose is to require that "full-time and part-time regulars" be given holidays off to the extent possible. It calls upon Management to "excuse" from holiday work "as many..." of them "as can be spared." It nevertheless recognizes that these regulars may sometimes be required to work on their holidays. But it says this cannot happen "unless all casuals and part-time flexibles are utilized to the maximum extent possible" including overtime and "unless all full-time and part-time regulars...who wish to work on the holiday have been afforded an opportunity to do so." Thus, all casuals, part-time flexibles and regular volunteers must be used for holiday work before Management can compel regular, non-volunteers to perform such work.

The precise order of choosing employees for holiday work, commonly referred to as the "pecking order", is left to the local parties. Article 30B, item 13 provides for

local implementation with respect to "the method of selecting employees to work on a holiday." Of course, should the local parties fail to agree on a "pecking order", they would be bound by the terms of Article 11, Section 6B.

Section 4 deals with the applicable rate of pay for the employee who works his holiday (or designated holiday) pursuant to the "pecking order." Ordinarily, he receives straight time for such holiday work (Section 4A) in addition to holiday pay. But if he works on Christmas Day, he receives time and one-half for such holiday work (Section 4B) in addition to holiday pay.

Because holiday scheduling involves more than the calendar holiday, employees are sometimes called upon to work during the holiday period on one or two of their regularly scheduled off days. Suppose, for instance, that the calendar holiday falls on Monday and that a regular volunteer has his off days on Sunday and Monday and hence his designated holiday on Saturday. If he is asked to work on Sunday (or Monday), he receives time and one-half for such work.[1] The parties appear to disagree on the basis for this payment. The Unions insist this overtime premium is required by Article 8, Section 4B. The Postal Service insists that pay for work performed because of the holiday scheduling provision has nothing to do with Article 8 but rather is based on the terms of Article 11 and the March 4, 1974 Settlement Agreement. Paragraph 3d of this Settlement Agreement states:

> "d. A full time regular employee required to work on a holiday which falls on his regularly scheduled non-work day shall be paid at the normal overtime rate of one and one-half (1½) times his basic hourly straight time rate for work performed on such day..."[2]

1 If he is asked to work on Saturday, his designated holiday, he receives straight time for such work pursuant to Article 11, Section 4A.

2 This clause plainly does not refer to Saturday in the hypothetical example above. For Saturday, being the employee's designated holiday, is by definition a scheduled workday. Rather, it must refer to the official holiday on Monday which was a "scheduled non-work day" for this employee. In any event, this clause does not concern his pay for work performed on Sunday pursuant to the holiday schedule. For Sunday was neither a calendar holiday nor his designated holiday.

Article 8 is a critical part of this dispute as well. Prior to the 1984 National Agreement, it provided overtime pay for work performed "after eight (8) hours on duty in any one service day or forty (40) hours in any one service week" (Section 4B). It provided further for overtime pay for work outside the regularly scheduled work week, i.e., for work on the employee's non-scheduled days (Section 4B). It referred to a single overtime rate, time and one-half (Section 4A).

The 1984 national negotiations led to significant changes in Article 8. The most important one, for purposes of this case, was the establishment of "penalty overtime pay" of "two (2) times the base hourly straight time rate" (Section 4C). The manner in which this penalty premium was to be applied is set forth in Sections 4 and 5 of the 1984 National Agreement:

> "Section 4...D. Effective January 19, 1985, penalty overtime pay will be paid to full-time regular employees for any overtime work in contravention of the restrictions in Section 5.F.
>
> "Section 5...F. Effective January 19, 1985, excluding December, no full-time regular employee will be required to work overtime on more than four (4) of the employee's five (5) scheduled days in a service week or work over ten (10) hours on a regularly scheduled day, over eight (8) hours on a non-scheduled day, or over six (6) days in a service week."

In short, employees who work beyond these Section 5F restrictions are entitled to penalty overtime pay.

In the 1984 national negotiations, the Unions proposed several changes in Article 11. One was to "correct Article 11 to reflect the Martin Luther King, Jr. holiday." Another was to "increase...the premium paid for work on a holiday or designated holiday." The former proposal was submitted to the Kerr interest arbitration panel which held that the King birthday should be an additional holiday beginning in 1986. The latter proposal was evidently an attempt to raise any existing "premium" for holiday work. It was dropped by the Unions during negotiations and was never placed before the Kerr panel.

The Postal Service advised the Unions of its interpretation of Article 11 in mid-April 1985. It asserted that volunteering for holiday period work would be considered by Management as indicating a willingness to work up to twelve hours per day. It asserted further that a holiday schedule would continue to be based on the "pecking order" created by Article 11, Section 6B and local implementation but that Management was not obligated to follow the "pecking order" if, by doing so, it incurred penalty overtime pay. Both Unions objected to this interpretation. NALC grieved, alleging that "pecking orders, however established, must be followed by the Postal Service." Its position was that the "pecking order" could not be disregarded because of penalty overtime pay considerations. APWU grieved, taking the same position as NALC on the "pecking order" question. It urged that an employee's right to holiday period work pursuant to Article 11, Section 6B and local implementation could not be affected by any Article 8 changes in overtime compensation. It added too that employees scheduled for holiday work "are available to work the number of hours [eight] they would normally be available for if it were not a holiday schedule."

The original arbitration hearing was held in Washington, D.C. on December 19, 1985. The parties submitted only the question of whether the Unions' complaint was arbitrable under the terms of the 1984 National Agreement. I ruled on May 5, 1986, that "the grievances in this case are arbitrable." A hearing was held on the merits of the dispute on October 8, 1986. Post-hearing briefs were received by the arbitrator on December 6, 1986.

DISCUSSION AND FINDINGS

Article 11, Section 6B is the key provision in this case. It deals with the holiday schedule for the holiday period, namely, the day on which the official holiday falls and the preceding day(s) on which many employees have their designated holiday. Its purpose was to insure, insofar as possible, that regulars would enjoy the holiday (or designated holiday) and be off work that day. It accomplished this purpose by creating a "pecking order." Thus, in preparing a holiday schedule, Management must use (1) "all casuals and part-time flexibles..." and (2) "all full-time and part-time regulars ...who wish to work on the holiday..." before turning to any regular who does not wish to work. The parties gave the regular non-volunteer a right, vis-a-vis others, to time off on

his holiday (or designated holiday). That right can be disregarded, according to Section 6B, only if Management has scheduled all qualified people in groups (1) and (2) and requires still more manpower for the holiday (or designated holiday).

More important, the "pecking order" described here is a mandatory procedure. Management must use non-protected employees (i.e., casuals, part-time flexibles, and regular volunteers) before protected employees (i.e., regular non-volunteers) during the holiday period. There are no exceptions. Failure to honor these priorities (i.e., scheduling a regular non-volunteer while other qualified non-protected people are available) would plainly be a violation of Article 11, Section 6B.

The Postal Service nevertheless insists that the "pecking order" is not always mandatory under the 1984 National Agreement. It stresses that part of Article 11, Section 6B which says the priorities set forth in the "pecking order" are to be followed "even if the payment of overtime is required." It believes these words mean that the parties anticipated the "pecking order" would cost Management no more than the "overtime" rate in effect (i.e., time and one-half) at the time Section 6B was first written into the National Agreement. It urges that the parties negotiated a new "penalty overtime" rate (i.e., double time) in the 1984 National Agreement, that this was not the "overtime" rate contemplated by Article 11, Section 6, and that Management may therefore ignore the "pecking order" when necessary to avoid the payment of anything beyond such "overtime" rate. Its position is that the parties agreed the Section 6B scheduling procedure could result in "...the payment of overtime" but not "...the payment of penalty overtime."

This argument fails for several reasons. The object of the phrase in question ("even if the payment of overtime is required") obviously was to make clear that Management could not escape the mandatory scheduling procedure in Article 11, Section 6B on the ground that strict application of this procedure would call for "overtime" pay. The "pecking order" had to be followed even though it caused employees to be paid time and one-half. The "pecking order" had to be

followed without regard to labor cost considerations.[3] Realistically viewed, this phrase simply serves to emphasize the unconditional nature of the Section 6B scheduling obligation. The Postal Service has never had an option in this matter. It had to honor the "pecking order" whenever it made up a holiday schedule. It presumably did so between 1973, when Section 6B came into being, and 1984. Now Management contends that this phrase, absent any change in the language of Section 6B, somehow places a new condition on what had always been an unconditional obligation. This claim is unconvincing, not only because it would alter the longstanding interpretation of Section 6B but also because it would expand the meaning of this phrase far beyond what the parties could possibly have intended.

To repeat, the phrase in question precludes any deviation from the "pecking order" because of "overtime." It is true that when Article 11, Section 6B was initially written, there was just one kind of "overtime" pay, namely, time and one-half. The parties established another kind of "overtime" pay, namely, double time, in the 1984 National Agreement and described it as "penalty overtime." Neither of these circumstances command a different conclusion in this case. For "penalty overtime" is still a form of "overtime" and double time is simply a new type of "overtime" rate. Moreover, these new arrangements have been included in the "overtime work" provisions of Article 8, Section 4. The parties' intent to make "overtime" (i.e., labor cost) considerations irrelevant in preparing a holiday schedule under Article 11, Section 6B strongly suggests that Management may not deviate from the "pecking order" because of "penalty overtime."

Neither party seems to have anticipated in the 1984 negotiations that the creation of "penalty overtime" in Article 8, Section 4 might have an impact on holiday scheduling under Article 11, Section 6B. There is no evidence that the negotiators discussed this interrelationship. The Postal Service maintains the Unions never advised Management at the time that the "pecking order" would have to be applied without regard to "penalty overtime" as well as "overtime." Had

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3 The Postal Service can, of course, choose from among the part-time flexibles (or from among the regular volunteers, etc.) in order to limit its labor cost. That kind of choice would not conflict with the "pecking order."

it been so advised, it says it would have insisted on renegotiating Article 11, Section 6B. But the Unions can make the very same type of argument. They could properly assert the Postal Service never advised them at the time that deviation from the "pecking order" was prohibited with respect to "overtime" but not "penalty overtime." Had they been so advised, they presumably would also have insisted on renegotiating Article 11, Section 6B.

The difficulty here is the parties' silence on this issue in the 1984 negotiations. That silence, however, does not work to the Unions' disadvantage. For the holiday scheduling in Article 11, Section 6B, the "pecking order", has always been an unconditional obligation. Nothing in the Postal Service's argument convinces me that a sound basis exists for modifying that unconditional obligation.

The Postal Service resists these findings on other grounds as well. First, it states that pay for work performed pursuant to a holiday schedule is based not on Article 8 but rather on Article 11 and the March 4, 1974 Settlement Agreement. It seems to be asserting that there is no interrelationship between Articles 8 and 11. Second, it states that the Unions are seeking through this arbitration what they failed to achieve in the 1984 negotiations. It refers to the Unions' withdrawal in those negotiations of a proposal for "increasing the premium paid for work on a holiday or designated holiday" under Article 11.

The first claim has no merit whatever. It is true that pay for work on a holiday (or designated holiday) is governed by Article 11, Section 4. But the holiday schedule typically encompasses a two- or three-day period and calls for employees to work on a day(s) outside their regular schedule, a day(s) other than their holiday (or designated holiday). Payment for these days is not covered by Article 11. Payment for these days is covered by Article 8 and to a limited extent by the Settlement Agreement.[4]

4 See footnote 2 which explains that Paragraph 3d of the Settlement Agreement has a limited application to a holiday schedule. Note too that the purpose of Paragraph 3d, according to a lengthy April 1974 memorandum issued by Postal Service headquarters, was to show that an employee who "works on a calendar holiday" which is in fact "his sixth work day...is entitled only to the normal overtime rate for service performed that day..." (Emphasis added).

The Postal Service has recognized the applicability of the overtime pay provisions of Article 8 in these circumstances. An August 1973 telegraphic message was sent to facilities throughout the country by the then Senior Assistant Postmaster General for Employee & Labor Relations. The message dealt with misunderstandings as to the proper interpretation of Article 11, Section 6B. It described the priorities or "pecking order" for a holiday schedule and noted the fourth and fifth priorities in these words:

> "4. All other full time and part time regular volunteers. In the case of such full time volunteers, if they are scheduled to work and it is what would otherwise be their non-scheduled work day, they will be guaranteed 8 hours at <u>the overtime rate in accordance with Article VIII, Sections 1 and 4</u>.
>
> "5. Full time and part time regulars who have not volunteered and who will be working on what would otherwise be their non-scheduled work day. In the case of such full time employees, they will be guaranteed 8 hours at <u>the overtime rate in accordance with Article VIII, Sections 1 and 4</u>." (Emphasis added)

Equally important, the Postal Service issued a January 1985 special postal bulletin (21495) which dealt with pay issues arising from the new "penalty overtime" provision. The bulletin addressed the situation where an "employee worked all seven days of the week which included a holiday." The calendar holiday fell on a Monday; the employee's regularly scheduled off days were Saturday and Sunday; the holiday schedule called for him to work these off days. The bulletin stated that "<u>penalty overtime is paid</u> for the 2nd non-scheduled workday, <u>for hours worked on a 7th day</u> (Sunday)" (Emphasis added). That was obviously a reference to Article 8, Section 4.

The Postal Service expressly acknowledged the applicability of "penalty overtime" to holiday scheduling in an April 1985 letter to the Unions. It stated its "position" in these words:

"For holiday scheduling purposes work hour limitations for the holiday period; i.e., the holiday and designated holidays, would be as follows:

* * *

- Penalty pay would be due for work in excess of 10 hours per day.

- Penalty pay would be due for overtime work on more than 4 of the employees 5 scheduled days.

- Penalty pay would be paid for work over 8 hours on a nonscheduled day.

- Penalty pay would be paid for work over 6 days in a service week." (Emphasis added)

These statements show that employees on a holiday schedule can, where appropriate, qualify for "penalty overtime" under Article 8, Sections 4 and 5. Indeed, the present dispute is before the arbitrator because the Postal Service has admittedly deviated from the "pecking order" of Article 11, Section 6B to avoid the payment of "penalty overtime." That action plainly implies that were Management required to follow the "pecking order" in such situations, it would have to pay "penalty overtime."

All of this illustrates, beyond question, that Article 8 does apply to certain portions of the Article 11, Section 6B holiday schedule. Articles 8 and 11 are interrelated.

The second claim is also not persuasive. In the 1984 negotiations, the Unions noted that "most employees are required to work on holidays" and proposed amending Article 11 so as to "increase...the premium paid for work on a holiday or designated holiday." This proposal was later withdrawn. The parties disagree on the significance, if any, to be attributed to this withdrawal.

The Unions' proposal had a narrow target. It was aimed at work performed by employees on their holiday (or designated holiday). It sought something more than the straight

time pay authorized by Article 11, Section 4 for such work.[5] The present dispute, however, does not concern work on the employee's holiday (or designated holiday). The Unions do not challenge the pay formulation in Article 11, Section 4. Rather, their concern is with the employee required to work on a non-scheduled day[6] pursuant to the holiday scheduling procedure of Article 11, Section 6B. Their concern is with Management's obligation to follow the "pecking order" of Section 6B without regard to the "overtime" consequences. Such concerns were obviously not part of the Unions' negotiating proposal. Therefore, it cannot be said that the Unions' position in this case is an attempt to secure through arbitration what it failed to achieve through negotiations.

The final issue in this case concerns the Postal Service's view that any regular employee who volunteers for holiday period work may be treated as having volunteered for up to twelve hours on whatever day(s) he is asked to work. The Unions do not agree. They believe that such a regular volunteer is limited to just eight hours and that should Management need more than this eight hours' work, it must use the overtime desired list (ODL).

Article 11 does not address this issue. It deals with the scheduling of holiday period work but it says nothing of the number of hours for which a regular volunteer may be scheduled. However, Article 8, Section 5 offers some significant clues. It describes the procedures to be followed in scheduling "overtime work" for employees. Its general provisions must give way to the specific provisions for holiday scheduling in Article 11, Section 6. Hence, a regular volunteer may be scheduled for an eight-hour shift in the holiday period even though these hours constitute "overtime work" for him and even though he is not on the ODL. But because Article 11 does not speak of the length of a holiday period assignment and because anything beyond the initial eight hours must amount to "overtime work", it is appropriate to look at Article 8, Section 5.

Assume, for instance, that a regular full-time volunteer is working eight hours on a non-scheduled day pursuant to the

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5 Time and one-half pay is authorized for work on the Christmas holiday.

6 This non-scheduled day would, by definition, be a day other than his holiday (or designated holiday).

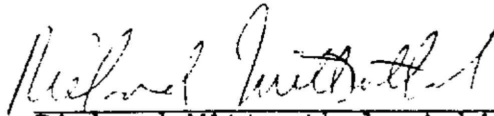
holiday schedule. That would be "overtime work." But Article 8, Section 5F says "no full-time regular will be required to work...over eight...hours on a non-scheduled day..." Assume further that this regular volunteer is also working eight hours on his holiday (or designated holiday), one of his regularly scheduled days. He receives straight time for such holiday work in addition to his holiday pay. Only if he is asked to work beyond eight hours would overtime pay be applicable. But Article 8, Section 5G says "full-time employees not on the [ODL]...may be required to work overtime only if all available employees on the [ODL]...have worked up to twelve...hours in a day or sixty...hours in a service week..."[7] In short, the regular volunteer cannot work beyond the eight hours without supervision first exhausting the ODL. These Article 8 provisions, when read together with Article 11, strongly suggest that regular volunteers are contractually expected to work eight hours, nothing more. And it appears that regular volunteers were ordinarily scheduled for holiday period work in eight-hour blocks prior to the 1984 National Agreement.

I find, accordingly, that the regular volunteer is volunteering for eight hours' work as urged by the Unions. That evidently was the accepted construction of Article 11, Section 6 prior to the 1984 National Agreement. There is no sound reason why the new "penalty overtime" provisions of Article 8 should prompt a different construction.

7 If the regular volunteer is also on the ODL, a different situation might well be presented.

AWARD

The grievances are granted. Management may not ignore the "pecking order" in holiday period scheduling under Article 11, Section 6 in order to avoid penalty overtime pay under Article 8. Management may not treat regular volunteers for holiday period work as having volunteered for up to twelve hours on whatever day(s) they are asked to work. The remedy for this violation, the question of who is entitled to back pay for Management's failure to honor rights under Articles 8 and 11, is remanded to the parties for their consideration. Should they be unable to resolve this matter, the back pay issue may be returned to the appropriate arbitration forum for a final decision.



Richard Mittenthal, Arbitrator