C#07323 F

ARBITRATION AWARD

September 11, 1987

UNITED STATES POSTAL SERVICE

-and-

NATIONAL ASSOCIATION OF LETTER CARRIERS

Case Nos.
H4N-NA-C-21 (3rd issue)
H4C-NA-C-27

-and-

AMERICAN POSTAL WORKERS UNION

Subject: Pay Consequences of Application of 60-Hour Work Limitation

Statement of the Issue: Whether an employee sent home in the middle of his tour on a regularly scheduled day, because of the bar against employees working more than 60 hours in a service week, is entitled to be paid for the remainder of his scheduled day?

Contract Provisions Involved: Article 7, Section 1; Article 8, Sections 1, 2, 4, 5 and 8; Article 19; and the Article 8 Memorandum of the July 21, 1984 National Agreement. Various Postal Service handbooks and manuals.

Appearances: For the Postal Service, J. K. Hellquist, Field Director, Human Resources; for NALC, Keith E. Secular, Attorney (Cohen Weiss & Simon); for APWU, Darryl J. Anderson, Attorney (O'Donnell Schwartz & Anderson).

Statement of the Award: The Unions' request for the hypothetical employee involved in this case is granted. This employee, having been sent home on his regularly scheduled day before the end of his tour on account of the 60-hour ceiling and having experienced no temporary change of schedule, must be paid for the hours he lost that day.

BACKGROUND

This grievance concerns the pay consequences, if any, of Management sending an employee home before he completes a regularly scheduled day because of the 60-hour work limitation in Article 8, Section 5G2 of the National Agreement. The Unions insist that he is entitled to be paid for the regularly scheduled hours he lost, that these hours are part of his guaranteed workweek. The Postal Service disagrees.

To better understand the issue, it would be helpful to consider a hypothetical example. Suppose "X" is a full-time regular on the overtime desired list (ODL). Suppose further that his regular schedule for a given week was Monday through Friday on day tour and that he worked the extra hours indicated below:

	S	S	M	T	W	T	F
Hours Scheduled			8	8	8	8	8
Extra Hours		8	4	4	4	4	
Actual (Total) Hours		8	12	12	12	12	8

All of the extra hours, eight on Sunday and four on Monday through Thursday, were paid for at the overtime rate (time and one-half) or the penalty overtime rate (double time). At the end of "X"'s Thursday tour, he had worked a total of 56 hours. My original award in this case (dated May 12, 1986) held that Article 8, Section 5G2 establishes "an absolute bar against an employee working more than 60 hours in a service week." Management was hence obliged to send "X" home after four hours of work on Friday, his last regularly scheduled day.

The Unions also raised the pay question, the pay consequences of strict enforcement of the 60-hour limitation. My award expressed the issue in these words:

> "...Whether an employee sent home on a regularly scheduled day before the end of his tour, on account of the 60-hour ceiling, is neverthless guaranteed a full eight hours' pay for the day? Or, referring to the hypothetical example and assuming "X" is sent home after four hours' work on Friday because he has at that point completed 60 hours, whether he is entitled to pay for the other four hours he did not work that day?"

I addressed this issue from the standpoint of Section 432.6 (Guaranteed Time) of the Employee & Labor Relations Manual and the "guarantee provisions" of Article 8, Section 8C. But the ambiguities in the latter contract clause and the absence of any detailed argument on this point led me to remand this phase of the dispute to the parties for further consideration. After extensive discussion, they were unable to resolve the pay question and they returned the matter to the arbitrator. A hearing was held on April 21, 1987. Post-hearing briefs were received on June 26, 1987.

The Unions claim that "X" is entitled to be paid for the four hours he lost on Friday due to the 60-hour work limitation.* They believe this claim is justified by two basic propositions. First, they maintain that "full-time regular employees are guaranteed 8 hours pay for each of their 5 regularly scheduled days, whether worked or not, absent a valid temporary change of schedule." They rely on the history of pay guarantees for regularly scheduled hours (particularly the Salary Act of 1965 and the subsequent Groettum rulings), the contract language with respect to the regular five-day schedule (particularly Article 7, Section 1A1 and Article 8, Section 1), the terms of various Postal Service manuals and handbooks (particularly Part 434.612 of the ELM and EL-401, the Supervisor's Guide to Scheduling and Premium Pay), and the admissions made by Postal Service representatives in this very case.

Second, they maintain that the "1984 changes to the overtime provisions of Article 8 do not nullify this guarantee for employees who are sent home because of the 60-hour limit." They stress the purpose behind the 1984 overtime amendments (specifically, to reduce overtime). They contend this purpose would be undermined by allowing Management to substitute overtime hours for regularly scheduled straight time hours (for example, permitting "X"'s four overtime hours on Thursday to take the place of his final four regularly scheduled hours on Friday). Moreover, they say Management's position in this case "would actually have the perverse effect of diminishing the disincentives to use of overtime established by the Agreement."

* That four hours' pay would evidently be in the form of administrative leave.

The Postal Service argues that this pay issue "has already been decided by this arbitrator in his earlier opinion and award." It refers to the comments made in that award regarding Article 7, Section 1A1 and Article 8, Section 1 and contends "these provisions did not construct any entitlement - or requirement - to work." Its position is that where a full-time regular is sent home during a regularly scheduled tour because of the operation of the 60-hour work limitation, he has "no guarantee of work or pay based upon..." the above Article 7 and 8 contract clauses. It also cites the comments in the earlier award on "guaranteed time" under Part 432.6 of the ELM. It notes that this manual language "does not provide an independent basis for the payment of 'guaranteed time'..." to "X" and that one must therefore look to the National Agreement. But, it emphasizes, the parties agree that the "guarantee provisions" of the National Agreement, specifically, Article 8, Section 8, are not applicable to the hypothetical problem in this case.

The Postal Service further urges that the "guaranteed time" concept relates, with the exception of the "carrier rounding rule", only to "an overtime situation." It relies, in support of this proposition, on the F-21 and F-22 Handbooks. It observes that the pay question here concerns the final four hours of "X"'s regularly scheduled tour on Friday, a straight time situation. It concludes that the "guaranteed time" concept therefore has no application to the four straight time hours in dispute. For these reasons, it believes a full-time regular sent home during his regularly scheduled tour because of the 60-hour ceiling is not entitled to be paid for the remainder of that scheduled tour. It insists that the lost hours are properly treated as leave without pay.

DISCUSSION AND FINDINGS

It should be stressed at the outset that the earlier award addressed three separate issues. I held (1) that the Unions' grievances with respect to the 60-hour limitation in Article 8, Section 5G2 were arbitrable, (2) that this contract provision established "an absolute bar against employees working more than 60 hours in a service week", and (3) that the pay consequences of this 60-hour ceiling on our hypothetical "X" could not be decided on the basis of the limited evidence and argument then before me. Consequently, this third issue was remanded to the parties for further

discussion. I did speculate, however, as to possible considerations which might influence a decision on the third issue. Part of that speculation dealt with Article 8, Section 8, the "guarantee provisions" of the National Agreement. The parties have now agreed that Article 8, Section 8 is not relevant to this pay question. The answer lies elsewhere.

Any analysis of the problem must begin with certain Management admissions. The Postal Service argued in the earlier case that "Article 7, Section 1 and Article 8, Sections 1 and 2C constructed a core schedule for full-time regulars" and that "a full-time regular is guaranteed that basic core schedule." For example, Article 8, Section 1 speaks of the "normal workweek" being "forty (40) hours per week, eight (8) hours per day..." The full-time regular is thus plainly "guaranteed" those core hours, those hours which are part of his regularly scheduled week. The original award stated, however, that Management could not insist on the employee working his "guaranteed" hours if, by doing so, he would exceed the 60-hour ceiling.

The Postal Service's position now seems to be that if the 60-hour ceiling prevents an employee from working certain regularly scheduled hours, those hours cannot be considered part of any "guarantee." It contends that the employee cannot properly be paid, in these circumstances, for the regularly scheduled hours he lost. The Unions, on the other hand, seem to say that the "guarantee" insures the employee either his regularly scheduled hours or, where some such hours cannot be worked because of a contract prohibition, pay in lieu of those hours. It recognizes just one exception, namely, a timely change in schedule which alters the employee's hours in a given week.

Thus, the crux of this dispute is the parties' different conceptions of the scope of the "guarantee." A fair reading of certain Postal Service handbook and manual language reveals that the "guarantee" is a good deal broader than the Postal Service is prepared to concede. The EL-401 Handbook, described as "a management tool to assist in the continuing maintenance of time and attendance in compliance with the Fair Labor Standards Act..., postal policy, and...contractual agreements", is particularly helpful. Part IVB is entitled "Work Schedule Guarantees." It quotes Article 8, Section 1 in full and then adds by way of illustration:

"...if you [Management] work a full-time employee 6 hours [on one of his regularly scheduled eight-hour tours], then release him from duty for lack of work, you incur the obligation [apparently under Article 8, Section 1] to pay 2 hours. These 2 unworked hours are charged to administrative leave." (Emphasis added)

This point is made even more forcefully in other EL-401 examples:

"...a maintenance employee who normally reports at 4:00 p.m. was called in at 9:00 a.m. because of a major mechanical problem. His work was completed at 11:30 a.m. His supervisor directed him to go ahead and work until 5:30 p.m., then go home for the day. The supervisor mistakenly assumed that a management-initiated schedule change would keep the workhours to 8. Since the employee was ordered to clock out at 5:30 p.m. and not given the opportunity to work his regular tour, the Postal Service is liable for 6½ hours of postal overtime for the period between 9:00 a.m. and the start of the scheduled tour at 4:00 p.m., 1½ hours at the straight time rate for the period between 4:00 p.m. and 5:30 p.m., PLUS 6½ hours of administrative leave at the straight time rate for the unworked portion of the employee's scheduled tour between 5:30 p.m. and 12:30 a.m. In this example, the Postal Service receives 8 hours' work but pays for 14½ hours." Part IIB (Emphasis added)

"...a supervisor plans ahead and notifies an employee by the Wednesday of the preceding service week to work a temporary schedule the following service week from 6:00 a.m. to 2:30 p.m., instead of his regular schedule from 8:00 a.m. to 4:30 p.m. The employee is paid 2 hours' 'out-of-schedule premium' for the hours worked from 6:00 a.m. to 8:00 a.m. and 6 hours straight time for the hours worked from 8:00 a.m. to 2:30 p.m. ... If the same situation occurred, except that the notification requirement was not met, the time between 8:00 a.m. and 4:30 p.m. - the regular schedule - is payable as straight-time hours. If the employee was sent home at 2:30 p.m., he must be paid for the two hours between 6:00 a.m. and

8:00 a.m. at the overtime rate; straight-time pay for the period from 8:00 a.m. to 2:30 p.m., plus two hours' administrative leave at the straight-time pay for the period from 2:30 p.m. to 4:30 p.m." Part IIID3 (Emphasis added)

All of this EL-401 language clearly shows that a full-time regular, who has not received proper notice of a schedule change, is entitled to work all of his regularly scheduled hours. And when he is sent home early on one of his regularly scheduled tours due to lack of work (or due to his having completed eight hours as a result of his having reported early at supervision's request), he is entitled to be paid for the hours he lost. He appears to be "guaranteed" eight hours' pay for each of his regularly scheduled tours.

The ELM reaches much the same conclusion. Parts 434.611 and 434.612 concern "out of schedule premium." Where Management asks a full-time regular to work a "temporary schedule" different from his regularly scheduled workday or workweek and where it gives him timely notice of such a change, he receives "out of schedule premium" (i.e., time and one-half) for any hours worked "outside of, and instead of..." his regularly scheduled hours. However, if the notice requirement is not met, then -

"...the employee is entitled to work his regular schedule. Therefore, any hours worked in addition to the employee's regular schedule are not worked 'instead of' his regular schedule. Such additional hours worked are not considered as 'out of schedule premium' hours. Instead, they are paid as overtime hours [time and one-half] worked in excess of 8 hours per service day or 40 hours per service week." Part 434.612b (Emphasis added)

This notice requirement would be meaningless if regularly scheduled hours were not "guaranteed." Consider the following comparison. Management provides an employee with the necessary notice and substitutes a 7:00 a.m. to 3:30 p.m. tour for his regularly scheduled 3:30 p.m. to 12 midnight tour on a given day. Part 434.611 says he is entitled to out-of-schedule premium (time and one-half) for his changed shift hours. Absent such notice, however, Part 434.612 says he is entitled to overtime (ordinarily, time and one-half) for such hours. Assuming there were no "guarantee", the end result

would be the same (time and one-half for the changed hours) whether Management gave the required notice or not. That plainly could not have been what the ELM intended. Where the notice requirement is not satisfied, according to 434.612b, "the employee is entitled to work his regular schedule..." In these circumstances, the regularly scheduled hours are "guaranteed." And, according to EL-401, if Management does not permit the employee to work his "guaranteed" hours due to lack of work (or certain other reasons), it must nevertheless pay him for his lost hours.

None of this is expressly stated in the National Agreement. But Article 19 provides that "those parts of all handbooks, manuals and published regulations of the Postal Service, that directly relate to wages, hours or working conditions...shall contain nothing that conflicts with this [National] Agreement, and shall be continued in effect...." The terms of the EL-401 and ELM, quoted above, concern "wages" and "hours" for bargaining unit employees. They do not conflict with the language of the National Agreement.* They were not "change[d]", pursuant to the procedures set forth in Article 19, during the life of the Agreement. They therefore were "continued in effect..." and were binding obligations on Management at the time this dispute arose. When Article 8, Section 1 and this EL-401 and ELM language are read together, there can be little question that the parties contemplated that the "normal work week" would, in most circumstances, "guarantee" a full-time regular all of his regularly scheduled hours.

The present case, our hypothetical "X", and the situation described in the EL-401 both involve an employee sent home during his regularly scheduled hours. Only the reasons for this action differ. EL-401 refers to someone sent home due to lack of work or due to his completing eight hours' work before the end of his tour on account of having reported early. "X" was sent home because he could not work beyond the 60-hour ceiling established by Article 8, Section 5G2. The question is whether this distinction calls for a result different from the one provided in the EL-401. I do not think so. The crucial consideration is that "X", like his

* The parties agree that Article 8, Section 8C relates only to part-time employees with flexible schedules and is therefore inapplicable to the facts of this case.

fellow employee in the EL-401, was sent home during his regularly scheduled hours through no fault of his own. He did not ask to leave early; he was not removed due to misconduct or due to some breach of duty by others. His regularly scheduled hours on Friday were cut short because supervision, knowing he had not yet worked his last regularly scheduled day, failed to limit his overtime to 20 hours. Had supervision taken his accumulated overtime hours into consideration, the problem would never have arisen and "X" could have worked his last regularly scheduled day without exceeding 60 hours.* Because "X" was in no way at fault, he should be treated no differently for purposes of the "guarantee" than his fellow employees in the EL-401.

None of these findings are undermined by the Postal Service argument. The earlier award held that the 60-hour work limitation had to be applied whenever an employee reached this ceiling regardless of the "normal work week" and "full-time employee" definitions in Article 8, Section 1 and Article 7, Section 1, respectively, Or, to put the proposition

* Management can avoid the kind of problem posed in this case by simply limiting ODL employees to no more than 20 hours' overtime during a week. This was acknowledged by the Postal Service in questions and answers it prepared on the impact of the 1984 National Agreement:

> "16. If overtime is needed on a non-scheduled day, and the appropriate employee on the ODL will exceed the 60 hour week limit if he is scheduled to work his non-scheduled day, is he still scheduled to work the overtime?
>
> No. Since the work hour guarantees of Article 8, Section 8 would apply, this employee would exceed the 60 hour limit designated in Article 8, Section 5.G.2. Therefore, he is not considered to be available and would not be scheduled for this overtime assignment."

Such arrangements would be consistent with one of the parties' main objectives in negotiating the Article 8 changes, namely, "to limit overtime..." See the first paragraph of the Article 8 Memorandum.

somewhat differently, a full-time employee's regularly scheduled hours must be cut short at the point at which he has accumulated 60 hours in a service week. The Postal Service insists that the arbitrator, by ruling that regularly scheduled hours can be limited in this fashion, necessarily limited the pay the employee could receive for such hours. Its position seems to be that to the extent to which regularly scheduled hours cannot be "guaranteed" because of the 60-hour ceiling, they cannot be paid for either.

This argument, however, reads far too much into the earlier award. My references there to Articles 7 and 8 dealt largely with the arbitrability issue. My concern was with hours, whether a full-time employee could be required to work more than 60 hours where this extra time involved regularly scheduled hours. My award did not decide the pay question, that is, the pay consequences of the 60-hour work limitation. The present opinion shows that a full-time employee is ordinarily entitled to pay for regularly scheduled hours not worked through no fault of his own. That concept was plainly embraced by the Postal Service in the EL-401. It is properly applicable to our hypothetical "X" in the circumstances of this case.

The Postal Service relies also on the F-21 and F-22 Time & Attendance Handbooks. It points to Part 222.14 of the F-21 which says, "Guaranteed time for all employees excepting regular carriers (See 222.53) applies only in an overtime situation." It emphasizes that the hypothetical in this case concerns straight time hours, rather than overtime hours, and hence does not call for the application of the "guaranteed time" provisions.

The difficulty with this claim is that the EL-401 and Part 434.612 of the ELM clearly recognize that a "guarantee" exists for straight time hours as well. The EL-401 expressly speaks of the employee being paid for regularly scheduled hours not worked, the same situation as the present case. And, indeed, one of the exhibits attached to the F-21 authorizes the payment of "guaranteed time" for straight time hours not worked. See, in this connection, Exhibit 222.51 which instructs the timekeeper to record certain straight time hours not worked in a "Guaranteed Time box" that identifies "the time as guaranteed time." All of this seems to contradict the Part 222.14 language. It seems evident, in

other words, that the Postal Service contemplated "guaranteed time" for certain regularly scheduled hours not worked. That is exactly what the Unions are seeking in these grievances.

For the foregoing reasons, the ruling is that "X" was entitled to be paid for the four regularly scheduled hours he lost because of the application of the 60-hour ceiling.

AWARD

The Unions' request for the hypothetical employee involved in this case is granted. This employee, having been sent home on his regularly scheduled day before the end of his tour on account of the 60-hour ceiling and having experienced no temporary change of schedule, must be paid for the hours he lost that day.

Richard Mittenthal, Arbitrator