C # 10054

MODIFIED UMPs ARBITRATION PANEL

In the Matter of the Arbitration between UNITED STATES POSTAL SERVICE and NATIONAL ASSOCIATION OF LETTER CARRIERS, AFL-CIO	GRIEVANT: Class Action POST OFFICE: Raleigh, NC CASE NO: 89-100C NALC Case No. GTS #11992

BEFORE: Robert W. Foster, Arbitrator

APPEARANCES:

For the U.S. Postal Service: Robert L. Kraft, Labor Relations Representative

For the Union: Chuck Windham, Regional Administrative Assistant

Place of Hearing: Raleigh, NC

Date of Hearing: April 20, 1990

AWARD:

The employer violated the National Agreement by the manner in which the overtime opportunities and hours were distributed as to several of the carriers on the overtime desired list during the second and third quarters of 1989.

The remedy is that Carrriers Barron, Peterson, Gay and Sutton shall receive overtime pay for the difference between the overtime hours they worked and five hours during the second and third quarters of 1989.

Date of Award: June 1, 1990

Robert W. Foster

Robert W. Foster
Arbitrator

ISSUE

Whether the employer violated the National Agreement by the matter in which the overtime opportunities and hours were distributed among the carriers on the overtime desired list during the second and third quarters of 1989? If so, what is the appropriate remedy?

PERTINENT PROVISIONS FROM THE NATIONAL AGREEMENT

ARTICLE 8

HOURS OF WORK

Section 5. Overtime Assignments

2.a. Only 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 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.

BACKGROUND

This grievance came to the instant arbitration when the employer and union representatives in the UMPs team in Raleigh, North Carolina were unable to reach an agreement with respect to the union's claim of an Article 8 violation based on the disparity in overtime opportunities and overtime hours worked among the employees on the overtime desired list (ODL) during the second and third quarters of 1989. Overtime tracking sheets for employees on the ODL during this period set up by carrier routes in Zone 9 were received into evidence. From its analysis of this evidence

a union steward constructed a listing of overtime opportunities and overtime hours worked by each employee on the ODL, after making adjustments based on discussions with the carrier's supervisor and excluding the opportunities not properly considered for purposes of equalizing overtime such as overtime on the carrier's own route and non-scheduled overtime. This computation shows that there was an average of approximately 9 overtime opportunities and an average of some 29 overtime hours worked during the two quarters in question. Several employees worked in excess of 55 overtime hours and several worked less than 10. In the second quarter, Carrier Gay, whose off day is Thursday, had zero opportunities and zero hours of opportunity worked. During this quarter, Carrier Peterson had three opportunities and worked .72 hours of overtime, as compared with another carrier with the same schedule who worked approximately twenty-one hours of overtime. Carrier Barron had 2.36 hours of overtime for that quarter. In the third quarter, Carrier Sutton's 2.86 overtime hours worked placed him at the bottom of the list for that period with the next lowest overtime hours of 9.45. Carrier Price's 56.87 overtime hours for that quarter placed him at the top of the ODL.

Management witnesses testified that some one and one-half to two hours per day were spent in tracking overtime worked by employees on the ODL. These witnesses further told of the problem in equalizing overtime under the fixed off days schedule at this station due to such factors as a greater need for overtime on Saturdays and Mondays, the fact that overtime on a carrier's own

route is not counted and the limits on bumps based on travel time in deciding whether to assign overtime to complete another carrier's route. It was recognized that Carrier Gay was overlooked for overtime assignments on one tracking sheet, but the low overtime for Carrier Peterson in the second quarter was attributed in part to the fact that his schedule changed from Wednesday to Thursday as his off day and this put him at the bottom of the list.

SUMMARIZED POSITION OF THE PARTIES

The Union

The union cites the provisions of Article 8, Section 5.C.2.b requiring the employer to make every effort to distribute equitably the opportunity for overtime, and claims that the wide disparity in overtime worked by employees on the ODL establishes that management has failed to meet its contract obligation in this regard. The union also cites Arbitrator Bernstein's analysis of this contract provision calling for equalization of overtime dollars paid to employees on the overtime desired list, while the high overtime employee in this case made over twice as much money in the quarter than the employee in the middle of the overtime distribution tracking sheet. The union views the average of twenty-nine hours overtime worked in the quarter as the starting point to judge whether overtime was equalized, and concludes that more than a ten hour spread from this level constitutes too wide a disparity.

Accordingly, the union concludes that management does not enjoy the luxury of such an inequitable distribution of overtime

and must remedy that disparity by payment to those employees at the lower end of the list for the hours they should have been assigned overtime work.

The Employer

The employer cites the precedential national arbitration award of Arbitrator Bernstein holding that Article 8 requires management to "at least try very hard to make its distribution as fair as possible" and that the service has an opportunity to explain drastically uneven hours. The employer provides such an explanation by its claim that equalizing overtime of a Saturday off employee with a Thursday off employee, for example, is mathematically impossible since the later will have much less opportunities to work overtime on his or her day off as compared with the former.

The employer also cites an agreement at the national level that overtime on a carriers own route is not counted as an opportunity, that the national agreement does not require management to use a letter carrier on the ODL to provide auxiliary assistance if that carrier would be in a penalty overtime status and consideration of the reasonableness of the travel time involved when considering which carrier will provide auxiliary assistance.

Accordingly, the employer says that it made more sense to equalize overtime of employees with the same off days, than to equalize the overtime available for auxiliary assistance.

Even if it should be found that the employer failed to equalize overtime in violation of Article 8, the employer cites the Bernstein award which it views as defining the appropriate

remedy of corrective distribution of overtime in the subsequent quarter, rather than a monetary award.

DISCUSSION AND OPINION

As clarified by Arbitrator Bernstein in a precedent setting arbitration award at the national level, Article 8, Section 5.C.2.b obligates the service to at least try very hard to make its distribution of overtime pay as fair as possible. As further explained by Arbitrator Bernstein, when the posted evidence required by Article 8.5.C.2.c. "shows hours worked to be drastically uneven and the disparity is not explainable in terms of opportunities offered but rejected (which would also be posted), that information would presumably pressure the service to explain the disparity." Put another way, huge disparities create a prima facie case of a contract violation, thereby placing the burden on management to provide an alternative explanation that this was caused by factors beyond the control of management despite efforts to equalize overtime.

While there may be some minor error in the union's calculation of overtime distribution among the carriers covered by this grievance who were on the ODL during the second and third quarters of 1989, the fact remains that there is such a wide disparity as to call into question whether management has met its contract obligation to these employees. In response, management has explained that most of the disparity is based on factors beyond its control.

As correctly observed by the employer, it is mathematically impossible to equalize overtime under the fixed off days schedule

employed at this facility. Given the fact that the most popular day of the week for annual leave and other causes of employee absence is Saturday, employees with that off day will be called upon the work eight hours of Saturday overtime much more often than, for example, employees with Thursdays off, the day in the week when overtime to fill in for an absent employee is the least needed. Those employees whose schedules necessarily limit their overtime opportunities based on their off days, are also restricted in the amount of overtime that they may be assigned by the agreed upon provisions that permit management to seek cheaper carrier hours in the avoidance of penalty time and the rule of reason permitted in assigning assistance on overtime based on travel time. Thus, as a practical matter, no degree of effort on the part of management will be able to even approximate equality of overtime when comparing employees with different off days.

Even though the employer has carried its burden of establishing an affirmative defense with respect to the wide disparity in overtime hours worked during the quarters in question, the extreme gap between several carriers at the top and bottom of the list cannot be attributed solely to the difference in scheduling. The zero opportunities and overtime hours worked by Carrier Gay in the second quarter was undoubtedly due to an error in by-passing him during that period, as the employer apparently concedes. And while there was some further explanation of the .72 hours of overtime worked by Carrier Peterson based on a schedule change during this period, it is not likely that this fact alone accounts

for the extreme difference of 21.52 overtime hours worked by another carrier with the same off days. Moreover, even with the accepted constraints on management's ability to assign overtime equally among the carriers, the extreme variance of less than three hours for Carriers Sutton and Barron, as compared with over fifty hours for several others, should have been avoided had management complied with its contractual obligation under the Bernstein standard "to at least try very hard to make its distribution as fair as possible."

Analysis of the well-organized and carefully maintained overtime tracking sheets fails to produce a precise line to be drawn below the average of twenty-nine overtime hours worked during both quarters that is attributable to differences in off day schedules of the several carriers involved. While the union clearly overstates the case in suggesting an allowable deviation of ten hours, my best judgment is that the required effort by management would most likely have resulted in the lowest number of overtime hours worked to be something less than ten and more than three. By this admittedly unscientific calculation, I have concluded that the employer's explanation for the disparity in overtime work could logically limit those with the least available opportunity to five hours. Accordingly, appropriate adjustment shall be made for all carriers on the ODL falling below that level.

The employer argues that any remedy should be limited to corrective distribution of overtime in the subsequent quarter. The employer cites the following dicta statement in the Bernstein

award as authority for this position: "Perhaps, if the difference could not be justified, the service might have to undertake corrective action in the next quarter." I do not read that statement as precluding the alternative remedy of a monetary award if necessary in order to make the aggrieved employees whole. Indeed, the authority of arbitrators to fashion appropriate remedies in case where violations are found is well-established and commonly applied under circumstances similar to those present here where the passage of time negates the offering of future opportunities to make up for lost overtime. In view of the fact that almost a year has passed, it is not likely that future overtime opportunities will provide a practical remedy and, in any event, would create the potential of impinging upon the rights of other employees on the ODL. Accordingly, the award will provide for compensation to those employees whose level of overtime hours worked during the time in question fell below the line attributable to factors beyond the control of the employer.