AUG 13 1990
A.P.W.U.

REGULAR ARBITRATION PANEL

WESTERN REGION

C #10690

UNITED STATES POSTAL SERVICE and AMERICAN POSTAL WORKERS UNION, AFL-CIO	GRIEVANT: LOCAL POST OFFICE: RICHMOND CASE NO: W7C-5E-C 18702

BEFORE: WILLIAM EATON, Arbitrator

APPEARANCES:

U. S. Postal Service: ROBERT FONTEK
Regional Labor Relations Exec.
Western Regional Headquarters
U. S. Postal Service
850 Cherry Avenue
San Bruno, CA 94099-0841

Union: SHIRLEY TAYLOR
President
American Postal Workers Union
East Bay Area, Local 47
2116 N. Main Street, Suite A
Walnut Creek, CA 94596

Place of Hearing: Walnut Creek, California

Date of Hearing: May 11 1990

AWARD: Grievants Noureddine, Carrera and Lysaght are awarded half their straight time pay for each hour worked.

Date of Award: August 13 1990

WILLIAM EATON, Arbitrator

ISSUE AND EVIDENCE

The issue to be determined in this dispute is whether the Postal Service is obligated to compensate three individuals, Anita Noureddine, Precilla Carrera, and Stephen Lysaght, an additional premium due to the late posting of the holiday schedule for Columbus Day 1989. Hearing was held in Walnut Creek California on May 11 1990. At that time the three Grievants were represented by Grievant Steven Lysaght, who was present throughout the hearing and testified on his and their behalf. Following presentation of evidence, the matter was submitted to the Arbitrator for final and binding determination upon filing of post-hearing briefs which was completed on July 9 1990.

It is stipulated that the schedule for the holiday, which should have been posted the previous Tuesday, was not posted until Wednesday. Grievants Lysaght and Carrera had volunteered to work the holiday, which was their scheduled day off. Johnie Jones had been scheduled to work the holiday, became ill, and Ms. Noureddine was required to work in his place. A fourth original Grievant, Cassandra Powell, worked her scheduled holiday, and has since been paid the holiday premium.

The Union contends that failure to post the schedule in a timely manner warrants a penalty being paid to the employees volunteering to work during the holiday scheduling period. The remedy sought is pay equal to twice their straight time rate, whereas they have been compensated at one and one-half times the

rate, so that the remedy now sought is half of their straight time pay for each Grievant for the hours worked.

The Postal Service argues that under relevant provisions of the Employee and Labor Relations Manual, namely Sections 434.531, and 434.533, the parties have provided fully for holiday work, and that the remedy sought by the Union is therefore not authorized under the National Agreement or under any of the incorporated Handbooks and Manuals.

Posting

Article 11, Section 6, of the National Agreement requires that a holiday schedule be posted as of the Tuesday preceding the service week in which the holiday falls. In this case the Columbus Day holiday fell on October 7 1989, the schedule should have been posted by Tuesday, October 3, but in fact was posted at the facility in question on Wednesday, October 4. William Giddens, who was Manager of Mail Processing in Richmond California at the time, testified that the schedule was posted at the McVittie Annex in a timely manner, but that through a clerical error the posting was not dispatched on Tuesday to the other stations in Richmond, hence was not posted until Wednesday.

Grievant Lysaght, who is Vice President of the East Bay Local of the APWU, testified that Ms. Noureddine is included as a Grievant, even though her name was not included on the original posting, for the reason that she did in fact substitute

for Jones, and in the opinion of the Union is affected by the faulty posting in the same manner as the other Grievants. Ms. Noureddine, it appears, was informed that she would be required to work only a day or two before the holiday, which was her scheduled day off. All of the Grievants are either Window Clerks or Window Relief Clerks in Richmond.

Relief Sought

The Union requests, in effect, out of schedule pay for the three remaining Grievants. As indicated in its argument, the Union bases its request on the requirement that the schedule be timely posted, upon the agreed fact that it was not, and upon the theory that "where there is a wrong there is a remedy." It also argues that local Management at one point agreed to the remedy and then reneged on that agreement.

There were introduced into evidence minutes from a Labor/Management meeting of October 18 1989, as taken by a Management representative, which includes the notation, "the timekeeper will pay out of schedule pay to employees for the holiday." The Union contends that the notation refers to the remedy it now requests. Manager Giddons, who attended the meeting, testified that he could not recall what the notation in the minutes referred to, and maintained in no situation would out of schedule pay be paid on a holiday.

Gary Connely, Senior Regional Labor Relations Program Analyst, testified that Section 434.533 of the ELM has been

applied to individuals working on a holiday or a designated holiday when the schedule is untimely posted.

ARGUMENTS

Union

There is no dispute between the parties that the holiday schedule was not timely posted on Tuesday, October 3 1989, or that the schedule was indeed posted on Wednesday, October 4 1989. The Postal Service conceded that this posting did not meet the posting criteria contained in Article 11, Section 6 of the National Agreement.

The Union maintains that Management's Memo of Understanding dated October 19 1988 is not on point, since the issue in the Step 4 sign-off dealt with the Employer's refusal to comply with the "pecking order" provisions of Article 11, Section 6, or the provisions of a Local Memorandum of Understanding. The Union grieved the untimely posting of a holiday schedule for employees who worked their SDO's, and because the remedy requested uses the word "penalty," Management argued that they were not allowed the "penalty" given employees who have a schedule untimely posted for their holiday or designated holiday.

The Service would have the Arbitrator rule that there should be no remedy for the violation of a contractual rule, and they argue that since the employees received overtime pay (the usual pay for working a scheduled off day) that no harm or injury exists to the Grievants. To require the Union to show injury for

the failure of the Service to conform to its own instructions (timely posting) in order to validate payment to the Grievants would establish a structure of incentives which would encourage the Service to violate its own rules and regulations, which have become enforceable obligations under the National Agreement.

The Union also argues that to rule so would lead to a harsh, absurd, or nonsensical result, would make the contractual Tuesday posting nothing less than a farce, and make it appear that the parties simply negotiated superfluous deadlines. The Union submits that there is no bar to paying employees a premium for working their scheduled day off when a schedule is not timely posted.

Some gap filling is a natural part of the interpretive process. Situations unforseen when the Agreement was written, but falling within its general framework, often arise. Where reasonably possible, arbitrators considering these situations must decide what the parties would have agreed upon, within the general framework of the agreement, had the matter been specifically before them. As to such situations, one survey of labor arbitration suggests:

> In such cases there is no true 'intent' of the parties expressed in the agreement itself. What is asked of the arbitrator is that he conceive, or adopt from the arguments of counsel, a theory of the agreement which explains his solution to the matter not covered by the agreement, and which does no violence to the general spirit and intent which have been expressed in the agreement. The arbitrator's task might be described as having to find out what the parties would have intended had they thought to deal with the particular item under dispute, or if they had had time to deal with it. How to accomplish this procedurally becomes a cardinal task of arbitration.

(Eaton, Labor Arbitration in the San Francisco Bay Area, 48 LA 1381, 1390 (1967) - Elkouri and Elkouri, "How Arbitration Works, 4th Edition.)

The Union submits that a ruling which compensates employees who do not receive timely notice that they are included on the two or three day holiday schedule would not violate the intent or spirit of the Collective Bargaining Agreement. Many arbitrators have ruled that a late posting requires a penalty. There is no good reason why employees who work a scheduled day off within the holiday scheduling framework should not also receive a penalty for late posting.

Because there is no bar in the agreement which prohibits the payment; since the agreement gives the Arbitrator authority to resolve and adjudicate the grievance; because the lack of a remedy would negate a clear dictate to the Employer; because the Employer made no attempt to send a timely posting to the stations in spite of knowing on noon Monday that they had missed a dispatch which would cause the posting to be untimely; and finally, because Management should not be allowed to say, "We violated the Collective Bargaining Agreement, and so what?" the Union respectfully requests that the grievance be granted.

Postal Service

Article II, Section 6 of the National Agreement requires that a holiday schedule be posted as of the Tuesday preceding the service week in which the holiday falls. In this particular case, the Columbus Day holiday fell on October 7 1989.

The holiday schedule was required to be posted by Tuesday, October 3 1989. Due to an administrative error, the schedule was not received and posted until Wednesday, October 4 1989. The Postal Service conceded that this posting did not meet the posting criteria contained in Article 11, Section 6 of the National Agreement. In the Step 2 and Step 3 grievance appeal, the Union requested that the employees receive an additional 50% of their straight time rate of pay due to the late posting.

Employee C. Powell was paid the holiday scheduling premium contained in ELM Part 434.533 (a) which states the following:

> If the schedule is not posted as of Tuesday preceding the service week in which the holiday falls, a full-time regular bargaining-unit employee who is required to work on his or her holiday or designated holiday, or who volunteers to work on such day, will receive holiday scheduling premium for each hour of work not to exceed 8 hours. This premium is in addition to both holiday leave pay and holiday worked pay.

Employees working their holiday or designated holiday are compensated per the provisions of Part 434.531 of the ELM:

> Eligible employees who are required to work on their holiday or designated holiday are paid (in addition to any pay for holiday leave to which they may be entitled) their base hourly straight time rate for each hour worked up to 8 . . .

Holiday scheduling premium is defined in Part 434.533 of the ELM:

> A holiday scheduling premium equal to 50% of the amount paid in 434.531 is paid to eligible employees for time actually worked on a holiday or on the employee's designated holiday (except Christmas) when the holiday schedule is not posted in accordance with the National Agreement . . .

Grievant C. Powell was, therefore, entitled to "Holiday Scheduling Premium" since this was her designated holiday, and was so paid.

Grievants Lysaght, Carrera, and Noureddine were scheduled to work on their non-scheduled days and are not entitled to any additional premium. Such penalty premium has not be negotiated nor implied in any manner in the Agreement. On the dates in question the individuals worked their non-scheduled days, not a holiday or designated holiday.

During the course of the hearing, the Union submitted an April 17 1974 "Memorandum For: All Postmasters" signed by E. V. Dorsey, SAMPG, Operations Group and Darrell F. Brown, SAPNG E&LR Group. This memorandum was submitted into evidence as Union Exhibit 5. This memorandum fully supports management's position in this case:

> 3. A. Except as provided in subparagraphs (b) and (c) of this paragraph, when the Employer fails to post in accordance with Article XI, Section 6, a full-time regular employee required to work on his holiday, or who volunteers to work on such holiday, shall be paid in accordance with Article XI, Sections 2, 3, and 4, and shall receive an additional fifty (50%) of his basic hourly straight time rate for each hour worked up to eight (8) hours.

The "comments" following this provision of the Memorandum state:

> This is the penalty pay provision applicable in instances where management fails to comply with the provisions of Article XI, Section 6, of the 1973 National Agreement.
>
> With two important exceptions, an employee who is not timely scheduled to work on a holiday but nevertheless is required to work whether he volunteers or is directed to work,

will receive fifty percent (50%) "penalty pay" at his straight time hourly rate for each hour worked up to eight (8) hours in addition to the pay due him under Article XI, Sections 2, 3 and 4.

Such an employee will, therefore, be getting eight (8) hours holiday pay (see Article XI, Section 3A); up to eight (8) hours at his straight time hourly rate (see Article XI, Section 4A); and, up to eight (8) hours at fifty percent (50%) of his straight time hourly rate (this is the penalty provision.)"

An additional provision of the Memorandum states:

3. 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 (1-1/2) times his basic hourly straight time rate for work performed on such day. Such employee's entitlement to his holiday pay for his designated holiday shall be governed by the provisions of Article XI, Sections 2, 3, 5 and 6.

"Comments" following this provision are:

This provision means that if an employee who is required to work on a calendar holiday is in fact working his sixth work day, he is entitled only to the normal overtime rate for service performed that day. His holiday pay will be governed by the provisions of Article XI, Sections 2, 3, 5 and 6, which provide the terms applicable to employees for work on their designated holidays. This provision is meant to insure that in no situation will any employee get more than one and one-half (1-1/2) times his hourly straight time rate for any work performed on a holiday or designated holiday, and in no situation will an employee be credited with holiday pay on both the calendar holiday and his designated holiday.

In reference to Article XI, Section 6 of the National Agreement, a "comment" on page 7 of the 1974 Memorandum states:

This is an important no-pyramiding provision, which specifies that under no circumstances will an employee be entitled to more than one and one-half times his basic hourly straight time rate for hours actually worked on a

holiday or day designated as a holiday in addition to his normal holiday pay.

The Postal Service introduced into evidence at the hearing a 10/19/88 Memorandum of Understanding between the U. S. Postal Service, APWU and NALC which was accepted into evidence as Postal Service Exhibit No.1. Page two states:

> Holiday Work
>
> The parties agree that the Employer may not refuse to comply with the holiday scheduling "pecking order" provisions of Article 11, Section 6 or the provisions of a Local Memorandum of Understanding in order to avoid payment of penalty overtime.
>
> The parties further agree to remedy past and future violations of the above understanding as follows:
>
> 1. Full-time employees and part-time regular employees who file a timely grievance because they were improperly assigned to work their holiday or designated holiday will be compensated at an additional premium of 50 percent of the base hourly straight time rate.
>
> The above settles the holiday remedy question which was remanded to the parties by Arbitrator Mittenthal in his January 19 1987 decision in H4N-NA-C 21 and H4N-NA-C 24.

The Postal Service maintains that at no time did the parties fashion any type of monetary penalty in cases involving late holiday schedule posting for those individuals scheduled to work their non-scheduled days. It must also be noted that there was no testimony, verbal argument or documentary evidence from the Union presented at the hearing to establish the late holiday posting as being a repetitive violation at the Richmond CA Post Office.

The Union's request for a 50% payment to the three employees specified in this grievance as a "penalty" clearly exceeds the limit of the parties in the 1974 Settlement Agreement and the 1988 "Holiday Work" Memorandum of Understanding.

The issue of remedies fashioned by arbitrators is addressed in an opinion and award by Arbitrator Jonathan Dworkin in Case No. C8N-4F-C 13593, Columbus Ohio, issued August 11 1981. In his opinion Arbitrator Dworkin states:

> Procedural and jurisdictional challenges to arbitrability, if successful, cause an employee to lose the right to full exposure of his claim to the grievance machinery. They deprive an aggrieved member of the Bargaining Unit of his contractual privilege to final resolution. Such results tend to frustrate the purposes for which the grievance procedure was established-- the preservation of management-labor harmony through provision of an orderly structured method for settling disagreements. For those reasons, an assertion that a controversy is not arbitrable ought not to be lightly sustained. . . . However, when a grievance seeks relief that an arbitrator is contractually prohibited from granting, there is no alternative other than to summarily deny that grievance, irrespective of its merits. To do otherwise would require that the arbitrator alter or amend the governing Collective Bargaining Agreement in order to impose his personal view of justice upon the parties.

These thoughts are similarly expressed in the opinion and award issued by Arbitrator William Haber in Case No. C8N-4B-C 9542, Westland Michigan, on November 20 1980, where he stated:

> The Agreement is clear. Premium rates are paid for overtime, for work on Sundays, for shift differentials and for work on Christmas Day. There is no provision in the Agreement for time and a half for work on any other holiday or designated holiday. The Arbitrator understands and is not unsympathetic to the grievant's sense of deprivation of a day which he would have preferred not to work.
>
> Since the grievant had what appeared to him like a serious complaint, he was justified in filing a grievance; that is what the grievance procedure is for. The remedy proposed, however, is beyond the Arbitrator's authority to grant. He

> is bound by the specific provisions of the Labor Agreement between the parties. He simply cannot say that since the Employer did not utilize all of the casuals and part-time flexibles to the extent which the Union thought he should have, although the Employer denies this, the grievant was wronged and deprived on his designated holiday. He may have been wronged. The Arbitrator is not certain, but the proposed remedy that he should be paid time and a half for work on that day goes beyond the Arbitrators authority.

It is apparent that the Union has attempted to secure in this grievance a premium that they could not obtain in negotiations at the National level.

Based on the above arguments, the Postal Service requests that this grievance be denied.

ANALYSIS

The question to be determined is not whether any violation has occurred, but whether the violation which concededly occurred is one for which there is an appropriate remedy, and whether the Arbitrator is authorized to provide a remedy. In pursuing their respective positions in this matter, the parties have offered several prior Postal Service arbitration awards.

In the Award by Arbitrator Johnathan Dworkin (C8N-4F-C 13593), the question concerned granting out-of-schedule pay when a Carrier's route was arbitrarily changed. Relief was denied by the Arbitrator on the grounds that the Carrier affected was a PTF, whereas out-of-schedule pay is authorized by the National Agreement only for full-time Carriers but not for PTFs. For that reason Arbitrator Dworkin concluded that "an arbitrator is

contractually prohibited" from granting the out-of-schedule pay asked as a remedy in that dispute. In the opinion of the present Arbitrator, that case presented a direct contractual guideline concerning the out-of-schedule pay which is not analogous to what may be more properly be described as the equitable remedy requested by the Union in this dispute.

The facts dealt with by Arbitrator William Haber (C8N-4B-C 9542) would appear to be more closely analogous to the situation of the present dispute. There the question was whether a remedy could be provided where the Contract was allegedly violated by failure to utilize fully PTFs and casual employees on a holiday before requiring regular employees to work. Arbitrator Haber found that, even if that fact could be established, "The Arbitrator has no authority under the Agreement to provide a premium rate for the day in question."

In pursuing its theory that, "Where there is a wrong, there must be a remedy," the Union has cited several prior Postal Service cases as well. In Case No. E1S-2B-C 1366, Arbitrator James F. Scearce granted a claim for holiday compensation where the schedule had not been properly posted, but did so on the basis of the remedies specifically provided for in the March 4 1974 Settlement Agreement. Similarly, Arbitrator A. Epstein, in Case No. C-4C-4F-C 10347, also a case where proper notice was not given for the holiday schedule, granted the relief specifically provided for in paragraph 434.533 of the ELM. The present Arbitrator, in Case No. W4C-5K-C 14658, also relied on the

specific provisions of Section 434.533 in order to grant the relief requested.

Case No. W7C-5K 4239, decided by the present Arbitrator, required a review of the question as to what extent an Arbitrator has inherent authority to fashion an appropriate remedy where a contractual violation has been found. Cases cited therein included No. W1C-5D-C 3343, by the present Arbitrator; No. N1C-M-C 821, by Arbitrator Peter Seitz; and W1C-5D-C 9675, by Arbitrator Joseph Gentile. The conclusion was that the cited cases "all recognize that where a violation has occurred the Arbitrator has inherent authority to fashion an appropriate remedy." There a remedy was granted upon finding a violation of Article 11 of the National Agreement, in that regular employees who preferred not to work on a holiday were nevertheless required to work, but their services were not needed. As a remedy those employees were awarded pay at one-half time their straight time rate for each hour worked.

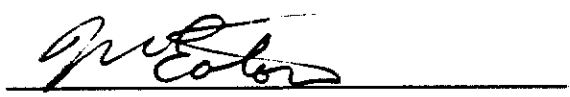
In the present dispute the scheduling of the three Grievants was part and parcel of the holiday scheduling, which concededly was not posted in a timely manner. As Arbitrator Richard Mittenthal has observed (Case Nos. H4N-NA-C-21 & 23), "the holiday schedule typically encompasses a two-or three-day period and calls for employees to work on a day(s) outside their regular schedule, a day(s) other than their holiday (or designated holiday) period."

The remedy requested by the Union in this situation is not excessive, and is a remedy which is neither specifically authorized nor prohibited by the National Agreement or by applicable Handbooks and Manuals. It appears to me that the weight of authority in Postal Service decisions is that a party to whom a contractual obligation is owed has a concomitant right to insist on enforcement when the contract is breached. Where a right is not enforceable, where a remedy is not available, the right itself is in danger of becoming meaningless.

Thus, while it is, of course, incumbent upon an arbitrator not to change the terms of a collective bargaining agreement, his primary duty is to enforce those terms which the parties themselves have agreed to. In the present dispute, the correct course is to grant the reasonable, and fairly modest, relief requested by the Union as a remedy for the violation which is conceded.

DECISION

Grievants Noureddine, Carrera and Lysaght are awarded half their straight time pay for each hour worked.



WILLIAM EATON, Arbitrator

August 13 1990