C#13671

NATIONAL ARBITRATION PANEL

In the Matter of the Arbitration between UNITED STATES POSTAL SERVICE -and- NATIONAL ASSOCIATION OF LETTER CARRIERS	GRIEVANTS: City letter carriers from Alaska CASE NOS. H1N-5D-C-297, H1N-5A-C-22078, H1N-5A-C-23692

BEFORE: Richard Mittenthal, Arbitrator

APPEARANCES:

For the Postal Service:	James A. Friedman Deputy Chief Field Counsel Windsor Field Office
For the NALC:	Keith E. Secular Attorney (Cohen Weiss & Simon)
Place of Hearing:	Washington, D.C.
Date of Hearing:	December 22, 1993
Date of Post-Hearing Briefs:	April 1 and 15, 1994

AWARD: The Alaska postal employees in question are not entitled to any back pay for the period prior to April 30, 1987, or for the period subsequent to July 10, 1992. However, if there are any such employees covered by the present grievances who were not party plaintiffs in the McQuigg litigation and hence were not beneficiaries in the McQuigg Settlement and who actually worked FLSA overtime between April 30, 1987 and July 10, 1992, they should receive back pay for whatever FLSA overtime compensation they were denied.

Date of the Award: June 16, 1994.

Richard Mittenthal, Arbitrator

BACKGROUND

NALC claims that Alaska letter carriers involved in this dispute have been improperly denied back pay for a period of time during which the Postal Service failed to comply with the FLSA (Fair Labor Standards Act) overtime provisions of the ELM (Employee & Labor Relations Manual). The Postal Service insists it correctly applied these FLSA overtime provisions. It contends further that even if it misapplied such provisions, no back pay would be warranted in view of the language of the FLSA, a decision by the U.S. Court of Appeals, and a number of settlement agreements.

Some history is necessary to a full appreciation of this dispute. Postal overtime is paid at "150% of each employee's base hourly rate for all actual work hours in excess of 8 paid hours in a day, 40 paid hours in a service week..." (ELM 434.131). Congress amended the FLSA in May 1974 to cover postal employees. The Postal Service then added regulations to the ELM to deal with FLSA overtime. Specifically, it provided that FLSA overtime be paid at "one and one-half times the employee's regular rate for all hours of actual work in excess of 40 hours in any FLSA workweek..." (444.1).

The differences are obvious. Traditional overtime pay is a function of "base [basic] hourly rate" and the number of "paid hours" in excess of 8 in a day or 40 in a week. FLSA overtime pay is a function of the "regular rate" and the number of "work" hours in excess of 40 in a week.

The Postal Service was forced to redesign its timekeeping and payroll systems to comply with its new obligations under FLSA. It published a Special Postal Bulletin in July 1976 explaining how it intended to satisfy its retroactive overtime liability for the period between May 1974 and July 1976. This bulletin stated that FLSA overtime would be computed by first obtaining the "regular rate" (dividing total straight time pay including a cost-of-living allowance by actual hours worked) and then "multiplying" that figure "by 50%." The bulletin also gave examples of this method of computation.

The Secretary of the U.S. Department of Labor (DOL) filed suit against the Postal Service in April 1978 in a U.S. District Court. DOL alleged that there had been a variety of FLSA violations. Its principal complaint was that certain Postal Service "practices" called for employees to work more than 40 hours a week "without compensating" them for the hours in excess of 40 "at rates not less than one and one-half times the regular rate..." The "practices" were identified in general terms but do not appear to have included the overtime issue raised in the present case.

NALC's counsel wrote DOL in January 1982 requesting an opinion with respect to how FLSA overtime should be computed for carriers receiving a territorial cost-of-living allowance (TCOLA). He urged that the Postal Service was improperly calculating overtime in this situation. He asked also that DOL amend its pending suit in District Court to include the allegations raised in his letter.

Before DOL could respond, it settled the pending suit and a number of related FLSA actions in October 1982. That will be referred to as the Donovan Settlement. The Postal Service agreed to pay 400 million dollars to its employees on account of its misapplication of its FLSA obligations. Alaska letter carriers, all of whom were receiving TCOLA, were among the many beneficiaries of the settlement. NALC's counsel signed the Donovan Settlement as attorney for a group of carriers who had intervened in the case. But NALC itself was not a party to any of these FLSA law suits.

Paragraph IIA of the settlement agreement read in part:

> A. Scope of Claims Resolved
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> The parties stipulate to the entry of an Order providing for certain additional amendments, filed contemporaneously with this Settlement Agreement, to the [DOL's]...First Amended Complaint. The parties further stipulate that such pleading, as so amended, alleges all possible FLSA violations known to the parties, and that it shall be construed to encompass any other alleged violation

> occurring on or before the date of entry of final Judgment in these actions. Accordingly, the parties agree that the payments made under this Settlement Agreement resolve all FLSA claims of all Postal Service employees occurring on or before the date of entry of final Judgment in these actions, except the "meal period" claims of plaintiffs whose consents are on file in [listed cases] ...as of the date of this Settlement Agreement.

Moreover, at the same time, DOL's complaint was amended to cover the universe of all possible FLSA violations by the Postal Service. The District Court thereupon approved the Donovan Settlement but deferred dismissal of the law suit until the DOL Wage & Hour Administrator issued an opinion letter affirming that the Postal Service timekeeping and payroll manuals were consistent with FLSA requirements. The Administrator issued such an opinion letter in mid-May 1983. He issued another letter at roughly the same time in response to NALC counsel's January 1982 request and ruled that the Postal Service's method of calculating overtime for TCOLA recipients was consistent with FLSA requirements. As a result of such opinion letters, the District Court dismissed the DOL law suit with prejudice on June 15, 1983. The Postal Service published revised manuals concerning FLSA overtime on June 23, 1983, and believed it was then in full compliance with FLSA requirements.

In the meantime, a class action grievance (H1N-5D-C-297) had been filed by Alaska letter carriers in Branch 4319. The complaint was that the Postal Service was not properly calculating FLSA overtime at "one and one-half times..." the "regular rate" for hours worked in excess of 40 in a workweek. That grievance was initiated in September 1981 and was appealed to arbitration by NALC in November 1984. After the Donovan Settlement and the dismissal of the DOL law suit, two more grievances were filed. The first (H1N-5A-C-22078) was also a class action and raised the same claim as the earlier grievance. It was initiated in February 1984 and appealed to arbitration in April 1985. The second (H1N-5A-C-23692) was an individual grievance by D. McQuigg, the President of Branch 4319, and it echoed the class claims previously made. It was initiated in

March 1984 and appealed to arbitration in April 1985. These are the cases presently before me.

In order to illustrate the problem posed by these grievances, consider the following example. Assume that an Alaska letter carrier at the time had a basic rate of $10 per hour and received a TCOLA of 25 percent or $2.50. Assume further that he worked a total of 50 hours in the relevant FLSA workweek. The parties agree that TCOLA is paid for no more than 40 hours per week for city carriers. They agree too that this carrier's "regular rate" was determined by adding his basic straight-time pay for the week (50 hours x $10 per hour or $500) and his TCOLA pay (40 hours x $2.50 or $100) and then dividing that total ($600) by actual hours worked (50). The result is a "regular rate" of $12 per hour.

The disagreement occurred at the next step of the calculation. According to the Postal Service, FLSA overtime was determined by multiplying the "regular rate" ($12 per hour) by the number of overtime hours (10) by a factor of .5 (one-half). That amounted to $60 or a total pay liability for the week of $600 straight-time pay and $60 overtime pay or $660.[1] The Postal Service stresses that the "regular rate" formula called for the accumulation of all pay hours (50) at straight-time rates, that the 10 hours of overtime ($100) were thus accounted for at straight-time, that there remained only the need to pay an additional "one-half time..." for these overtime hours, and that this was represented in its calculation by the .5 factor. Its position is that the carrier received "one and one-half times" his "regular rate."

According to NALC, the FLSA provisions contemplate separate and distinct calculations for the first 40 hours at straight-time and the rest at overtime. It believes FLSA overtime should have been determined by multiplying the "regular rate" ($12 per hour) by the number of overtime hours (10) by a factor of 1.5. That amounts to $180 which, when added to straight-time pay for 40

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[1] The carrier would apparently receive FLSA overtime pay only to the extent to which his straight-time pay and postal overtime pay (calculated from his basic rate rather than "regular rate") was less than $660.

hours ($400) and TCOLA pay ($100), totals $680. It urges that anything less than a 1.5 factor would deny carriers the ELM standard of "one and one-half times..." their "regular rate."

These grievances were not heard at national level arbitration until December 22, 1993. The reason for the delay apparently was that McQuigg and other Alaska carriers filed a law suit in U.S. District Court in February 1983. It alleged, like the grievances, that the Postal Service's method of computing FLSA overtime for TCOLA recipients was a violation of the FLSA. Chief Judge Holland made a series of rulings between June 1983 and April 1987. He held (1) that the Postal Service computation was in violation of the FLSA, (2) that the McQuigg plaintiffs were not entitled to any money relief prior to June 15, 1983, based on the Donovan Settlement and the subsequent dismissal of the DOL law suit, and (3) that the Postal Service could not escape liability for its violation for the period after June 15, 1983, inasmuch as it had not relied in good faith on the Administrator's May 1983 opinion letter.

The Postal Service then appealed Judge Holland's first and third rulings to the U.S. Court of Appeals for the Ninth Circuit. That court, speaking through Judge Trott, rendered its opinion in early December 1991. It affirmed by a 2-1 vote Judge Holland's finding that the Postal Service computation was a violation of the FLSA but reversed by a 3-0 vote Judge Holland's finding that the Postal Service was liable to the McQuigg plaintiffs for the period subsequent to the June 15, 1983 dismissal of the DOL law suit. Specifically, the Appeals Court held that the Postal Service had relied in good faith on the Administrator's May 1983 opinion letter to the effect that its overtime computation complied with the FLSA and that the Postal Service was therefore protected against liability up to April 30, 1987, when Judge Holland rejected the opinion letter's interpretation and found the Postal Service to be in violation of the FLSA.

The Postal Service made no further appeal. It accepted the Appeals Court decision and changed its pay practices accordingly. It executed a Settlement Agreement with the McQuigg plaintiffs in late 1992-early 1993 to resolve back pay liability for the period from April 30, 1987 through July 10, 1992. It paid employees, pursuant to that settlement, a total of close to 2.3 million dollars.

The instant grievances seek back pay for FLSA overtime for Alaska carriers who were TCOLA recipients. NALC asks that these carriers be paid for any loss of FLSA overtime pay due to the Postal Service's miscalculation of such pay. It contends the remedy should apply "for the period commencing 14 days prior to the initiation of the first grievance" (that is, 14 days prior to September 19, 1981) and running to April 30, 1987, the starting date for back pay under the McQuigg Settlement Agreement. It contends further that individual carriers who were not covered by this Settlement Agreement should receive "back pay or any underpayment of FLSA overtime both before and after April 30, 1987." It requests, in other words, the very back pay which had been denied carriers by the Appeals Court.

Finally, the Postal Service began to pay FLSA overtime in a manner consistent with the courts' rulings and NALC's view effective July 11, 1992. It has applied the NALC overtime formula to all TCOLA carriers since then. It has, NALC concedes, been in compliance with FLSA requirements since July 11, 1992.

DISCUSSION AND FINDINGS

The Postal Service urges, at the outset, that these grievances were untimely filed. It stresses that a Special Postal Bulletin was issued in July 1976 spelling out the manner in which FLSA overtime for TCOLA recipients was to be calculated and noting the final step in this calculation was to multiply the "regular rate" by a factor of ".50 (50% overtime premium rate)..." It insists that NALC was thus placed on notice as to Management's intended use of a factor of .5 rather than 1.5 and that no grievance was submitted protesting this calculation until September 1981. It points to the terms of Article 15, Section 2, Step 1(a) of the National Agreement which require a grievance to be initiated "within fourteen (14) days of the date on which the employee or the Union first learned or may be reasonably have been expected to have learned of its cause..." It alleges that because more than four years passed between the announcement in the Special Postal Bulletin and the submission of the instant grievances, the arbitrator should dismiss the complaint in this case as being untimely.

This argument is not persuasive. Assume for the moment, consistent with the federal court rulings, that the Postal Service incorrectly calculated FLSA overtime for TCOLA recipients under the ELM. Each such error would have been a separate and distinct violation. We are not dealing here with a single, isolated occurrence. Management was involved in a continuing violation of the ELM. The affected employees (or NALC) could properly have grieved the violation on any day the miscalculation took place and such grievance would be timely provided it was submitted within the fourteen-day time limit set forth in Article 15. This is precisely the kind of case where a "continuing violation" theory seems applicable. To rule otherwise would allow an improper pay practice to be frozen forever into the ELM by the mere failure of some employee initially to challenge that practice within the relevant fourteen-day period.

The back pay issue in this case involves the interpretation of the ELM, specifically, ELM 444.1. I shall assume, as the Postal Service has since the Appeals Court ruling in December 1991, that 444.1 called for the Postal Service to compute FLSA overtime in the manner urged by NALC and embraced by the Appeals Court. That assumption, however, does not resolve the dispute. For the arbitrator must also determine what significance, if any, should attach to the language of the FLSA, the DOL Administrator's opinion letter, the Donovan Settlement, the McQuigg Settlement, and the District and Appeals Court rulings. The Postal Service believes these factors together should bar any back pay in this proceeding. NALC believes these factors, apart from the Appeals Court ruling, are largely irrelevant.

Consider, to begin with, the ELM itself. When Congress determined in May 1974 to extend FLSA coverage to postal employees, the Postal Service chose to include in the ELM certain basic principles found in the FLSA. It described those principles in Part 440 under the rubric "Fair Labor Standards Act...Administration." It wrote in 444.1 that the FLSA "establishes requirements for...overtime pay." It noted in 441.2 that the FLSA "authorizes" the DOL "to supervise the payment of...unpaid overtime compensation owing to any employee in the event of violations" and that the FLSA "also provides for enforcement in the courts." It stated in 444.1 the "policy" that is the heart of this dispute, "The FLSA provides that the USPS must pay an employee...one and one-half times the employee's

regular rate for all hours of actual work in excess of 40 hours in any FLSA workweek." It added in 444.21 and 444.22 definitions of "regular rate" and "actual work" which echo FLSA language.

Thus, there can be little doubt that the ELM intended to impose on the Postal Service the same obligations as are found in the FLSA. Those obligations plainly should be neither greater nor lesser than what is found in the statutory language. By the same token, employees should have neither greater nor lesser rights than what is found in the statutory language. They should not receive overtime compensation under the ELM where they would not be entitled to such compensation under the FLSA itself.

The back pay liability question must be broken down into several different time frames.

Prior to June 15, 1983

For the period prior to June 15, 1983, the Postal Service liability for any FLSA overtime was disposed of through the Donovan Settlement. The Secretary of Labor, Donovan, filed suit against the Postal Service in April 1978 alleging a variety of FLSA violations. His complaint was later amended to cover the universe of all possible FLSA violations. The Donovan Settlement provided for the payment of 400 million dollars to the affected postal employees and stated that "the parties agree that the payments made under this Settlement Agreement resolve all FLSA claims of all Postal Service employees occurring on or before the date of entry of Final Judgment..." The date of such "Judgment", approving the Donovan Settlement and dismissing the suit with prejudice, was June 15, 1983.

The significance of these actions is dealt with in the FLSA, Section 216(c), which reads in part:

> ...The Secretary may bring an action in any court of competent jurisdiction to recover the amount of unpaid...overtime compensation and an equal amount as liquidated damages. The right provided by subsection (b) of this section to bring an action by or on behalf of any employee to recover the liability specified...and of any employee to become a party plaintiff to any such action shall terminate upon the

> filing of a complaint by the Secretary in an action under this subsection in which a recovery is sought of...unpaid overtime compensation... owing to such employee by an employer liable under the provisions of subsection (b)... unless such action is dismissed without prejudice on motion of the Secretary.

The Secretary's suit precluded the courts from considering any other law suit filed by employees for redress of a FLSA overtime violation occurring before June 15, 1983. Thus, the District and Appeals Courts later denied the McQuigg plaintiffs any monetary relief for such violations. The Donovan Settlement was broad indeed. It related, pursuant to one or more amendments, to any possible FLSA violations with a few stated exceptions. It resolved "all FLSA claims of all Postal Service employees..." Such "claims" were not limited to a particular forum, to law suits. The relevant term, "all...claims...", encompassed any kind of employee complaint with respect to FLSA overtime. It encompassed, in my opinion, one of the three instant grievances in this case. That grievance, filed in September 1981, covered the same subject matter as the amended Donovan suit. If, as is apparent, the employees in that grievance were barred by the Donovan Settlement from asserting a separate FLSA right for the period prior to June 15, 1983, surely they should likewise be barred from asserting an ELM right for the same period where their claim concerns the very same FLSA question.

May 13, 1983 through April 30, 1987

For this period, there are a different set of considerations. In May 1983, the DOL Administrator issued an opinion letter stating that the Postal Service's method of calculating FLSA overtime for TCOLA recipients was not a violation of the FLSA. The Postal Service relied upon that opinion letter, as well as its own view of FLSA requirements, and continued the method of calculation it had used since postal employees were first covered by the FLSA. That method, however, was rejected by a District Court on April 30, 1987. The Appeals Court agreed with the District Court but held that the Postal Service was insulated against any back pay liability between May 1983 and August 30, 1987, because it had during this period relied in good faith upon the Administrator's opinion letter.

This back pay question is dealt with in the Portal-to-Portal Pay Act, Section 259, which was intended as an amendment to the FLSA. That section reads in part:

> (a) In any action or proceeding based on any act or omission on or after May 14, 1947, no employer shall be subject to any liability or punishment for or on account of the failure of the employer to pay...overtime compensation under the Fair Labor Standards Act...if he pleads and proves that the act or omission complained of was in good faith in conformity with and in reliance on any written administrative regulation, order, ruling, approval, or interpretation, of the agency of the United States specified in sub-section (b)...or any administrative practice or enforcement policy of such agency...Such a defense, if established, shall be a bar to the action or proceeding...
>
> (b) The agency referred to in sub-section (a)...shall be...in the case of the Fair Labor Standards Act...the Administrator of the Wage and Hour Division of the Department of Labor.

These words plainly serve to protect the Postal Service against any back pay liability for the above period. The Postal Service computed FLSA overtime for TCOLA recipients in a manner contrary to the FLSA. But it did so "in good faith...in reliance on a...written interpretation..." by the DOL Administrator. The Appeals Court so held and nothing in the record made in this case suggests that the Appeals Court was mistaken. It follows that the Postal Service "shall [not] be subject to any liability..." for its failure to pay the correct amount of FLSA overtime. This defense is available to the Postal Service "in any action or proceeding..." based on an alleged FLSA violation. This arbitration is a "proceeding" within the meaning of Section 259. And, as I have already suggested, if Part 440 of the ELM incorporates the Postal Service's FLSA obligations, it must also incorporate the Postal Service's FLSA defenses. To rule otherwise would allow the ELM to impose upon the Postal Service

liabilities greater than those found in the FLSA itself. Such a result would be unreasonable and inequitable.[2]

Furthermore, had this dispute been heard first in arbitration and then been appealed to the courts because of a statutory construction issue, surely the parties would have deemed themselves bound by the court's ruling. The same question would have been before both the arbitrator and the court. In such circumstances, the arbitrator would not later be asked to overrule or ignore an Appeals Court ruling. Here, however, the dispute followed the opposite path. It was heard first in the courts and only now, after the Appeals Court decision, has the matter reached arbitration. There are sound reasons, from the standpoint of the law and collective bargaining, to treat this situation the same as if the case had gone from arbitration to the courts. The decision of the Appeals Court, regarding the meaning of the FLSA and the remedy, should prevail.

Indeed, NALC embraces a large part of the Appeals Court decision. It relies on the court's interpretation of that portion of the FLSA language ("...one and one-half times the employee's regular rate...") which is identical to 444.1 of the ELM. And it urges that this interpretation should be controlling with respect to 444.1. It rejects, however, the court's finding on back pay liability prior to April 30, 1987. Given the views I expressed earlier in this opinion regarding FLSA obligations and FLSA defenses, NALC should not be allowed to pick and choose among the several findings of the Appeals Court.

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[2] NALC points to a Postal Service-APWU award, Case No. H7T-3W-C-12454, et al. in which I found the FLSA provisions of the ELM enforceable in arbitration even though the employees involved could have pursued such FLSA rights in the courts. In that case, I held that travel time outside normal work hours should be considered "actual work" for purposes of FLSA overtime under 444.22a of the ELM even though such travel time was not "compensable" under 438.134. The opinion emphasized that my interpretation of the ELM was not inconsistent with the terms of the FLSA and was not really contradicted by any DOL regulation. That award is plainly distinguishable from the present case. It does not preclude my reliance on the FLSA in limiting back pay.

April 30, 1987 through July 10, 1992

This is the period from the District Court ruling in favor of the McQuigg plaintiffs until the Postal Service's change in its method of calculating FLSA overtime pay to conform to the District and Appeals Court rulings. The McQuigg Settlement called upon the Postal Service to pay roughly 2.3 million dollars to more than 1,900 Alaska employees who joined the law suit as plaintiffs. Those employees who participated in the settlement have already been made whole. They have no right to further overtime compensation under the present grievances.

Nothing in the McQuigg Settlement, however, served to surrender the rights of Alaska employees who are covered by the present grievances but who chose not to sign consent forms to become plaintiffs in the McQuigg litigation. I do not know whether there are any such employees who worked FLSA overtime during the period in question. If there are, they are entitled to back pay under the present grievances. The fact that they did not choose to become part of the McQuigg litigation is no reason for allowing the McQuigg Settlement to bar their claims.

In view of this finding, the meaning of 444.1 of the ELM must be considered. There is no need to repeat the parties' lengthy arguments on this point. I am convinced that the courts' interpretation of the FLSA language which is identical to 444.1 is correct. That is the very interpretation adopted by the Postal Service itself since July 10, 1992.

July 11, 1992 to Date

As of July 11, 1992, the Postal Service changed its method of calculating FLSA overtime pay. It embraced the Appeals Court interpretation in the McQuigg case and has since then applied that interpretation in all TCOLA jurisdictions. Thus, the employees covered by the present grievances have received the correct amount of FLSA overtime pay since July 1992. No back pay is due for this period. NALC does not claim otherwise.

AWARD

The Alaska postal employees in question are not entitled to any back pay for the period prior to April 30, 1987, or for the period subsequent to July 10, 1992. However, if there are any such employees covered by the present grievances who were not party plaintiffs in the McQuigg litigation and hence were not beneficiaries in the McQuigg Settlement and who actually worked FLSA overtime between April 30, 1987 and July 10, 1992, they should receive back pay for whatever FLSA overtime compensation they were denied.

Richard Mittenthal, Arbitrator