C # 13903

NATIONAL ARBITRATION PANEL

In the Matter of the Arbitration

between

UNITED STATES POSTAL SERVICE

-and-

AMERICAN POSTAL WORKERS UNION

GRIEVANTS: Employees from Tampa & Ft. Myers, Fla., Macon, Ga., and Austin, Texas.

CASE NOS. H7T-3W-C 12454
H7T-3W-C 14652
H7T-3W-C 14653
H7T-3W-C 14655
H7T-3D-C 14884
H7T-3S-C 18966
H7T-3U-C 20347

BEFORE: Richard Mittenthal, Arbitrator

APPEARANCES:

For the Postal Service: James Hellquist
Labor Relations
USPS Headquarters

For the APWU: Darryl J. Anderson
Attorney (O'Donnell Schwartz & Anderson)

Place of Hearing: Washington, D.C.

Date of Hearing: July 2 and Dec. 2, 1992

Date of Post-Hearing Briefs: February 12, 1993

AWARD: To the extent set forth in the foregoing opinion, the grievances are granted. Because the facts in each of these grievances were not really developed at the arbitration hearing, those cases are remanded to the parties for settlement or for further hearings in regional arbitration.

Date of Award: April 12, 1993

Richard Mittenthal
Arbitrator

BACKGROUND

This case involves a basic dispute as to how time spent in travel away from home overnight should be treated for pay purposes. APWU argues that even when such travel time is not compensable under subchapter 438.134 of the Employee & Labor Relations Manual (ELM), it must nevertheless be considered "actual work" under subchapter 444.2 in calculating Fair Labor Standards Act (FLSA) overtime pay. The Postal Service disagrees. It believes travel time can be considered "actual work" under 444.2 only if it is compensable travel time. It contends in any event that the APWU claim is not arbitrable.

Issue 9 of the ELM was in effect at the time this dispute arose. Its provisions regarding "basic and special pay" are set forth in chapter 430. It recognizes two separate and distinct forms of overtime compensation in subchapter 434:

> 434.131 Postal Overtime. Postal overtime is compensation paid to eligible personnel 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 or, if a full-time bargaining unit employee, on a nonscheduled day.
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> .132 FLSA Overtime. FLSA overtime (see 444) is compensation paid to all nonexempt personnel at 150% of each employee's regularly hourly rate for all worktime which management "suffers or permits" to be actually worked in excess of 40 hours worked within an FLSA workweek.

In this connection, it should be noted that supervisors have the following obligation:

> 432.73 Supervisors must credit employees with all time designated as worktime under the Fair Labor Standards Act. Examples of time which must be credited as worktime...include...

More to the point, however, the ELM also establishes a detailed set of rules with respect to "compensable travel time." The relevant provisions state:

> 438.131 General. The determination of whether travel time is compensable or not depends upon (1) the kind of travel involved, (2) when the travel takes place, and (3) the eligibility of the employee ... The three situations that may involve compensable travel time are described below.

.132 Travel from Job Site to Job Site

* * *

.133 One Day Assignment Outside the Local Commuting Area

* * *

.134 Travel Away from Home Overnight

a. Rule. Travel time spent by an eligible employee in travel on Postal Service business to and from a postal facility or other work or training site which is outside the local commuting area and at which the employee remains overnight is compensable if it coincides with the employee's normal work hours at the home installation, whether on a scheduled or a non-scheduled day... For instance, if an eligible employee with a regular schedule of 8:00 a.m. to 4:30 p.m., Monday through Friday, travels from 2:00 p.m. to 5:00 p.m. on any day of the week, 2.50 hours would be compensable. If the same employee travels from 5:00 p.m. to 8:00 p.m. on any day of the week, no hours would be compensable. Compensable travel time includes the time spent in going to and from an airport, bus terminal, or railroad station.

* * *

d. Scheduling of Travel. Travel away from home overnight is to be scheduled by management on a reasonable basis without a purpose either to avoid compensation for the travel time or to make the travel time compensable.

* * *

.151 Compensable travel time is counted as worktime for pay purposes and is included in hours worked in excess of 8 hours in a day, 40 hours in a week, or on a nonscheduled day for a full-time employee, for the determination of overtime or compensatory time for eligible employees... (Emphasis added)

There are also detailed ELM provisions covering FLSA overtime. Those provisions are found in chapter 440 and read in part:

441.1 Federal Statute

The Fair Labor Standards Act (FLSA) as amended, is a federal statute of general application which establishes requirements for...(d) overtime pay.

* * *

442.1 Effective Date

USPS employees became subject to the provisions of the FLSA effective May 1, 1974.

* * *

444.1 Policy [Overtime Pay]

The FLSA provides that the USPS must pay an employee covered by the overtime provisions of the Act...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...

444.2 Explanation of Terms

.21 Regular Rate. An employee's regular rate of pay is defined as all remuneration for employment received during an FLSA workweek divided by the hours that the employee actually worked. Note:

a. Inclusions. All remuneration for employment includes: [twelve listed items, one of which is "total pay for travel time"]...

b. Exclusions...

* * *

.22 Actual Work. Actual work is defined as all time which management suffers or permits an employee to work. Note:

a. Exclusions. Actual work does not include any paid time off, but does include steward's duty time, travel time, meeting time, training time,... (Emphasis added)

In order to understand fully how the parties construe these ELM provisions, it would be helpful to pose a hypothetical situation.[1] Assume that a maintenance employee is scheduled from 7:00 a.m. to 4:00 p.m. with one hour off for lunch, Monday through Friday. Assume further that he is assigned to training at the Norman, Oklahoma training center for a week beginning on Saturday. Assume finally that he works as scheduled except that he leaves his home postal facility at 2:00 p.m. Friday, travels to Oklahoma, and arrives in Norman at 9:00 p.m. Friday.

How is his travel time to be handled for pay purposes? The Postal Service states that 438.134a is the pertinent principle and that pay for this type of travel time is required only to the extent to which it "coincides with the employee's normal work hours at the home installation, whether on a scheduled or nonscheduled day..." It insists, accordingly, that the only portion of this employee's travel time which is "compensable" is 2:00 p.m. to 4:00 p.m. Friday. It does not pay for the remainder of his travel time, 4:00 p.m. to 9:00 p.m. Friday. It contends that no FLSA overtime is involved under 444 because his "actual work", including his two hours of "compensable" travel time, was not "in excess of 40 hours" in the FLSA workweek. It believes, in other words, that when 444.22 speaks of "actual work" as including "travel time", it is referring only to "compensable" travel time within the meaning of 438.

APWU appears to concede that the travel time between 4:00 p.m. and 9:00 p.m. Friday in the hypothetical example is not "compensable", that no pay is required for these hours under the ELM. Its argument relies instead on FLSA overtime under 444. It maintains that even though these hours are not "compensable", they must be regarded as "actual work" under 444.22. It emphasizes that this provision defines "actual work" as encompassing "travel time" and that the latter words must, as a matter of sound contract interpretation, include any "travel time" whether "compensable" or not. It urges, accordingly, that this employee, although entitled to no more than 40 hours' pay, must be considered to have "work[ed]" 45 hours for FLSA purposes. It insists he has a right to FLSA overtime for five of these 40 hours pursuant to 444.1.

At this point, it is appropriate to move from these conflicting views of the ELM to the more general arguments

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[1] This hypothetical may not reflect a real-life situation but it will serve to bring the parties' conflicting views into sharp focus.

made in support of the parties' respective positions.

The Postal Service resists these grievances for a variety of reasons. First, it says what APWU requests here is contrary to the ruling by National Arbitrator Collins in Case No. H7C-NA-C 8. Second, it states that APWU bargaining proposals with respect to compensable travel time were rejected by Management in 1987 and 1990 and that APWU now seeks to gain through this arbitration what it was unable to gain through negotiation. Third, it asserts that APWU made no Article 19 protest in September 1983 (or earlier) when compensable travel time provisions were placed in the ELM and that it should not be permitted to mount such a protest years later. Fourth, it believes the proper forum for APWU to resolve any FLSA overtime claim is the courts rather than the arbitration provisions of the National Agreement. Fifth, it says the FLSA overtime provisions in the ELM have never been applied in the manner urged by APWU in this case. It contends, in other words, that long-standing pay practices support its position. Sixth, as suggested earlier, it urges that when "actual work" is defined in 444.22a to include "travel time", it should reasonably be read to mean only "compensable travel time." These matters are raised by the Postal Service to demonstrate not only that APWU's case lacks merit but also that APWU's case is not arbitrable under the National Agreement.

APWU disagrees with each of these arguments. It alleges that the Collins' award is clearly distinguishable from the present case, that the rejected APWU bargaining proposals dealt with a different subject, that these proposals were in any event made "without prejudice" to its position "regarding existing rights of postal employees...", and that it is not here protesting 438.134, the "compensable travel time" provisions of the ELM. Furthermore, it insists that 444 is part of the ELM and hence, by reason of Article 19, part of the National Agreement. It believes that it has a right therefore to object to any misapplication of 444 under the arbitration provisions of the Agreement rather than taking its claim to the courts. It stresses that grievances for travel time brought under 444 have for the most part been granted by regional arbitrators and that these grievances and awards demonstrate that any pay practices under 444 have long been in dispute. It urges that when "actual work" is defined in 444.22a to include "travel time", it should reasonably be read to mean any "travel time" whether "compensable" or not. It states that the Postal Service's attempt to modify 444.22a after the present grievances were filed, first by adding a cross-reference to "438.1" and later by adding the word

"compensable" to "travel time",[2] is tacit recognition of the validity of APWU's interpretation of 444.22a.

DISCUSSION AND FINDINGS

The Postal Service's arbitrability defense can be disposed of briefly. APWU's position, simply stated, is that Management violated employee rights to FLSA overtime under 444 by ignoring travel time outside of the employee's normal work hours. It relies on 444 which is part of the ELM which is in turn, through Article 19, incorporated in the National Agreement. Its argument thus concerns the meaning and scope of the terms of the National Agreement. The Postal Service disagrees with APWU's reading of this ELM provision. The resultant dispute plainly raises "interpretive issues under this Agreement..." and is therefore arbitrable.

As I stated in the earlier award in this case, denying APWU's request that the Postal Service not be allowed to raise this arbitrability defense, "the Postal Service argument has little, if anything, to do with the arbitrator's jurisdiction." Its claim, realistically viewed, is that I have no choice but to accept Management's interpretation of the ELM. It cites arbitral history (i.e., the Collins award), collective bargaining history (i.e., the rejection of prior APWU bargaining proposals), ELM history (i.e., APWU's failure to make an Article 19 protest regarding the introduction of 438.134 in the ELM years ago), and so on. This arbitrability defense is an argument on the merits in scant disguise. APWU's complaint is arbitrable. The matters raised by the Postal Service will be dealt with at length in the following discussion.

Collins Award

National Arbitrator Collins was confronted by an unusual claim in Case No. H7C-NA-C 8. The Postal Service had issued internal memoranda in February 1987 and May 1987 concerning the impact of "Super Saver" air fares on travel time arrangements. Copies were given to APWU. The February 1987 memorandum spoke of Management making "every effort...to schedule flights as near as possible to the person's work schedule, or to reschedule the employee's work hours if very early or late flights are ticketed." The May 1987 memorandum said employees

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[2] These proposed modifications have been challenged by APWU under Article 19.

"must use the least costly service available, taking into account the need for reasonable convenience, safety, and comfort..." and noted that "due consideration must be given to an employee's regularly scheduled workhours to allow for reasonable time between work termination and flight departure time."

APWU argued that the February 1987 memorandum, read in light of discussions with a Postal Service official concerning the memorandum, involved a commitment that if travel time did not occur within an employee's regular work hours, such hours would be rescheduled to encompass travel time. It asserted that this memorandum, this commitment, was unilaterally repudiated by the May 1987 memorandum which also improperly changed the terms of the F-10 Travel Handbook. The Postal Service disagreed. Collins described the issue before him in these words:

> ...whether the Postal Service violated Sections 8(a)(1) and (5) of the National Labor Relations Act, and hence violated Article 5 of the 1987-90 National Agreement, allegedly by making certain unilateral changes in travel policy?

Collins found that no such violation had occurred. His essential point was that there had been no unilateral change in travel policy and that APWU's view of the Postal Service commitment could not be supported by the language of the memoranda or by any oral understanding. He went on to say, by way of dicta, that APWU's claim amounted in large part to a demand that all travel time be paid for and that such a demand had been made in negotiations and rejected by Management.

It should be obvious from this brief summary of the Collins award that the present case is clearly distinguishable. Collins dealt with an alleged Article 5 violation which was premised on an alleged violation of the National Labor Relations Act. Here, the alleged violation relates to the ELM and Article 19. Collins referred at most to the travel time regulations found in 438.134 of the ELM. Here, the critical travel time provision upon which APWU rests its claim is 444. Collins' decision does not deal with the issues raised by APWU in the instant case. His decision does not affect the disposition of the instant case.

Negotiations Proposals

The Joint Bargaining Committee (JBC) proposed in the 1987 negotiations that Article 38, presumably the ELM as well, be changed so that "no matter when an employee [in the

maintenance craft] travels, he is entitled to receive compensation." And the JBC proposed in the 1990 negotiations that a new provision be added to Article 36 "confining administratively controlled travel to an employee's scheduled work week..." The Postal Service rejected each of these proposals and no such change was made in the language of Articles 36 or 38 or the ELM. It contends that APWU is now seeking through this arbitration what it was unable to obtain through negotiation and that APWU's claim should therefore be dismissed.

This argument is not persuasive. The APWU proposals at the national bargaining table were an attempt to make all travel time compensable, whether or not it "coincides with the employee's normal work hours..." The APWU claim in the present case does not seek any compensation for travel time as such. Rather, it seeks a determination that travel time, even when not "compensable", must be considered "actual work" for purposes of calculating FLSA overtime under the ELM. Thus, what APWU requests here is something quite different from what it requested in negotiations. Moreover, in submitting these proposals, APWU made clear to the Postal Service that it was doing so "without prejudice to the Joint Bargaining Committee's position regarding the existing rights of postal employees..." under the ELM.

Late Protest by APWU

Sometime in 1983, perhaps earlier, the Postal Service introduced 438.134a into the ELM, specifically, the travel time regulation with respect to "travel away from home overnight." Such travel time, according to the regulation, was to be "compensable" to the extent to which it "coincides with the employee's normal work hours..." APWU was free at that time to protest, pursuant to Article 19, that 438.134a was not "fair, reasonable, and equitable." It made no such protest. The Postal Service believes APWU is now belatedly mounting a protest which should have been made years ago.

This argument fails for the same reasons as are set forth in the discussion of "negotiations proposals." APWU is not challenging 438.134a in the present case. It has apparently accepted the principle in that regulation, compensation for travel time only if it falls within "normal work hours... whether on a scheduled or a nonscheduled day." APWU's challenge here concerns 444 of the ELM and the scope of FLSA overtime, matters which are not covered by 438.134.

Meaning of 444.22

The heart of this dispute is the conflicting interpretations of 444.22. That provision defines "actual work" as "all time which management suffers or permits an employee to work." It then refines this definition by stating that "actual work does not include any paid time off" but "does include steward's duty time, travel time, meeting time, training time,..." APWU insists that the underscored words cover all "travel time", whether "compensable" or not. The Postal Service insists that these words cover only "compensable travel time." This distinction is critical because the Postal Service is obliged to pay FLSA overtime "for all hours of actual work in excess of 40 hours in any FLSA workweek."[3]

The ELM, viewed by itself, supports APWU's interpretation. When Management assigns an employee to a period of training in a distant facility, the employee has no choice in the matter. He must accept the assignment. When the travel arrangements and distances involved are such that some or all of his travel time falls outside his "normal work hours", he again has no choice in the matter. He must accept such travel arrangements. The travel is an integral part of the assignment. The two are inextricably tied together. Given these circumstances, it seems clear that such travel time is "time which management suffers...an employee to work." This broad definition of "actual work" in 444.22 would certainly appear to encompass the travel time involved in this case.

Equally important, when the Postal Service wrote 444.22a and said "actual work" includes "travel time", it must have been fully aware of the "basic and special pay" regulations in chapter 430. Indeed, the FLSA provisions in 444 and 445 contain a number of cross-references to 430:

FLSA		Basic & Special Pay
444.21a(7)	-	"See 432.53"
444.21a(11)	-	"See 432.74"
444.22a	-	"432.53"
444.23	-	"See 432.42"
445.2	-	"433" and "434"

[3] Note that when FLSA overtime is required, it is paid for at "one and one-half times the employee's regular rate..." And "regular rate" is defined as total remuneration in a FLSA workweek "divided by the hours that the employee actually worked."

However, "travel time" in 444.22a has no cross-reference to 438.13.[4] The Postal Service did not see fit to link "travel time" for purposes of FLSA overtime to the travel time regulations found in 438.13. The latter regulations distinguish, time and again, between "compensable" and noncompensable travel time. Yet, in drafting 444.22a, the Postal Service ignored these distinctions and spoke in the broadest possible terms, "travel time." Given these circumstances, along with the fact that Management alone was responsible for drafting 444.22a, my conclusion must be that the reference there to "travel time" encompasses all "travel away from home overnight", whether "compensable" or not.

What this means is that even though travel time outside of "normal work hours" is not "compensable" under 438.134, it must nevertheless be considered "actual work" under 444.22a for purposes of calculating FLSA overtime. Such travel hours need not be - and are not - paid for by the Postal Service but they must be counted as "actual work" in determining whether an employee has worked "in excess of 40 hours in any FLSA workweek." If so, then hours which would otherwise be paid for at straight time may have to be paid for at the appropriate FLSA overtime rate. This interpretation allows 444.22a and 438.134 to be given their apparent meaning while at the same time avoiding any conflict between the two provisions.

The Postal Service approach is simply to view 444.22a as if the words "travel time" were really "compensable travel time." But, as I have already explained, that is not what 444.22a said and that is not what 444.22a appears to have intended. It could be argued, as at least one regional arbitrator has, that the specific language of 438.134 should take precedence over the general language of 444.22a. This argument assumes a conflict between these ELM provisions. No such conflict exists, however, if these provisions are interpreted in the manner I have already suggested - 438.134 as a "pay" provision and 444.22a as an "hours of work" provision for purposes of FLSA overtime calculation. True, the treatment of travel time outside "normal work hours" as "actual work" under 444.22a will have certain pay consequences, other hours being paid at FLSA overtime rather

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[4] Note that the Postal Service did change 444.22a in October 1988 by adding after the words "travel time", a parenthetical cross-reference to "438.1". But this occurred after the grievances in this case had been filed and APWU in any event protested this change under Article 19.

than straight time. This does not mean, however, that such travel time has itself become "compensable."

Practice

The Postal Service stresses its pay practices. It alleges that travel time within "normal work hours" has customarily been considered "actual work" under 444.22a but that travel time outside "normal work hours" has not been considered "actual work" under 444.22a. It believes that, in light of this practice, "actual work" should be read to cover only travel time within "normal work hours", that is, "compensable" travel time.

The difficulty with this argument is that the practice has been in dispute for some years. APWU has on numerous occasions filed grievances maintaining that travel time outside "normal work hours" is "actual work" under 444.22a and is "compensable" as such notwithstanding the terms of 438.134. It has prevailed in twenty such cases before regional arbitrators in the southern, eastern and central regions.[5] Given this history, it can hardly be said that the alleged practice is the understood and accepted way of dealing with travel time under 444. APWU cannot be deemed bound by a practice which it has consistently objected to for years and which regional arbitrators have consistently ignored.

These comments should not be taken as a blanket approval of the findings in the twenty regional awards. Quite the contrary, those awards were in my opinion in error to the extent to which they held that travel time outside "normal work hours" was "compensable" as "actual work" under 444.22a. These hours could not be "compensable" because of the clear and unambiguous terms of 438.134. This now appears to be acknowledged by APWU. Those awards did recognize, however,

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[5] There have also been eight travel time regional awards in which APWU did not prevail. But four of them made no mention whatever of 444 and another two relied on the October 1988 ELM revision in which "travel time" in 444.22a was cross-referenced to "438.1." Of the remaining two awards, one held that there was a conflict between 438.134 and 444.22a and resolved the conflict by choosing the specific language of the former over the general language of the latter. The other held APWU's claim was not arbitrable on the basis of the Collins award, several Step 4 settlements, and the clear language of 438.134. That award did not deal with the 444 theory advanced by APWU in the present case.

that travel time outside "normal work hours" is "actual work" for purposes of 444.22a. To that extent, they were correct.

FLSA Enforcement, Dep't. of Labor

The Postal Service contends that APWU's claim in this case is not arbitrable. It relies heavily on Arbitrator Bloch's award in a USPS-Federation of Police Officers dispute (Case No. FPSP-NAT-81-006).

That case dealt with officers in the Pittsburgh area who worked at the General Post Office (GPO) or the Bulk Mail Center (BMC). Prior to 1982, when additional officers were needed at BMC, they were taken from GPO and assigned to BMC. They would, however, report initially to GPO, change into uniform, and receive transportation to BMC. The uniform change and transportation were apparently "on the clock." A new procedure was then introduced. A GPO officer needed at BMC the following day was told to report directly to BMC and he was occasionally permitted to take his uniform and equipment home with him. The Federation claim was that "time spent transporting equipment home and back should be considered to be 'on the clock'" and that Management's failure to do so was a violation of the Labor Agreement, the ELM, and the FLSA. It conceded that its claim "requires application of the [FLSA].."

Bloch ruled that the Federation complaint was not arbitrable. He stated that "the essence of this matter, while wage related, is a Fair Labor Standards Act claim", that the Federation claim "is not only inextricably bound to it [FLSA], but there is nothing beyond such a contention." He explained that if the FLSA regulations had been violated, "resolution [of the matter] is for the courts." He stated further in response to a Federation contention that the parties had incorporated FLSA rights within the ELM and hence within the Labor Agreement:

> ...while one may speculate that the handbooks and manuals (and indeed the Labor Agreement itself) are intended to be drafted in a manner consistent with law, (1) the parties may not, in fact, have achieved that goal and (2) in any event, the arbitrator's jurisdiction is limited to ascertaining the parties' compliance with their Labor Agreement, and not with the law.

I agree with the latter observation as a general proposition. Arbitrators are to apply the Agreement, not the law, in resolving grievance disputes. But no real reason was

given in this opinion for ignoring the ELM's FLSA provisions. I can only assume from the quoted passage that Bloch was holding that to the extent to which a portion of the ELM is based solely on law, it is either not incorporated in the Agreement or, if incorporated, is not enforceable. Such a view is difficult to justify given the broad language of Article 19[6]:

> Those parts of all handbooks, manuals and published regulations of the Postal Service, that directly relate to wages, hours or working conditions, as they apply to employees covered by this Agreement,...shall be continued in effect except that the Employer shall have the right to make changes that are not inconsistent with this Agreement and that are fair, reasonable, and equitable...

The ELM is plainly one of the "manuals" contemplated by Article 19. It has in effect been incorporated in the National Agreement. Its provisions are enforceable under the grievance and arbitration machinery of Article 15. That has been true for years in this collective bargaining relationship. The fact that a provision of the ELM is similar to (or the same as) federal law does not make that provision any less enforceable under the National Agreement.[7] Subchapter 444 of the ELM, FLSA overtime pay, no doubt contains the same provisions as federal law. Those provisions, to use the terms of Article 19, "directly relate to wages, hours or working conditions, as they apply to employees covered by this Agreement..." Once they were made part of the ELM, they become enforceable through Article 19. APWU here is basing its case not on federal law but rather on the ELM itself. For these reasons, the Bloch award is not a controlling precedent.[8] I find the dispute is arbitrable.

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[6] The comparable provision of the USPS-Federation of Police Officers Agreement is Article 36.

[7] That is certainly true of the provisions of the National Agreement. For example, the fact that Article 2 prohibits discrimination on account of "race, color,..." and the further fact that the same prohibition can be found in federal law does not make Article 2 unenforceable under the grievance and arbitration machinery of the National Agreement.

[8] Moreover, it is worth emphasizing that the Bloch award did not involve the Unions which are parties to this National Agreement, that is, the NALC and APWU.

The Postal Service further argues, assuming the dispute is arbitrable, that "actual work" for purposes of 444.22a of the ELM should be read in a manner consistent with the Department of Labor's regulations with respect to FLSA administration. It relies specifically on Section 785.39 of the DOL regulations which state in part:

> Travel that keeps an employee away from home overnight is travel away from home. Travel away from home is clearly worktime when it cuts across the employee's workday...not only hours worked on regular working days during normal working hours but also during the corresponding hours on nonworking days... As an enforcement policy the Divisions will not consider as worktime that time spent in travel away from home outside of regular working hours as a passenger on an airplane, train,... (Emphasis added)

There are two problems with this argument. First, my function in this arbitration is to interpret and apply the National Agreement, specifically, 444.22a of the ELM, rather than the law. My interpretation, set forth earlier in this opinion, is that travel time away from home overnight should be considered "actual work" for purposes of FLSA overtime under 444.22a even though such travel time occurs outside "normal work hours" and is not "compensable." My interpretation was compelled by the broad language of 444.2 and by the absence of any cross-reference to the travel time regulations in chapter 430. Because of the parties' long-standing disagreement over the proper application of 444, past practice could not be a controlling consideration. There was no need to go outside the parties' relationship and look at the law.

Second, even if I were to refer to DOL regulations for guidance, my conclusion would be the same. Nowhere in Section 785.39 did DOL say that travel time outside "normal work hours" is not "worktime", that is, "actual work", under the FLSA. Instead, it said that as a matter of DOL "enforcement policy", such travel time would not be treated as "worktime." One must remember that the law speaks of "worktime" as "time which management suffers...an employee to work" and that the kind of compulsory travel time in this case plainly fits this definition. Thus, the DOL regulation appears to be saying that DOL will not insist upon what the law seemingly requires. At most, 444.22a should be read in a manner consistent with the legislation itself. It certainly should not be read, absent some instruction in the ELM to the contrary, in a manner consistent with a DOL "enforcement policy" whose origin

and purpose were nowhere explained in the record made by the parties in this case. The fact is that there is no express mention of DOL regulations in chapter 440 of the ELM.

AWARD

To the extent set forth in the foregoing opinion, the grievances are granted. Because the facts in each of these grievances were not really developed at the arbitration hearing, those cases are remanded to the parties for settlement or for further hearings in regional arbitration.

Richard Mittenthal, Arbitrator