C # 15699

NATIONAL ARBITRATION PANEL

In the Matter of Arbitration Between UNITED STATES POSTAL SERVICE And NATIONAL ASSOCIATION OF LETTER CARRIERS	GRIEVANCE: 12-Hour Work Limit Rule POST OFFICE: Watertown, N.Y. USPS CASE NO.: B90N-4B-C 94027390 NALC System No.: 5088

BEFORE: Carlton J. Snow, Professor of Law

APPEARANCES: For the Postal Service: Ms. Larissa Omelchenko Taran
Ms. Marta E.Erceg

For the Union: Mr. Keith E. Secular

PLACE OF HEARING: Washington, D.C.

DATE OF HEARING: May 2, 1996

POST-HEARING BRIEFS: June 26, 1996

AWARD

Having carefully considered all evidence submitted by the parties concerning this matter, the arbitrator concludes that the "12-hour a day" work rule applies to transitional employes, and the seven grievants in this case shall be made whole. The arbitrator shall retain jurisdiction in this matter for 60 days from the date of the report in order to resolve any problems resulting from the remedy in the award. It is so ordered and awarded.

Date: 8-20-96

Carlton J. Snow
Professor of Law

IN THE MATTER OF ARBITRATION)
)
BETWEEN)
)
UNITED STATES POSTAL SERVICE) ANALYSIS AND AWARD
)
AND)
) Carlton J. Snow
NATIONAL ASSOCIATION OF) Arbitrator
LETTER CARRIERS)
(Grievance Re 12-Hour Work)
Limit Rule))
(USPS CASE NO.:)
B90N-4B-C 94027390))
(NALC System No.: 5088))

I. INTRODUCTION

This matter came for hearing pursuant to a collective bargaining agreement between the parties effective from June 12, 1991 through November 20, 1994, and as extended by the parties. A hearing occurred on May 2, 1996 in a conference room of the Employer located at 475 L'Enfant Plaza, in Washington, D.C. Ms. Larissa Omelchenko Taran and Ms. Marta E. Erceg, Labor Relations Specialists, represented the U.S. Post Office. Mr. Keith Secular, attorney, represented the National Association of Letter Carriers.

The hearing proceeded in an orderly manner. There was a full opportunity for the parties to submit evidence, to examine and cross-examine witnesses, and to argue the matter. Witnesses testified under oath as administered by the arbitrator. Mr. Edward J. Greenberg of Diversified Reporting Services, Inc. reported the matter and submitted a transcript

of 81 pages. The advocates fully and fairly represented their respective parties.

There were no challenges to the substantive or procedural arbitrability of the dispute, and the parties stipulated that the matter properly had been submitted to arbitration. They authorized the arbitrator to retain jurisdiction in the matter for 60 days following issuance of an award. The arbitrator officially closed the hearing on June 26, 1996 after receipt of the final post-hearing brief in the matter.

II. STATEMENT OF THE ISSUE

The issue before the arbitrator is as follows:

> Did the Employer violate the parties' agreement when transitional employes in the NALC bargaining unit worked more than 12 hours? If so, what is the appropriate remedy?

III. RELEVANT CONTRACTUAL PROVISIONS

ARTICLE 8 HOURS OF WORK

Section 1. Work Week

The work week for full-time regulars shall be forty (40) hours per week, eight (8) hours per day within ten (10) consecutive hours, provided, however, that in all offices with more than 100 full-time employees in the bargaining units the normal work week for full-time regular employees will be forty hours per week, eight hours per day within nine (9) consecutive hours. Shorter work weeks will, however, exist as needed for part-time regulars.

Section 2. Work Schedules

A. The employee's service week shall be a calendar week beginning at 12:01 a.m. Saturday and ending at 12 midnight the following Friday.

B. The employee's service day is the calendar day on which the majority of work is scheduled. Where the work schedule is distributed evenly over two calendar days, the service day is the calendar day on which such work schedule begins.

C. The employee's normal work week is five (5) service days, each consisting of eight (8) hours, within ten (10) consecutive hours, except as provided in Section 1 of this Article. As far as practicable the five days shall be consecutive days within the service week.

Section 3. Exceptions

The above shall not apply to part-time employees and transitional employees.

. . . .

Transitional employees will be scheduled in accordance with Section 2. A and B, of this Article.

IV. STATEMENT OF FACTS

In this case, the Union challenged the decision of the Employer not to apply the "12-hour maximum hours" rule to transitional employes. On January 18, 1994, management required eight Letter Carriers in Watertown, N.Y. to work more than 12 hours in a day. Severe weather conditions and heavy mail volume created a business necessity for the Employer's decision. One of the employes was a career part-time flexible worker, and the other seven were transitional employes. The Union argued that the affected employes should be paid two and a half times their regular pay rate for hours worked beyond 12 in a day. It is the belief of the Union that the Employer violated the parties' agreement and, specifically, should have complied with ELM Section 432.32. This provision states:

> Except as designated in labor agreements for bargaining-unit employees or in emergency situations as determined by the PMG (or designee), employees may not be required to work more than 12 hours in 1 service day. In addition, the total hours of daily service, including scheduled work hours, overtime, and mealtime, may not be extended over a period longer than 12 consecutive hours. Postmasters, Postal Inspectors, and exempt employees are excluded from these provisions. (See, Employer's Exhibit No. 1).

Management ultimately agreed to compensate the part-time flexible worker in accordance with the requested remedy, but the Employer contended that transitional employes were not entitled to such a remedy. The Employer maintained that transitional employes are not covered by "regular work schedule" provisions of the National Agreement and

constitute an exception to contractual provisions on which the Union relied. When the parties were unable to resolve their differences, the matter proceeded to arbitration.

V. POSITION OF THE PARTIES

A. The Union

The Union argues that the "12-hour maximum hours" rule as set forth in ELM Section 432.32 covers all employes, including transitional employes. Moreover, the Union argues that neither of the exceptions set forth in the administrative regulations is relevant in this case with regard to transitional employes.

It is the contention of the Union that the absence of references to the "12-hour rule" in Article 8, Sections 1 and 2 fails to provide an exception to the Employee and Labor Relations Manual. The Union maintains that the reference in Article 8, Section 3 stating "the above shall not apply to part-time employees and transitional employees" could only refer to the above material in Sections 1 and 2 of the provision. The Union believes that there is no logical reason for reading into Sections 1 and 2 any reference to the "12-hour" rule.

The Union also argues that the historical development for the "12-hour" rule illustrates why Article 8.3 of the parties' agreement should not be interpreted to create an

exception for transitional employes. It is the position of the Union that the history of the ELM provision concerning the "12-hour rule" demonstrates a difference in applicability of the "12-hour" rule and work schedule provision. Moreover, developments and alterations of the ELM provision concerning the "12-hour" rule allegedly demonstrate a clear intent to cover part-time flexible employes as well as temporary employes. It is the position of the Union that conditions set forth in ELM Section 432.32 have been satisfied in this case.

B. The Employer

It is the position of the Employer that the Union is attempting to expand rights of transitional employes beyond those set forth in the parties' agreement. Their rights allegedly have been explicitly described in the parties' agreement and should not be changed without bargaining as the Union allegedly is attempting to accomplish in this case. It is the contention of the Employer that the arbitration panel chaired by Arbitrator Mittenthal issued binding guidelines that should be applied in this case. The Employer contends that a contractual provision applies to transitional employes only if it specifically has been identified as such in the Mittenthal award.

The Employer also finds support for its position in

Article 19 of the National Agreement. Management contends that the Union must be precluded from relying on ELM Section 432.32 as a means of expanding rights of transitional employes. To permit such an expansion allegedly is inconsistent with the parties' National Agreement and a violation of language in Article 19. Hence, the Employer asserts that the grievance must be denied.

VI. ANALYSIS

A. New Arguments in Arbitration

Arbitrators have been open to receiving new arguments advanced for the first time in arbitration. The parties are free to design their system in a way that best suits their needs. There is a general desire to interact with the substance of a dispute and not to make a fetish of form as was the case with eighteenth century common law rules of pleading. Arbitrators typically want to interact with the merits of the dispute and try to avoid the rigidity that follows a restrictive application of legalistic rules of procedure in arbitration. As one arbitrator observed:

> Where there is no requirement by contract, or otherwise, that either party submit or stand on any formal written protest or answer, formalities are dispensed with in hearings of this kind, and technical objections are brushed aside in an endeavor to get at the facts of a given case, and to do equity and complete justice to the rights of all parties, without let or hindrance, or the entanglement of formal pleadings, procedures or techniques. (See, Charles Eneu Johnson Co., 17 LA 125, 129 (1950)).

There is always an opportunity to continue a hearing at a later time so that a party who did not expect to confront a particular piece of evidence or argument might have more time to prepare a case to be presented at another hearing.

At the same time, freedom of contract remains strong in the United States; and the parties have a right to design their system in a way they deem appropriate. Once that has been done, it is for an arbitrator to implement their intent

and not to impose a contrary understanding on them. The parties have chosen to design their grievance and arbitration system in a way that makes national level arbitration decisions binding throughout the process. An arbitral interpretation of the parties' agreement becomes a part of the contractual relationship between the parties until they decide to modify it. A prior decision relevant to this case was rendered on September 21, 1981 by Arbitrator Richard Mittenthal. (See, Case No. N8-W-0406 (1981)).

In the interpretive case before Arbitrator Mittenthal, he had to decide whether an argument advanced for the first time at the arbitration hearing should be considered by the arbitrator in resolving the dispute. Interpreting Article 15, Arbitrator Mittenthal concluded that he had no contractual authority to consider a new argument because of its lateness. He stated:

> There remains the Postal Service's claim that the local clause in question is "inconsistent or in conflict with" Article XIII which concerns "assignment of ill or injured regular work force employees." The difficulty here is the lateness of this argument. Article XV describes in great detail what is expected of the parties in the grievance procedure. The Postal Service's Step 2 decision must make a "full statement" of its "understanding of . . . the contractual provisions involved." Its Step 3 decision must include "a statement of any additional . . . contentions not previously set forth . . ." Its Step 4 decision must contain "an adequate explanation of the reasons therefor." In this case, the Postal Service made no mention of Article XIII in Steps 2, 3 and 4. Its reliance on this contract provision did not surface until the arbitration hearing itself. Under such circumstances, it would be inappropriate to consider this belated Article XIII claim. (See, Union's Exhibit No. 14, p. 9 , emphasis added.)

Another national level arbitrator agreed with and followed Arbitrator Mittenthal's interpretation of the parties' agreement. Arbitrator Benjamin Aaron had to decide whether stronger arguments advanced for the first time in arbitration than had been advanced earlier in the grievance procedure should be considered by the arbitrator. He agreed with Arbitrator Mittenthal's interpretation and refused to give any weight to the new argument. Arbitrator Aaron stated:

> The Postal Service advanced other, more credible arguments at the arbitration hearing to support the reasonableness of its decision to assign the disputed work to Summers, but none of these except the later delivery of mail had been raised during earlier steps of the grievance procedure. I am fully in agreement with Arbitrator Mittenthal that the provisions of Article XV requiring that all of the facts and arguments relied upon by both parties must be fully disclosed before the case is submitted to arbitration should be strictly enforced. In this case, therefore, I have given no consideration to any of the arguments advanced by the Postal Service other than those referred to specifically in this and the preceding paragraph. (See, Case No. H8N-5B-C 17682 (1983), emphasis added.)

The parties have a long history of collective bargaining, and their negotiators are among the most astute in labor-management relations. They are presumed to understand that the doctrine of stare decisis is not explicitly a part of arbitral common law and that "each award in arbitration represents the judgment of the arbitrator of what the agreement of the parties means and where the equities lie." (See, Brewers Board of Trade, Inc., 38 LA 679, 680 (1962)). The parties made a strategic decision to design their system in

a way that permits interpretive issues of general application to be appealed to national level arbitration. Such decisions are binding on the parties and arbitrator alike.

The parties also are presumed to have understood that prior arbitration awards become a part of their ensuing agreement, unless the parties give contractual instructions to the contrary. Even in nonprecedential systems, it is generally assumed that prior arbitration awards between the same parties, involving the same collective bargaining agreement are highly persuasive and will be followed apart from some egregious error on the part of the first arbitrator. Arnold Zack, past president of the National Academy of Arbitrators, describe the process as follows:

> In submitting a matter to arbitration, the parties have agreed to seek an answer to a question of contract interpretation. Once that answer has been rendered, it becomes part of the agreement and may not be relitigated. Should the answer be unsatisfactory, the parties must modify the agreement by negotiation. (See, A.N. Zack and R.I. Bloch, Labor Agreement in Negotiation and Arbitration (1995), at 61.)

For their 1978-81 collective bargaining agreement, the parties required a full and detailed statement of facts and promised each other to cooperate fully to develop facts, papers, or documents for processing grevaces. Management promised to provide "the detailed reasons" for denying a grievance. Moreover, the Employer promised to state "the reasons for the decision in detail" and agreed to include "a statement of any additional facts and contentions not previously set forth in the record of the grievance as appealed

from Step 2." (See, 1978-81 Agreement, 41). In the ensuing 18 years, the parties have not modified the language of these contractual provisions. To deny the binding nature of Arbitrator Mittenthal's decision would be failing to draw the essence of the arbitrator's interpretation from the parties' collective bargaining agreement.

Being guided by prior national level decisions on the subject, it is inappropriate for the arbitrator to consider any claims or arguments advanced beyond those set forth in the Step 4 decision. The Employer advanced the following position at Step 4 of the grievance procedure:

> It is management's position that no contractual violation can be established. Article 8, Section 3 (which follows the contractual provisions concerning work week and work schedules) specifies that "the above shall not apply to part-time employees and transitional employees." Thus, by the specific terms of the National Agreement, transitional employees are an exception to the regular work schedule provisions of the National Agreement. (See, Joint Exhibit No. 2, p. 2).

This decision has provided the analytical context for the dispute before the arbitrator.

B. The Teaching of Article 8.3

In its Step 4 decision, the Employer relied on Article 8.3 as the basis for denying the grievance. Article 8.3 of the National Agreement states:

> Section 3. Exceptions
>
> The above shall not apply to part-time employees and transitional employees.
>
> Part-time employees will be scheduled in accordance with the above rules, except they may be scheduled for less than eight (8) hours per service day and less than forty (40) hours per normal work week.
>
> Transitional employees will be scheduled in accordance with Section 2, A and B, of this Article. (See, Joint Exhibit No. 1, p. 19).

Article 8.3 excludes transitional employes from the "regular work week" and "work schedule" positions set forth in Article 8.1 and Article 8.2 of the agreement. There is no mention of the "12-hour" rule in either Article 8.1 or Article 8.2. Nor are there implied or constructive terms embedded in the contractual provision.

It was the Employer's interpretation of Article 8.1, 8.2, and 8.3 on which management premised its conclusion that "transitional employees are an exception to the regular work schedule provisions of the National Agreement." (See, Joint Exhibit No. 2). There are references to other provisions that formed the basis for management's decision. As stated previously, the Employer had an obligation to present earlier in the process before arbitration "a full statement . . . of the contractual provisions involved.

The Employer conceded that Employee and Labor Relations Manual, Section 432.32 sets forth the administrative ceiling on hours. "Employees may not be required to work more than 12 hours in 1 service day." (See, Employer's Exhibit No. 1, p. 126). By virtue of Article 8.3 in the parties' agreement, this administrative regulation was not intended to cover transitional employes, according to the Employer. Evidence submitted to the arbitrator, however, failed to demonstrate a cohesive link between the "12-hour" rule and the "work week/schedule" provision in the parties' agreement.

Since the arbitrator has not previously applied the "Mittenthal-Aaron" prohibition on new material in arbitration, other arguments advanced in arbitration will be addressed. The Employer argued that rights of transitional employes are limited to those expressly set forth in the Mittenthal interest arbitration award of January 16, 1992. The award has been incorporated as Appendix B in the 1990-94 collective bargaining agreement between the parties. The Employer relied on background material set forth in the interest arbitration award which stated:

> The Panel has assumed jurisdiction over all economic and non-economic matters with respect to the transitional employee classification. All proposals of the parties not dealt with specifically by this Award were either withdrawn or have not been adopted by this Panel." (See, Joint Exhibit No. 1, p. 242).

From this statement in the interest arbitration award, the Employer reasoned that a provision in the National Agreement applies to transitional employes only if it was specifically identified by the Mittenthal-Mahon-Simon Award.

In fact, all provisions in the National Agreement applicable to transitional employes have been followed by a statement indicating that the preceding article or contractual provision applies to transitional employes. The entire National Agreement is replete with such statements. The problem is that the arbitrator received no evidence indicating that the "12-hour" rule was an issue before the Mittenthal interest arbitration panel and that, in response, the panel rejected it. An indication from the panel and introductory material that "all proposals of the parties not dealt with specifically by this Award were either withdrawn or have not been adopted by this Panel" failed to establish that the "12-hour" rule had been rejected by the Panel. (See, Joint Exhibit No. 1, p. 242). Such evidence would have provided conclusive proof that the parties did not intend the "12-hour" rule to apply to a transitional employe. In the absence of such evidence, the introductory statement in the interest arbitration award failed to be dispositive.

The Employer asserted that all rights of transitional employes are expressly set forth in contractual provisions presented in the Mittenthal award. In support of its contention, the Employer relied on Article 19 of the National Agreement as support for a strict "four corners" reading of the parties' agreement. But Article 19 attacked the core of the Employer's argument because Article 19 is not an integration clause and does not close off the National Agreement from a presentation of evidence describing other rights of

transitional employes.

Article 19 is explicit about its relationship to transitional employes. The parties agreed that:

> Article 19 shall apply in that those parts of all handbooks, manuals and published regulations of the Postal Service, which directly relate to wages, hours or working conditions shall apply to transitional employees only to the extent consistent with other rights and characteristics of transitional employees negotiated in this Agreement and otherwise as they apply to the supplemental work force. (See, Joint Exhibit No. 1, p. 100).

The parties agreed that there could be rights of transitional employes expressed in handbooks, manuals, and published regulations of the Employer as long as they remain consistent with rights and characteristics of transitional employes set forth in the agreement. There is no basis for interpreting Article 19 in a way that seals off transitional employes from handbook and manual provisions.

The Employer maintains that any broadening whatsoever of rights for transitional employes constitutes a per se inconsistency with the National Agreement. The language of the parties' agreement failed to support such a conclusion. The parties agreed that handbooks, manuals, and published regulations of the Employer directly related to wages, hours, or working conditions came under the coverage of Article 19 to the extent those administrative regulations are consistent with other rights and characteristics of transitional employes as expressed in the parties' agreement. The contractual language did not preclude other rights simply because they added to those already set forth in the agreement. There

needs to be an inconsistency, and a right from a handbook or manual or published regulation would be inconsistent with the National Agreement if a similar provision in the parties' collective bargaining agreement was followed by a clause stating its applicability to transitional employes.

The Employer maintained it is significant that Article 8.5.G does not apply to transitional employes. This contractual provision states:

> G. Full-time employees not on the "Overtime Desired" list may be required to work overtime only if all available employees on the "Overtime Desired" list have worked up to twelve (12) hours in a day or sixty (60) hours in a service week. Employees on the "Overtime Desired" list:
>
> 1. may be required to work up to twelve (12) hours in a day and sixty (60) hours in a service week (subject to payment of penalty overtime pay set forth in Section 4.D for contravention of Section 5.F); and
>
> 2. excluding December, shall be limited to no more than twelve (12) hours of work in a day and no more than sixty (60) hours of work in a service week. (See, Joint Exhibit No. 1, p. 22).

This provision is concerned with the Overtime Desired list and the order in which employes on the ODL will be required to work overtime. The focus of Article 8.5.G is not on the "12-hour" rule, and the functions of Articles 8.1, 8.2, and 8.5 are quite different. Management's argument failed to undermine the applicability of ELM Section 432.32 to transitional employes.

AWARD

Having carefully considered all evidence submitted by the parties concerning this matter, the arbitrator concludes that the "12-hour a day" work rule applies to transitional employes, and the seven grievants in this case shall be made whole. The arbitrator shall retain jurisdiction in this matter for 60 days from the date of the report in order to resolve any problems resulting from the remedy in the award. It is so ordered and awarded.

Respectfully submitted,

Carlton J. Snow
Professor of Law

Date: 8-20-96