C-23852

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In the Matter of the National Arbitration Between

UNITED STATES POSTAL SERVICE	)	
	)	Grievant:
and	)	Post Office: Meriden, CT
	)	USPS Case B94N-4B-C-97027260
NATIONAL ASSOCIATION OF LETTER CARRIERS, AFL-CIO	)	NALC Case No. 6069
	)	

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Before: Dennis R. Nolan, Arbitrator, USC Law School, Columbia, SC 29208-0001.

Appearances:

For the Employer: Jonathan I. Saperstein, Attorney, Employment and Labor Law, USPS, 475 L'Enfant Plaza, S.W., Washington, DC 20260-1150.

For the NALC: Keith E. Secular, Cohen, Weiss and Simon, LLP, 330 West 42nd Street, New York, NY 10036-6976.

Place of Hearing: Washington, D.C.

Date of Hearing: April 19, 2002

Date of Award: December 27, 2002

Relevant Contract Provision(s): Article 7, Sec. 1; Article 8, Secs. 1-3

Contract Year: 1994-1998

Type of Grievance: Contract Interpretation

Award Summary:

The Postal Service violated Article 8, as interpreted by a Step 4 agreement, when it created two PTR assignments with six-day schedules.

Dennis R. Nolan, Arbitrator

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Appearances:

For the Employer: Jonathan I. Saperstein, Attorney, Employment and Labor Law, USPS, 475 L'Enfant Plaza, S.W., Washington, DC 20260-1150.

For the Union: Keith E. Secular and Peter D. DeChiara, Cohen, Weiss and Simon, LLP, 330 West 42nd Street, New York, NY 10036-6976.

OPINION

I. Statement of the Case

The Union filed this grievance on December 4, 1996 to protest management's establishment of part-time regular (PTR) assignments with six-day schedules. The parties could not resolve the dispute in the grievance procedure, so the Union demanded arbitration. The arbitration hearing took place in Washington, DC on April 19, 2002. Both parties appeared and had full opportunity to testify, to examine and cross-examine witnesses, and to present all pertinent evidence. Both parties submitted post-hearing briefs, the last of which arrived on November 12, 2002.

II. Statement of the Facts

The facts leading up to this grievance are simple and undisputed. Late in 1996, the Manager of Postal Operations of the Meriden, CT post office created two six-day PTR assignments. Each assignment called for approximately four hours of work on six days to perform collections. The

Union grieved, alleging that these assignments violated Article 8 of the National Agreement and asking that they be reposted as five-day positions.

III. The Issue

Did the Postal Service violate the Agreement by establishing PTR assignments with six-day schedules? If so, what shall the remedy be?

IV. Pertinent Contractual Provisions

ARTICLE 3 (MANAGEMENT RIGHTS)

The Employer shall have the exclusive right, subject to the provisions of this Agreement and consistent with applicable laws and regulations:

A. To direct employees of the Employer in the performance of official duties;
B. To hire, promote, transfer, assign, and retain employees in positions within the Postal Service and to suspend, demote, discharge, or take other disciplinary action against such employees;
C. To maintain the efficiency of the operations entrusted to it;
D. To determine the methods, means and personnel by which such operations are to be conducted. . . .

ARTICLE 7
EMPLOYEE CLASSIFICATIONS

Section 1. Definition and Use

Regular Work Force. The regular work force shall be composed of two categories of employees which are as follows:

1. Full-Time. Employees in this category shall be hired pursuant to such procedures as the employer may establish and shall be assigned to regular schedules consisting of five (5) eight (8) hour days in a service week.

2. Part-Time. Employees in this category shall be hired pursuant to such procedures as the Employer may establish and shall be assigned to regular schedules of less than forty (40) hours in a service week, or shall be available to work flexible hours as assigned by the employer during the course of a service week.

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.

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.

ARTICLE 15
GRIEVANCE-ARBITRATION PROCEDURE

Section 2. Grievance Procedure—Steps

Step 1:

(a) Any employee who feels aggrieved must discuss the grievance with the employee's immediate supervisor within fourteen (14) days of the date on which the employee or the Union first learned or may reasonably have been expected to have learned of its cause. . . . The Union also may initiate a grievance at Step 1 within 14 days of the date the Union first became aware of (or reasonably should have become aware of) the facts giving rise to the grievance. . . .

V. The Union's Position

The Union argues that, despite some ambiguity, Article 8, Section 3 sets a normal PTR workweek of five days. The ambiguity was removed in a 1985 Step 4 agreement arising from similar facts in Ventura, CA. Step 4 agreements are binding precedent for the interpretation of the collective agreement and nothing has changed since that agreement. The Postal Service's claim that Section 7(1)(A)(2) controls this case is erroneous because the grievance involves Article 8 rather than Article 7 and because the same provisions were in the contract at the time of the 1985 Step 4 agreement. Pre-1985 negotiating history and management documents are therefore irrelevant. Nor do other unions' agreements with the Postal Service to allow longer workweeks for PTRs, or regional arbitration awards interpreting other unions' collective agreements, affect the interpretation of this collective agreement. The NALC regional awards relied on by the Postal Service are either irrelevant or wrong.

The two handbooks cited by the Postal Service, F22 and ELM, apply to all USPS employees and could therefore apply to PTRs represented by other unions. In any event, the handbooks may not override the National Agreement, and the 1985 Step 4 agreement definitively interpreted the National Agreement.

VI. The Employer's Position

The Postal Service's brief makes two broad arguments, that the absence of any contractual provision expressly limiting its authority to create six-day schedules means that it retains its power under the management rights clause to do so, and that the Union's reliance on the Ventura Step 4 agreement is misplaced. (The brief omits some of the arguments its counsel recited in its opening statement at the arbitration hearing. On the assumption that the brief represents the Postal Service's final statement of its position, I do not address those issues.)

Elaborating on its first argument, the Postal Service asserts that the text of the National Agreement permits the scheduling implemented in this case, that several regional arbitrators have so held, and that other Postal Service unions agree with the Employer's position. Bargaining history, handbooks, and Step 4 agreements entered by the APWU and NPMHU support the Postal Service's position. The NALC, together with its bargaining partners, unsuccessfully sought to include a five-day limit on PTR schedules in earlier collective bargaining agreements. Several Postal Service manuals refer to situations in which PTRs would work six days a week. After their failure to negotiate a five-day PTR work week, the APWU and NPMHU expressly recognized the Employer's authority to set six-day PTR schedules.

The Employer discounts the significance of the Ventura agreement because the Union failed to show that it dealt with similar facts and circumstances. Not only are the documents submitted by the Union unclear on those matters, the Postal Service continued to post six-day assignments after it signed the Step 4 agreement in 1985, just as it had done before.

VII. Discussion

A. The Nature of the Problem

The parties have carried this very old grievance to the national level because of a serious ambiguity in their contractual language. As so often happens, both parties claim that the National Agreement clearly answers the question; unfortunately, they flatly disagree about the National Agreement's answer.

Article 3 gives management authority to direct and assign employees, to maintain efficiency, and to determine the methods of conducting its operations. Article 7 creates two categories of employees, "Full-time" employees who work regular schedules of five eight-hour days and "Part-time" employees who work less than forty hours a week. The definition of part-time employees omits the normal five-day requirement applicable to full-time employees. That could mean that the Postal Service may schedule part-time employees for *more than* five days, or it could simply mean that the Employer may schedule them for *less than* five days.

Article 8 casts a little light on the question without fully illuminating it. Section 2.C. states that "The employee's normal work week" is five days. The first sentence of Section 3 then says that "The above" shall not apply to part-time employees. So far, so clear, but the second sentence of Section 3 retracts the exception in the first sentence, at least partially, by providing that part-time employees *will* "be scheduled in accordance with the above rules," except that they may work fewer than eight hours a day and forty hours in a normal work week.

The critical question is whether those provisions permit the Postal Service to schedule PTRs for regular work weeks of six days. But for Article 8, the Employer's management rights claim would suffice: it may assign employees except as limited by other provisions of the National Agreement. The Union relies on Section 3's specific statement of the ways in which part-time employees' schedules may differ from the five-day norm established in Section 2 and concludes that other deviations are forbidden. The Postal Service naturally relies on the earlier and unqualified exemption of part-time employees from the rules of Section 2 and on Article 7's use of hours per week rather than days per week to distinguish part-time from full-time employees.[1]

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[1]The Postal Service argued in its opening statement, but not in its brief, that the 2001 Joint Contract Administration Manual clarifies the parties' intent. In fact, it merely repeats the earlier ambiguities. Page 8-2 is the most revealing. Section 8.3 states that "the normal work week defined by Article 8.2.C above applies only to full-time employees and not part-time flexibles or transitional employees, who have no daily 8-hour or weekly 40-hour guarantees." The next sentence states that part-time flexibles "may be scheduled to work more or less than 5 days per week." While the statement that the normal work week applies only to full-time employees might support the Employer's position that it can schedule part-time employees for six days a week, the express statement that *PTFs* may be scheduled for "more or less than 5 days per week" suggests that other employees, including *PTRs*, may *not* be scheduled for more than five days. Because the JCAM cannot change the meaning of the National Agreement and does not clearly address the question in this case, the proper focus is on the relevant terms from the National Agreement.

Contrary to both parties' assertions, the National Agreement does not clearly answer the question posed by this grievance. To the contrary, the National Agreement's ambiguity is the very reason why the case has reached this level. Article 7 does not solve the problem because Section 1's definition of the part-time category is silent on the issue in this case. Working less than forty hours a week may make an employee a part-timer as opposed to a full-timer, but that criterion alone says nothing about the number of days the Employer may schedule part-time employees to work each week. To stop with that Article would beg the very question at issue. Article 8, Section 3's exemption of part-time employees from Section 2's work schedule limits would end the matter but for the next sentence's partial contradiction ("Part-time employees will be scheduled in accordance with the above rules"). On the other hand, the last-quoted phrase is not dispositive because it is incomplete: the rest of the sentence lists just two exceptions to Section 2's rules, the number of hours per day and the number of hours per week. It does not expressly except part-time employees from the normal five-day workweek, nor does it expressly limit their schedules to five days.

In sum, the texts of Articles 3, 7, and 8 do not say clearly whether the Postal Service may assign PTRs to six-day schedules. The resulting ambiguity requires recourse to other authority.

B. The Ventura Step 4 Agreement

The parties agree that Step 4 agreements normally constitute binding interpretations of the National Agreement. The Union relies almost exclusively on one Step 4 agreement. In 1985 the parties settled a grievance arising in Ventura, CA with a statement that PTRs' "normal workweek is five (5) service days; however, management is not prohibited from using them on six (6) days should the need arise." If that grievance involved the same situation involved here, namely permanent assignment of a PTR to a six-day schedule, it virtually dictates the result of this case. The Postal Service suggests that the paper record of the case is unclear. It might, argues the Postal Service, have involved only an occasional assignment to a sixth day. If so, it would have no effect on the legitimacy of a permanent six-day PTR assignment. The first step in addressing this case is therefore to examine the documents leading to the Ventura settlement.

The grievance itself (Union Exhibit 3, pages 11 and 12) is indeed unclear. It simply states that on July 21, 1984, the carrier "was ordered to do another collection on Saturday's [sic] from 4:30-6:30 P.M." That could mean that the grievant was challenging an isolated assignment or that she was reacting to a new permanent assignment. If that were the only evidence in the record about the grievance, its lack of clarity would make the ultimate Step 4 agreement problematic. However, several other documents from that exhibit are more helpful.

First, the grievance was filed at Step 1 on April 19, 1985, almost nine months after the challenged action. In light of Article 15, Section 2's strict 14-day requirement on filing grievances, this delay strongly indicates that the problem was a continuing violation extending through the entire nine months. That would take it out of the "occasional" category.

Second, the remedy sought in the grievance was a "return" to a five-day workweek and payment of overtime for working the sixth day, from July 1984 "to settlement." That also suggests that the six-day schedule continued for the entire period.

Third, management's Step 2 answer (page 10) denies any violation of the National Agreement "by working a part-time regular on a *fixed schedule of six days a week*" (emphasis added). "Fixed schedule" obviously suggests more than an occasional assignment to a sixth day. Similarly, management's Step 3 answer (page 5) refers to placing a PTR "on a 6 day per week schedule," not to an occasional six-day assignment.

Fourth, the Union's appeal to Step 4, dated September 19, 1985, asks that the Grievant "be returned to a five (5) day work week." If the Union was still seeking her return to a five day schedule more than a year after the initial assignment, the schedule change must have been permanent.

Viewed in light of those documents, there is no ambiguity in the Ventura Step 4 agreement. When that agreement sets a "normal workweek" of five days but permits a sixth day "should the need arise," it is clear that the parties rejected the Ventura post office's attempt to place a PTR on a regular six-day workweek. In short, the situation in that case was the same as the situation in this case.

C. The Employer's Remaining Arguments

Although the Ventura agreement, standing alone, would resolve the grievance, the Postal Service offers several other arguments that need to be addressed.

The first of these is that the Union failed to win a five-day limit in negotiations. Its attempt to impose such a limit, according to the Postal Service, shows that the National Agreement did not already contain one. That line of argument is generally risky. Parties have many reasons for seeking to put their existing rights (or at least the rights they believe already exist) into the text of their agreement. A party may wish to codify a past practice or verbal agreement, to clarify an ambiguous right, or to forestall future questions. There are at least as many reasons why a party might drop such a proposal, many of which may have nothing to do with the meaning of the existing language.

In this case there is an even better reason for the Union's actions. It sought a written limit on PTR schedules before the parties signed the Ventura Step 4 agreement. Once it had that agreement, the need for including the limit in the text of the National Agreement was much reduced. I therefore cannot conclude that the NALC's earlier bargaining objectives or its later omission of that proposal was a recognition that the National Agreement allowed six-day PTR schedules.

The second of the Employer's remaining arguments is that regional arbitrators have held that the Postal Service may schedule PTRs for six days. The simple and most common answer to that argument is that regional arbitration awards do not bind national-level arbitrators. That response is

too facile. The quality of the parties' regional arbitrators demands that even national-level arbitrators should treat their opinions with respect. Moreover, regional awards can help to demonstrate the existence of a settled interpretation, provided that they are sufficiently clear, numerous, and long-standing.

In this case, however, the Postal Service's reliance on regional awards is misplaced. The 1985 Step 4 agreement obviously supersedes earlier regional awards. Negotiation of a separate National Agreement for the NALC in 1994 severely limits the force of post-1994 awards involving other unions. Even if the other unions' contracts retained the same language found in the current NALC contract, the parties are free to apply it differently. Those restrictions mean that only 1985-94 regional awards involving the APWU, and post-1985 regional awards involving the NALC are likely to be of any help in resolving this dispute.

There are few such awards in the record and most of those deal with other issues, e.g., H1T-3A-C 41312 (Postal Service Exhibit 13b), an APWU case decided by Arbitrator Dan Collins, which involved maximization of full-time employees rather than six-day schedules, and S4N 3W C 216590 (Postal Service Exhibit 14a), an NALC case decided by Arbitrator Edmund Schedler, Jr., which dealt with an employee sent home because she could not ride a bicycle. The only regional award within the relevant time frames that is directly on point is Postal Service Exhibit 14h, D94 N4 DC 00240335 (Nicholas Duda 2001). Arbitrator Duda denied a grievance complaining about several six-day PTR schedules. Apparently the Union's argument in that case was that the Employer continually worked the employees for more than 36 hours a week. In a very brief, conclusory opinion, the arbitrator found that the scheduling did not violate the Step 4 agreements cited by the Union, one of which was the Ventura agreement involved here. In passing, he simply said that the scheduling "has been consistent with those two Step 4 settlements." Whatever the merits of Arbitrator Duda's decision, it does not provide any reason for concluding that six-day PTR schedules are consistent with the Ventura agreement's construction of the National Agreement.

The Employer's third remaining argument is that both the APWU and NPMHU recognize the Employer's authority to schedule PTRs for six days a week. One authority for that argument is a 1984 Step 4 agreement between the Employer and the APWU. Even if one were to assume that the 1984 agreement represented the parties' views on this issue, the Postal Service's agreement to a contrary position in 1985 changes the situation dramatically. In 2000, the NPMHU amended its collective bargaining agreement to allow six-day PTR schedules. Rather than supporting the Postal Service's point, that agreement undercuts it by implying that the language had to be changed in order to allow the Employer to do what it claims it has always been able to do. Furthermore, as the Union strenuously argues, agreements made by other parties neither bind the NALC nor authoritatively interpret its National Agreement.

The Employer's final argument is that at least since 1985, its manuals have contained several references to six-day PTR schedules and that the NALC has not challenged those provisions. As the Union's brief emphasizes, those manuals apply to APWU and NPMHU employees as well as Letter Carriers. The Union would have no basis for challenging manual provisions that legitimately apply

to other employees, and no reason to challenge them once it had won the principle in the 1985 Step 4 agreement.

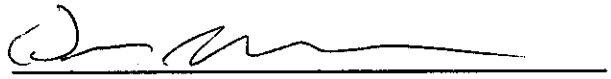
D. Conclusion and Remedy

I conclude that the Postal Service and the NALC interpreted their National Agreement in 1985 to prohibit permanent six-day PTR schedules and that nothing since has changed that interpretation. The grievance must therefore be sustained.

The Union wisely seeks a very limited remedy, namely that the Employer should be directed to repost the Meriden PTR assignments with a five-day schedule. That request is completely appropriate and will be granted.

AWARD

The Postal Service violated the National Agreement by posting two PTR assignments in Meriden, CT containing six-day schedules. The Employer is directed to repost the assignments with no more than a five-day schedule.



Dennis R. Nolan, Arbitrator and Mediator

December 27, 2002
Date