C-25914

REGULAR ARBITRATION PANEL

In the Matter of the Arbitration	)	Grievant: Class Action
Between	)	Post Office: Tulsa, Oklahoma
UNITED STATES POSTAL SERVICE	)	USPS Case: G01N-4G-C 04190349
And	)	NALC Case No.: 1358040291
NATIONAL ASSOCIATION OF LETTER CARRIERS UNION	)	

BEFORE: PETER J. CLARKE, Arbitrator

APPEARANCES:

For the U.S. Postal Service: Arthur Moore, Labor Relations Specialist

For the NALC: George Burlington, Local Business Agent

Place of Hearing: Tulsa, Oklahoma

Date of Hearing: February 11, 2005

Relevant Contract Provisions: Articles 3, 11.6 & 19, LMOU

Contract Year: 2001-2006

Type of Grievance: Contract

Award Summary:

The grievance is sustained. The Union was able to establish that the Postal Service failed to work casuals and part-time flexibles to the maximum extent possible before calling in a full-time regular carrier to work on her designated holiday. The carrier who worked on her designated holiday shall be paid back pay at a fifty percent (50%) premium of her regular straight time rate for each hour she worked on September 4, 2004.

PETER J. CLARKE
Arbitrator

ISSUE

Whether the Postal Service violated Article 11 and the LMOU when it scheduled a non-volunteer regular employee to work on her designated holiday even though PTF employees were scheduled to work on that day for less than 12 hours?

STATEMENT OF THE CASE

The hearing opened as scheduled on February 11, 2005 at 9:00 a.m. in the Tulsa, Oklahoma main facility. The parties provided a joint exhibit packet. Each party was afforded time for opening statements, direct and cross-examination of witnesses. The hearing was taped to ensure the accuracy of the record and for rendering this award. At the close of the hearing, the parties agreed to submit post-hearing briefs postmarked by March 11, 2005. All briefs were received by the deadline and the record was officially closed on March 11, 2005.

RELEVANT CONTRACT PROVISIONS

Based on the facts adduced at the hearing, the Arbitrator has determined that the relevant contract provisions are the following:

Article 3 entitled "Management Rights", provides

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;

...

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 11, entitled "Holidays, provides in Section 6 (Holiday Schedule):

A. The Employer will determine the number and categories of employees needed for holiday work and a schedule shall be posted as of the Tuesday preceding the service week in which the holiday falls.

B. As many full-time and part-time regular schedule employees as can be spared will be excused from duty on a holiday or day designated as their

holiday. Such employees will not be required to work on a holiday or day designated as their holiday unless all casuals and part-time flexibles are utilized to the maximum extent possible even if the payment of overtime is required, and unless all full-time and part-time regulars with the needed skills who wish to work on the holiday have been afforded an opportunity to do so. (Emphasis added).

Article 19 incorporates into the National Agreement, "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 the [National] Agreement."

The Joint Contract Administration Manual (JCAM) further explains the meaning of Article 11.6 by stating:

> The Intent of Article 11.6 is to permit the maximum number of full-time regular, full-time flexible and part-time regular employees to be off on the holiday should they desire not to work while preserving the right of employees who wish to work their holiday or designated holiday.
>
> Article 11.6B provides the scheduling procedure for holiday assignments. Keep in mind that Article 30, Section B.13 provides that "the method of selecting employees to work on a holiday" is a subject for discussion during the period of local implementation. The Local Memorandum of Understanding (LMOU) may contain a local "pecking order." In the absence of LMOU provisions or a past practice concerning holiday assignments, the following minimum pecking order should be followed....

A Local Memorandum of Understanding (LMOU) between Branch #1358 National Association of Letter Carriers and the United States Postal Service Tulsa contains the following provision:

ARTICLE 11-HOLIDAYS

Section 1. – Holiday Scheduling

The intent of this article is to excuse from duty as many full-time employees as possible on their designated holiday. Therefore, employees must be scheduled in the following sequence:

A. Casuals

B. Part time flexibles

C. Full time regular volunteers – by seniority regardless of status as NSD volunteer or day designated as holiday volunteer.

D. Full time regulars who did not volunteer on what would otherwise be their non-scheduled day, by inverse seniority.

E. All other non volunteer full time regulars, by inverse seniority.

(Emphasis added).

The method for selection of employees to work on a designated holiday is for craft employees wishing to volunteer to work a holiday to place their name on a notice posted on official letter carrier unit bulletin boards. This notice will be posted 14 days prior to a holiday and will remain posted for 7 days. Craft employees volunteering will be selected by seniority. Non-volunteer craft employees will be selected by juniority. The overtime desired list WILL NOT be the determining factor in selecting craft employees for holiday scheduling.

RELEVANT FACTS

On September 4, 2004, Julie Webb, a Full-Time Regular (FTR) Letter Carrier at the R.W. Jenkins Postal facility in Tulsa, Oklahoma was forced to work on what was designated as her Labor Day holiday. Carrier Webb was a non-volunteer to work on her scheduled holidays and was the most junior FTR at her facility. Carrier Webb worked over eight hours on September 4, 2004 at straight time. Carrier Webb was the only FTR forced to work on her designated holiday. The Union filed a grievance on her behalf claiming a violation of Article 11.6 of the National Agreement. The grievance was denied at the lower grievance levels and was appealed to arbitration.

DISCUSSION AND OPINION[1]

Union's Position

The Union argues that although the Postal Service has certain rights under Article 3 to determine, among other things, the methods, means, and personnel to conduct its operations, it nevertheless violated Article 11.6 when it forced Carrier Webb to work on her designated holiday. The Union cites to Article 11.6B which requires the Postal Service to spare as many FTRs and part-time regulars (PTR) from having to work on a holiday or day designated as a holiday. To that end, Article 11.6B also requires the Postal Service to utilize casuals and part-

[1] Though perhaps not discussed, the Arbitrator considered all of the parties' contentions and evidence.

time flexible (PTF) employees to the maximum extent possible, even if it has to pay overtime, before scheduling a FTR or PTR to work. The Union contends that in this case the Postal Service did not use PTFs to the maximum extent possible. Instead of working certain PTFs up to twelve hours, those PTFs were not scheduled for even eight hours. The failure to work the PTFs to the maximum extent possible is a violation of the "pecking order" provided by the LMOU. The Union also implies that the Postal Service merely wanted to avoid paying overtime because when a FTR or PTR is scheduled to work on a designated holiday, she is paid at straight time, not overtime.

Postal Service's Position

The Postal Service counters that the Union has failed to carry its burden of proof to establish a contract violation. In fact, the Union admitted that Article 3 affords it (the Postal Service) the right to determine and set the employees' schedule. It argues in its brief that the Union's witnesses could not point out where or how the Postal Service violated the National Agreement. The Postal Service adds that there is no requirement to work PTFs for 12 hours prior to scheduling a non-volunteer.

Analysis

It is undisputed that Carrier Webb was the most junior FTR. It is also undisputed that she was the only FTR who had to work on her designated holiday for Labor Day and that she did work on September 4, 2004 and was paid for 8.12 hours. What is disputed is the application of Article 11.6B's requirement that the Postal Service utilize casual and part-time flexible employees to the maximum extent possible before scheduling FTRs such as Carrier Webb. The Arbitrator is well aware that as a regional arbitrator he is powerless to interpret the meaning of Article 11.6B, and, to the extent determination of this grievance requires that, he must deny this grievance. Having said that, after careful consideration the Arbitrator is of the opinion that no interpretation of Article 11.6B is required to render a decision. Furthermore, the Arbitrator sustains the grievance for the reasons stated below.

Article 11.6B's plain language mandates that the Postal Service utilize casuals and part-time flexibles to the maximum extent possible before scheduling FTRs and PTRs. A determination of whether casuals and PTFs were utilized to the maximum extent possible is done on a case by case basis and is fact sensitive. The Arbitrator does not agree with the Union that "to the maximum extent possible" means that casuals and PTFs must work twelve hours before a

non-volunteer is forced to work on her designated holiday. The word "maximum" simply means utmost, most, greatest, highest, among other things. Black's Law Dictionary (1991).

Arbitrator Mittenthal in grievance H4N-NA-C 21/H4C-NA-C-23 (National Award) decided on January 19, 1987, found an Article 11.6B violation when the Postal Service failed to follow the "pecking order" when it required full-timed regular employees to work on their designated holidays. Specifically, Arbitrator Mittenthal held that,

> In preparing a holiday schedule, Management must use (1) "all casuals and part-time flexibles ..." and (2) "all full-time and part-time regulars ... who wish to work on the holiday ..." before turning to any regular non-volunteer to work. The parties gave the regular non-volunteer a right, vis-à-vis others, to time off on his holiday (or designated holiday). That right can be disregarded, according to Section 6B, only if Management has scheduled all qualified people in groups (1) and (2) and requires still more manpower for the holiday (or designated holiday).
>
> More importantly, the "pecking order" described here is a mandatory procedure. Management must use non-protected employees (i.e., casuals, part-time flexibles, and regular volunteers) before protected employees (i.e., regular non-volunteers) during the holiday period. There are no exceptions. (Emphasis added).

On July 31, 2000, Arbitrator Raymond Britton in K94N-4K-C 99242329 cited by the Union, sustained the grievance and held that the Postal Service violated Article 11.6B when it failed to schedule all carriers to the maximum before scheduling the grievant. The evidence presented in that case revealed that the two PTFs who worked on the relevant day, worked 8 hours and one unit and 6.60 hours, respectfully, while the grievant worked 8 hours. The PTF who worked 6.60 hours actually came in to work at 9:00 a.m. Arbitrator Britton opined that, "[t]here were personnel who were available to do the work done by the grievant. One PTF did not come in to work until 9:00 o'clock a.m. Management is required to maximize the personnel available to the extent of using overtime before it makes an employee work his holiday. Here, this was not done."

Arbitrator Louis M. Zigman in grievances F90N-4F-C95035997/F90N-4F-C95036001 also found in favor of the Union regarding an Article 11.6B violation involving letter carriers. In those grievances, Arbitrator Zigman considered an argument by the Union that the Postal Service's failure to maximize the casuals and PTFs before forcing the grievants—letter carriers—to work on Christmas and New Years eve violated Article 11.6B. While he agreed with the Union, Arbitrator Zigman did hold that, "there is no requirement that the Service must

schedule the casuals and PTFs for up to twelve or even ten hours prior to requiring/scheduling the full-time carriers to work on holidays." He added, however, "one must apply a general standard of reasonableness" and in light of all the facts known to management at the time." (quoting Arbitrators Charlotte Gold in grievance W7N-5E-C 30843).

In grievance B94N-4B-C 98069640 cited by the Union, Arbitrator Roger E. Maher considered an Article 11.6B argument by the Union. Arbitrator Maher sustained the grievance when he concluded that the Postal Service did not "utilize PTFs to the maximum extent possible regardless of the necessity of overtime" before scheduling the grievant to work on a designated holiday. While acknowledging that the term "maximum extent" was not defined in the LMOU and that it should not be inferred that it meant in all instances PTFs should be worked the maximum twelve hours per day, Arbitrator Maher nevertheless found a violation by reviewing the time records of the PTFs who did work on the relevant day. He defined "maximum extent" as "the greatest capacity or amount possible ... or an upper limit allowed or allowable by law ...." Based on that definition, Arbitrator Maher concluded that the several PTFs who worked between 8.05 hours and 9.63 hours demonstrated that those PTFs were not assigned the upper limit allowable by the contract.

Finally, in grievance E90N-4E-C95043829, Arbitrator Donald E. Olson, found an Article 11.6B violation when he held that the Postal Service failed to utilize twelve PTFs for more than eight hours on the relevant day before forcing three full-time regular non-volunteer letter carriers to work on their designated holiday.

The arbitration awards cited by the Postal Service were either factually distinguishable or were not deemed persuasive by the Arbitrator. *See* F98N-4F-C01121116 (arbitrator Olson, January 14, 2002); B98N4NC00208056 (Arbitrator Garry Wooters, October 24, 2001); F94N-4F-C 99067232 (Arbitrator Gary Axon, December 12, 200); A-94N-4A-C 97018192 (Arbitrator Kathleen Devine, August 14, 1997); J90N-4J-C95030527 (Arbitrator Thomas Erbs, September 7, 1995); and H7N-4A-C 19525 (Step 4, April 8, 1992).

In the instant case, the evidence presented by the Union is similar to the facts of the grievances decided by Arbitrators Britton and Maher, who both reviewed the time records of the casuals and PTFs who worked on the designated holidays to determine if they were utilized to the "maximum extent." The Union in this case, proffered the daily schedules of the PTFs who worked on September 4, 2004. *See* JX2 at 33. The schedule revealed that three PTF carriers

were scheduled at 9:30 a.m., and a fourth was scheduled for 8:00 a.m. but did not begin work until approximately 9:30 a.m. The three carriers scheduled for 9:30 a.m. worked for less than eight hours on September 4, 2004. The work schedule was made out on the Tuesday preceding the work week scheduled, therefore, as the Union argued, the Postal Service never intended to schedule those carriers for more than an eight hour day. In fact, none of the PTFs who worked that day were scheduled for even ten hours of work. The Arbitrator is convinced that if those PTFs had worked for more than eight hours they could have covered the office hours worked by Carrier Webb and that her hours actually spent delivering the mail could have been covered by other employees.[2]

Although the Postal Services argued that it is not mandated to work a PTF for twelve or even ten hours before forcing a non-volunteer regular employee to work, it must adhere to Article 11.6B's requirement to "maximize" the PTFs before forcing Carrier Webb to work on her designated holiday.[3] It is true that scheduling is not an exact science and that a myriad of factors are considered when drafting a work schedule. It is equally true that the data that is available when drafting a schedule requiring a single non-volunteer FTR to work, could just as easily created a schedule that would not have required her to work. That a single non-volunteer FTR had to work on September 4, 2004 is indicative that the workflow was not so great to force numerous employees to work on their holiday or designated holiday. It seems logical and reasonable then that with a little more tweaking, the Postal Service could have maximized the PTFs to ensure that carrier Webb was not forced to work. Nothing in the testimony from the Postal Service's witness, Nick Dodson, suggested otherwise.[4]

While certainly not concluding that the Postal Service must work casuals or PTFs up to twelve hours before a non-volunteer FTR is forced to work on her designated holiday, the Arbitrator reminds the Postal Service that "maximize" means just that. The facts of this case did little to establish that the Postal Service reasonably maximized the PTFs before forcing carrier Webb to work on September 4, 2004. The Arbitrator will draw no conclusion regarding whether the Postal Service attempted to avoid paying additional overtime, but obviously that is always a

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[2] The Union provided evidence that a PTF carrier who was scheduled to work auxiliary could have worked the hours in the street Carrier Webb worked.

[3] Article 11.6B speaks about casuals and PTFs; however, the Tulsa facility in question did not have casual employees during the relevant time-period. The first category of employees on the "pecking order" would therefore be PTF employees.

concern in these types of grievances. Instead, he simply holds that the Union carried its burden of proof to establish that the Postal Service failed to maximize PTFs before forcing Carrier Webb to work on her designated holiday.

AWARD

For the foregoing reasons, the grievance is sustained. Carrier Webb shall be paid back pay at a fifty percent (50%) premium of her regular straight time rate for each hour she worked on September 4, 2004.

April 25, 2005

PETER J. CLARKE
Arbitrator

[4] Mr. Dodson's testimony was self serving and did nothing to aid the Arbitrator in determining why the PTFs were not or could not be maximized.