

Office, and McKelvey was a non-ODL employee. December 19 was Lemus' and McKelvey's regular scheduled day of work, but it was Baik's regularly scheduled day off. It is undisputed McKelvey worked a total of 10 hours 57 units on December 19, of which 2 hours 57 units were overtime for which she was paid at the overtime rate of 1 ½. Grievant had begun her assigned route on December 19 at 7:50 AM. December 19 was the Monday before Christmas that week, which is one of the busiest times of Postal Service operations.

On April 12, 2006 the Step B team issued a decision resolving the grievance as to Baik and Lemus, but impasse on McKelvey. That Step B decision stated in pertinent part:

ISSUE:

Did Management violate Article 8.5. G of the National Agreement, when they did not maximize Mr. Baik and Lemus up to twelve (12) hour on December 19,2005 and if so what shall the remedy be?

DECISION:

The Dispute Resolution Team has RESOLVED and IMPASSE this grievance based on the information and documentation provided by the parties. It has been determined that Management did violate the National Agreement, by not working Mr. Baik and Lemus up to twelve (12) hours on the day in question. Management is directed to pay Mr. Baik 1 hour 20 units and Lemus 1 hour 46 units at the regular rate of overtime pay. Management has 14 days from the date of this decision to make the pay adjustments. No other remedy is issued.

IMPASSE:

The Step B Team has declared an impasse on the additional 125% at the straight time rate for all hours worked over (8) eight on December 19,2005, by Debbie McKelvey who worked 10 hours and 57 units. The National Business Agent may appeal this case to Arbitration within 14 days from the date of this decision.

EXPLANATION:

On December 17, 2005 Management scheduled Baik to work his non-schedule day, which was December 19,2005. He was scheduled to report to work at 7:30 a.m., he did report to work as scheduled and worked a total of 10 hours and 20 units for the day. Mr. Lemus was also scheduled on Saturday to report at 10:30 a.m., but was asked to report 2 hours early, he reported to work at 8:24 and worked a total of 10 hours and 54 units. This grievance was filed because both employees were not max[omized] to twelve

(12) hours.

The Union contends that Management did not intent to maximize all overtime desired list employees to 12 [hours] in accordance with article 8 section 5.G of the National Agreement, and failed to schedule both employees accordingly, so they would be available to work twelve hours on the day in question, and because there is no penalty overtime paid in the month of December, Management should have worked the overtime desired list employees up to twelve, before using a non-overtime desired list employee.

Management contends that when they scheduled both overtime desired list employees to work their non-schedule day it did not seem probable that the unit would need to be maximized. It was not until around 9:00 a.m. on the overtime day that it was determined by Management that they would not meet[their] up-time and the unit would have to be maximized to get the work load out.

After carefully reviewing all the facts and documentation in this case, the Team agreed, that Management did violate the National Agreement Article 8.5.G of the JCAM states that:

8.5.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 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.

However, the Employer is not required to utilize employees on the "Overtime Desired" list at the penalty overtime rate if qualified , employees on the "Overtime Desired" list who are not yet entitled to penalty overtime are available for the overtime assignment

Because, there is no penalty overtime pay in the month of December the Team agrees that Management should have maximized the grievants to 12 twelve hours before requiring an employee who was not on the overtime desired list to work the overtime. The Team also agrees that Management must still abide by the provisions of article (8) eight during the month of December.

Keven Lerch is local NALC President in Rockville. He testified in the recent past years there have been hundreds of similar instances grieved regarding Article 8. 5. G violations like the

one at issue between these same parties in which settlements in the Union's favor were reached at Formal Step A, or resolved in the Union's favor by Step B Decisions, or similarly resolved in pre-arbitration resolutions. He stated those resolutions provided additional payments beginning at 100% in 2003 and thereafter rising to 125% to non-ODL employees required to work overtime when ODL employees were available. He explained that occurred whether or not the non-ODL employees were working their regular assignments. He stated the initial 100% payments were by way of administrative leave, which was later changed in 2004 to monetary pay after the Postal Service said it was no longer able to use administrative leave in that manner. He identified hundreds of pages of such documents setting forth those resolutions.(UX-2)

The following are examples of the Step B decisions involving Article 8.5.G violations, in which management was ordered to pay additional 125% at their base rate to non-ODL carriers required to perform overtime while ODL carriers were available : K01N-4K-C04057730 - Step B — Decision issued 1/21/04- Twelve non-ODL employees involved- Explanation— “On 12/04/03 non-ODL Carriers worked overtime off their assignments and an ODL Carrier did not work his non-scheduled day.”

— “USPS Number 50-2004-17”- Step B decision issued 5/24/04- Explanation- One regular non-ODL carrier worked 48 units overtime on 3/20/04 after having requested assistance and being given less assistance than requested and being told to complete her assignment. “After carefully reviewing all the facts and documentation in this case, the Team agreed Management violated the National Agreement in this instance....the assistance should have been provided to keep the non-ODL carrier out of an overtime status.”

The following are examples¹ from of pre-arbitration resolutions involving Article 8.5.G violations, in which management agreed to pay an additional 125% at their base rate to non-ODL carriers required to perform overtime while ODL carriers were available:

K01N-4K-C 06059355

“As a result of our discussion this date [6/5/06], it is mutually agreed that the above cited grievance is resolved in accordance with the following:

The B-Team has already agreed that management violated Article 8 Section 5G of the Working Agreement on December 27, 2005 and paid carrier Baik 2. 75 hours of overtime. However, the B Team couldn't come to a resolve on the non-ODL carriers, McKelvey and Bodmer who were forced to work overtime on December 27 and was a part of this grievance. Therefore, to resolve this grievance at the lowest level possible, McKelvey will be compensated an additional \$48.00 (125% at 1.72 hrs at straight time rate) and Bodmer will be compensated an additional \$26.00 (125% of . 93 hours at straight time rate) for the overtime they were forced to work on December 27, 2005. Carrier Baik on the ODL was available to work the overtime.

KOIN-4K-C 06051973

As a result of our discussion this date [5-30-06], it is mutually agreed that the above cited grievance is resolved in accordance with the following:

To resolve this grievance at the lowest level possible, grievant will be compensated an additional 75% (in this case \$17.00) over the 50% that the B-Team has already agreed upon. Grievant was forced to work overtime (1.04 hrs) on December 3, 2005, when there were ODL carriers available to carry the mail.

In addition, UX-2 contains over two dozen Formal Step A Resolutions between 2004 and 2005 providing additional payments of 125% for non-ODL carriers working overtime off their assignments in similar circumstances to those at issue here. On January 27, Lerch and Management representative Jenny Thompson reached a Formal Step A Resolution involving an Article 8, Section 5 G violation occurring on December 31, 2004 as follows: “Non-ODL employee Carolyn King is hereby paid an additional 125% for 75 units on 12-31-04. ODL

¹The first of these pre-arbitration resolution involves McKelvey receiving an additional 125% payment for overtime occurring on December 27, 2005, when ODL carrier Baik was not maximized.

employee J. Moral is hereby paid an additional 75 units of overtime on 12-31-04.”

Lerch further testified Step B decisions are precedent setting for the installation involved citing page 15-8 of the Joint Contract Administration Manual (JCAM). That provision of the JCAM provides:

A Step B decision establishes precedent only in the installation from which the grievance arose. For this purpose, precedent means that the decision is relied upon in dealing with subsequent similar cases to avoid the repetition of disputes on similar issues that have been previously decided in that installation.

Lerch was questioned on cross examination about a recent arbitration decision dated July 10, 2006 between the parties issued by Arbitrator Joel Trosch.(K01N--4K-C 06027918) That decision specifically involved Article 8, Section 5. G. 2. limiting management from working ODL carriers to no more than 12 hours a day or 60 hours a service week. That provision was further addressed by the parties in a 1988 Memorandum of Understanding providing an additional 50% premium paid to ODL carriers working over those time limits. Trosch’s decision involved denying the Union’s request for an additional monetary payment above the 50% provided by the MOU because of management’s alleged “egregious” record of continuing to work ODL carriers above the 12 hours a day 60 hours a service week limitations. Trosch ruled that MOU sets the monetary limit for such violations.

Dominick Lignelle is a regular carrier on the Rockville ODL. He has held various local Union positions for many years and is currently a Shop Steward and Financial Secretary. He handled the grievance at informal and formal Step A and presented the Step B appeal for the Union. He stated the Step B team decision found ODLs Baik and Lemus did not work 12 hours on the day in question even though the B Team found them to be available to do so in violation

of Article 8, Section 5G. He testified about the Post Office's "game plan" for the December 19, 2005 showing management's plan for the distribution of work by use of the carriers. He understood the game plan is made up the day before, or in this case Saturday December 17. That game plan had no unscheduled sick leave use. Three routes (7, 50 and 54) were vacant assignments spilt into 4 to 5 pieces because of known short staffing that was covered by two ODL carriers. He stated that ODL were scheduled to come in early from 6 to 6:30 AM on December 19; however, Baik was came in at 7:30 AM and Lemus came in at 8:24 AM. He stated that Baik and Lemus could have scheduled performed work earlier on the three vacant assignments. He said Lemus could have come in at 7 AM and cased one of the two vacant assignments and the ODL carrier who actually performed such casing could have provided later street assistance for McKelvey. He stated the same could have applied to Baik coming in earlier. He explained both Baik and Lemus had no assigned route schedules that day. He pointed out all that information was available to supervision on December 17. The game plan showed McKelvey was scheduled to have 1 ½ hour overtime on December 19. He recalled McKelvey was not given all the assistance she requested that day on form 3966.

Lignelle stated the last Monday of Christmas week is traditionally the heaviest parcel delivery date of the year. He added that Mondays are normally heavy. Those two facts , Lignelle stressed, were enough for management to fully utilize ODLs when making up the schedule on December 17. He noted either Baik or Lemus could have come in earlier to deliver McKelvey's parcels, which were set up early that morning for delivery. He emphasized management in December still has to maximize its use of ODLs and does not have to pay a penalty for over ODL use that month per Article 8.5.G.2. He stated the violation found by Step B was management's

failure to maximize Baik and Lemus to 12 hours on December 19. He explained management should have made every effort to bring in earlier the two ODLs to perform work related to McKelvey's assignment or to free up other ODLs to do so thereby avoiding McKelvey performing overtime. If management had scheduled the two ODLs at 6:30 AM and those two ODLs were unable to do so or came in later there might not be a violation of Article 8 because management tried to maximize its ODLs, but was unable to do so for reasons beyond its control. The records reflect Lemus worked a truck run on December 19.

Lignelle stated management never argued lateness or its closing time as a defense in the earlier grievance steps. He stated the Rockville station did not have a "window of operations." He stated the majority of ODLs came to work around 6:30 AM on December 19 and worked 12 hours. The record (JX-2, page 25) contains a written statement by Lemus dated January 4, 2005, which Lignelle took in processing the grievance stating: On 12-17-05 I Sergio Lemus talk to 204 b Julie Hsueh about canceling my leave for 12-19-05 at the same time [she] told me that the unit 20850 probably was going to be max to 12:00 hours but still she did not schedule me early to comply with the contract."

Supervisor of Customer Services Lennie Jones testified that December 19 had excessive letter volume and there were 4 vacant routes that had to be split up to be covered. He said management knew it would be a particularly rough day to cover all the work. He stated he found out on December 19 he had to maximize the work at around 7 to 7:30 AM after all the employees were present. He said McKelvey came in at 7:34 AM and was given 1.75 units auxiliary street assistance by ODL Kong. Jones stated it was management's intent to max out the unit that day. He said Lemus came in at 8:24 AM, but was on a truck collection run, which is performed by

schedule that day and could not provide McKelvey assistance. Jones said Baik could not have helped McKelvey because he had a difficult route to deliver leaving the Post Office at 12:27 PM and earlier casing that route. It was his opinion McKelvey was not entitled to an additional 125% because she was given assistance and she spent time beyond what he believed was necessary to complete her assignment.

Jones further testified only 3 ODL carriers began after 6:30 AM on December 19. He stated he knew of the need to fill the splits in advance of December 19. He stated carrier Farooq called in sick on December 19. However, the record shows Farooq was off December 19 on scheduled sick leave. He stated ODL could work overtime before or after their regular scheduled time. He said he did not make up the schedule for the work week in question.

Station Manager Jenny Thompson testified she did not recall maximizing the unit until around 9:00 AM on December 19. She acknowledged it could have been maximized in advance if they know the mail demands it. She stated on Saturday employees could be told to come in early on Monday. She said normally the last dispatch is due back at the station at 7:15 PM and at 7:30 PM the last supervisor leaves the station. According to Thompson, her station has window of operations closes around 6 PM if no mail is available.

ISSUE

The parties stipulated the issue in the present case is whether the Postal Service violated Article 8.5.G when it assigned and worked Debbie McKelvey overtime on December 19, 2005; and, if so, what is the appropriate remedy?

UNION POSITION

The grievance should be sustained. The Postal Service violated Article 8.5.G. by working

McKelvey 10.57 hours on December 19 by not maximizing available ODL Baik and Lemus. The remedy of 125 % of her overtime is appropriate because of management's history of continuous similar violations. The Step B decision decided there was an overtime violation under Article 8.5.G. and paid ODL Baik and Lemus for overtime not received. The Step B impasse was limited to the additional 125% at straight time rate for time McKelvey worked over 8 hours December 19. That narrow issue is the only issue left to resolve here.

There is an extensive history of management's continuous Article 8.5.G overtime violations, many of which are similar to the present case. That includes a June 6, 2006, pre-arbitration settlement involving McKelvey's overtime on December 27, 2005. There have been a series of progressive remedies reaching 125% of the straight time rate agreed to locally to pay non-ODL carriers to stop these violations. Those resolutions have been at the local level, Step B and at pre-arbitration. Therefore, it is improper for management to seek to stop such payments. The Union's requested remedy is progressive and appropriate due to the history of these violations. It is within the Arbitrator's authority to fashion such remedies to enforce compliance with the Agreement.

The Trosch decision relied upon by the Postal Service is not applicable. It involved ODL carriers working over the 12 hour a day 60 hours a week limitations. The Snow decision on that matter also involves a related ODL penalty pay matter and is not applicable. The present case involves non-ODL working overtime in violation of Article 8.5.G and the 1984 MOU regarding Article 8 and the 1988 MOU involving overtime. The 1988 MOU is limited by its terms and not the same as the Snow decision. Mittenthal's decision (H4N-NA-C 21, which is MX-1) states the "letter carrier" paragraph is an enforceable obligation.

Management's simultaneous scheduling is without merit. Lignelli testified Baik and Lemus, who were available under the Step B decision, could have added to the overall pool of overtime and come in earlier to help with casing to free up other ODLs to have time to provide street relief later in the day. All the other ODLs were brought in earlier than Baik and Lemus. Management knew in advance this was going to be a heavy work day, it was short carriers and it needed to maximize the unit. It could have planned and scheduled its employees better, but failed to do so resulting in improperly using McKelvey on overtime. Its management's responsibility under Article 3 and 19 and related regulations to properly staff offices. It knew on the prior Saturday these demands. Contrary to Jones testimony, Farooq was off on scheduled sick leave. There were no employees out that day for unscheduled sick leave. Thompson's statement that the latest carriers could work was 7:30 PM, which she called the end of the office's operational window. But the record shows there is no fixed window of operations at this office. Most of the ODL were scheduled in at 6:30 AM, an hour before their tour. That makes 13 hours of operations at least for application of Article 8.5.G. The Union has never been notified of any window of operation.

McKelvey as a non-ODL employee is entitled to time off under the terms of the Agreement. It is not enough she was paid 1 ½ times her regular rate for the overtime. The parties have recognized this before by applying a 125% penalty payment. It is reasonable to do so here. In support of its position, the Union cites 14 arbitration decisions, including C01N-4C-C03049992 (H. Graham, October 13, 2003), C94N-4C-C99254957.

POSTAL SERVICE POSITION

The Postal Service contends the grievance should be denied because the Union failed to

establish a violation of Article 8 or the applicable MOU at page 162 of the Agreement. The 125% penalty the Union seeks is unfounded and contrary to that MOU.

McKelvey was given 2 hours auxiliary street assistance by ODL carrier Kong. ODLs Lemus and Baik could not have provided her any assistance. Lemus was assigned a truck route and Baik struggled on his assigned route after reporting at 7:50 AM and not leaving to deliver until 12:47 PM. Management had maxed out its ODL employees. The Union failed to show otherwise. The MOU sets 50% as the exclusive remedy for violations of Article 8. 5. G. This is supported by the Trosch decision. There is no contractual 125% remedy. Mittenthal found (H4C-NA-C 30) the "window of operation" justifies simultaneous scheduling of ODL and non-ODL before ODL are maxed out. The window of operations here ends at 7:10 PM. Mittenthal said such scheduling must be based on valid and legitimate operational reasons. Arrons said management can go off ODL for good cause. That is stated in paragraph 2 of the MOU at pages 160, 161 regarding insufficient ODL carriers needed to meet overtime needs.

McKelvey was paid overtime. The other carriers were paid. It is inappropriate to pay McKelvey more. This is not strictly a window of operation situation, but it does play a role in the scheduling on the day in question. No ODL were available to perform the overtime done by McKelvey. Management had maxed out the unit early that morning. The Union failed to show how any ODL could have worked the overtime within the rule of reason. Paragraph 2 of the Article 8 MOU recognizes management can set a deadline for getting the mail out, which may result in some non-ODLs, like McKelvey, working overtime on her assignment. McKelvey did not testify nor was it shown how she was harmed by management. In support of its position, the Postal Service also cited A01N-4A-C06040012 (Arbitrator H. Gudenberg, 2006), BO 1N-4B-C

02247724 (Roger Maher, 2005), A98N-4C- 01062259 (K. Devine, 2001), A90N-4A-C
94042668 and C94048740 (Snow, 1998).

DISCUSSION AND ANALYSIS

Article 8.5. G clearly provides that non-ODL carriers can be required to work overtime only if all available ODL carriers have worked 12 hours in a day or 60 hours in a week. The April 12, 2006 Step B Decision found management on December 19, 2005 violated Article 8.5.G. by not working ODLs Baik and Lemus 12 hours when they were available to do so. That decision directed management to pay both ODLs for the difference between what they worked and 12 hours. For Baik that resulted in pay at the overtime rate for 1 hour 20 units and for Lemus it was 1 hour and 46 units. Under Article 15, that decision and its findings are binding here. The Step B decision imposed as to the 125% at straight time rate remedy sought by the Union for non-ODL McKelvey, who worked 2 hours and 57 units of overtime that day on her assigned route. It is only that remedial matter which is to be decided here.

Therefore, based upon the Step B decision, it has already been decided management violated Article 8.5.G. by not maximizing to 12 hours ODL carriers Baik and Lemus, who were found therein available to perform overtime on December 19. The net result of that violation of not using the two available ODLs was management's having non-ODL McKelvey perform 2 hours and 57 units overtime. This record reflects management knew or should have known on December 17, when making out its operation/manpower "game plan" for December 19, that Monday, December 19 of Christmas week would necessitate maximizing out its ODL carriers to 12 hours that day. With the exception of Baik and Lemus, most of the ODL carriers began work

December 19 at 6:30 AM. However, Management scheduled Baik to report to work at 7:30 AM. and only worked a total of 10 hours and 20 units for the day. Mr. Lemus was asked to report at 8:24 AM and worked a total of 10 hours and 54 units. Had Baik and Lemus been maximized to 12 hours by being required to report earlier like the other ODLs, it is reasonable to conclude there would have been no need for McKelvey to work overtime. The record reflects Management could have used that extra ODL help case McKelvey's route or delivery her parcels. Management knew of McKelvey's request for assistance on her route, but it only provided a portion of that request resulting in her performing overtime on December 19.

The critical issue is what is the appropriate remedy for management's violation of Article 8.5.G by use of non-ODL McKelvey to perform overtime, when the two ODLs were available. There is abundant evidence in the record of a history of management in the last few years frequently violating Article 8.5.G by not maximizing or utilizing its ODLs to 12 hours a day or 60 hours a week before using non-ODLS for overtime. Management has acknowledged those violations by agreeing to resolve such dispute at numerous Step A and in pre-arbitration resolution agreement by initially paying non-ODL carriers initially 100% of their straight service rate .That payment rose to 125% in 2004.

There have been two pre-arbitration resolutions in which management agreed to pay 125% to no-ODLs working overtime in violation of Article 8.5.G when ODL carriers were available. On June 5, 2006, the parties in a pre-arbitration resolution agreed management should pay McKelvey and another non-ODL carrier 125% at their straight time rate for overtime performed on December 27, 2005 (eight days after the time in dispute here) based upon a B Team decision in which it was found management violated Article 8. 5.G. by not maximizing

ODL carrier Baik 2. 75 hours of overtime. As set forth above, there are two binding Step B decisions reaching the same result under similar circumstances.

Based upon the above circumstances, the appropriate remedy in this case is for management to pay McKelvey at the rate of 125% of her straight time for the 2 hours and 57 units of overtime she worked on December 17 while two ODLs were available to perform such overtime.

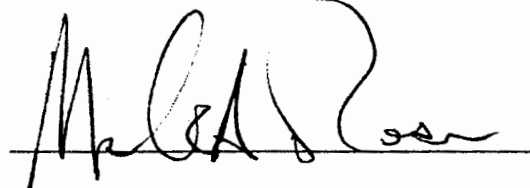
This is not a case in which ODL overuse penalty is involved as it was in Arbitrator Torsch's decision involving these parties. In fact, this case has nothing to do with Article 8.5.G.2 or the Mittenthal and Snow decisions relied upon by the Postal Service, or the MOU's involving penalty pay for ODLs. This case pertains only to management's violation of Article 8.5.G by improperly using a non-ODL to perform overtime, when ODL carriers were available. Moreover, as the Step B decision noted "Because, there is no penalty overtime pay [for ODLs under Article 8.5.G.2] in the month of December the Team agrees that Management should have maximized the grievants to 12 twelve hours before requiring an employee who was not on the overtime desired list to work the overtime. The Team also agrees that Management must still abide by the provisions of Article (8) eight during the month of December."

The other decisions relied upon by the postal Service in this case are not applicable here. Arbitrator Gudenberg's decision denying similar relief was based, in large part, upon the Union's not showing ODLs were available. However, in the present case that matter was decided to exist here in the Step B decision below. The decisions by Maher and Devine involve use of ODLs within particular Post Offices' "window of operation", which is not a factor in this case for the reasons discussed above. The Postal Service has acknowledged as much in its brief.

AWARD

Based upon the foregoing, the appropriate remedy is that management shall pay McKelvey 2 hours and 57 units of overtime she worked on December 17 at the rate of 125% of her straight time service rate.

DECIDED: August 31, 2006

A handwritten signature in black ink, appearing to read "Mark A. Rosen", is written over a horizontal line.

Mark A. Rosen, Arbitrator