

Regular Arbitration Panel

In the Matter of Arbitration	Grievant: Class Action
Between	Post Office: Fredericksburg, VA
United States Postal Service	USPS Case No. K01N-4K-C 06190725
and	Union Case No. F2706
National Association of Letter Carriers	DRT No. 13-044088

Before: Harry Graham

Appearances:

For the U.S. Postal Service: Frank K. King, Sr.

For the Union: Donald H. Huber

Date of Hearing: 10/26/07, Post-hearing briefs exchanged 12/14/07

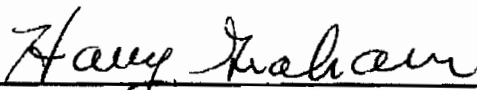
Place of Hearing: Fredericksburg, VA.

Date of Award: 1/4/08, MOU pp. 160-161

Relevant Contract Provisions: Article 8

Contract year: 2001-2006

Award summary: The grievance is sustained. Details of the remedy will be found in the body of the award.



Harry Graham
Arbitrator

INTRODUCTION: Pursuant to the procedures of the parties a hearing was held in this matter before Harry Graham. At that hearing the parties were provided complete opportunity to present testimony and evidence. Post-hearing briefs were submitted by both parties. They were exchanged by the Arbitrator on December 14, 2007 and the record was closed.

ISSUE: At the hearing the parties agreed upon the issue in dispute between them. That issue is:

Did Management violate Articles 8.5c2a, 8.5g and the Letter Carrier Paragraph when it forced work-assignment only carrier M. Fast to work mandatory overtime on his non-scheduled day and work-assignment Carriers C. MacGregor and C. Lance to work mandatory overtime on routes other than their own on 6/15/06 and work-assignment only Carrier T. Macleay to work mandatory overtime on a route other than her own on 6/16/06 prior to using all available ODL and PTF Carriers to their maximum extent? If so, what shall the remedy be?

BACKGROUND: The parties are in agreement over the events giving rise to this proceeding. On June 15, 2006 the Employer required work-assignment carrier Mark Fast to work 9.41 hours of overtime on his non-scheduled day. On that date as well Carrier C. Macgregor was required to work .65 hours of overtime. Like Mr. Fast, Macgregor is a work-assignment carrier. Carrier C. Lance, also a work-assignment carrier, was required to work .64 hours of overtime on June 15, 2006. Macgregor's route is C-25. Lance's route is C-30. Both were assigned to work on route C-14. On June 16, 2006 Carrier T. Macleay was assigned to work 2.05 hours on route C-15. As are her colleagues. Ms. Macleay is a work-assignment carrier. She carries route C-28. The Union felt that the assignments of Lance, Macgregor and Macleay violated the Agreement. A grievance was filed to protest

those assignments. That grievance was not resolved in the procedure of the parties and they agree it is properly before the Arbitrator for determination on its merits.

POSITION OF THE UNION: The Union points out that on June 15, 2006 there were 12 Carriers on the Overtime Desired List (ODL) who had not worked 12 hours. Cumulating the hours they had worked on that date shows that they collectively had 21.65 hours available for work. On June 16, 2006 a similar situation existed. There were four carriers on the ODL who had not reached a 12 hour work day. Total hours available from this group were 7.73. Additionally, PTF Tosh had worked 10.36 hours on June 16, 2006. Thus, Tosh had 1.14 hours available to work. As is seen from the undisputed facts, carriers on the ODL plus a PTF, Tosh, were available for work. They were not assigned. That they were not assigned overtime violates the Agreement according to the Union.

At Article 8 the Agreement deals with overtime, It provides that employees who desire to work overtime may sign-up on either the Overtime Desired list or the Work Assignment list. Thereupon, when overtime is required, employees will be selected from the overtime desired list. (Sec. 8.5.C.2.a).

The Agreement deals with situations in which the overtime desired list may not generate enough employees to work. At Section 8.5.D it permits the Employer to assign non-ODL employees to overtime on a rotating basis with the first assignment being given to the junior employee.

At Section 8.5.G the Agreement provides that employees on the ODL may be required to work up to 12 hours per day, 60 hours per week. The parties came

to recognize that excessive overtime was possible. They agreed upon a Memorandum of Understanding regarding overtime. That is set forth in the Joint Contract Administration Manual (JCAM) at page 8-26. As the Union relates history, the MOU concerning overtime was primarily the result of negotiations between the Employer and another Union, the APWU. There was added at the behest of the NALC a section, the Letter Carrier Paragraph, to deal specifically with the concerns of Letter Carriers. Finally, the Union points to the decision of Arbitrator Mittenthal in Case C-06238 (1986) in which he determined that the standard of a 12 hour day and a 60 hour week is absolute. Employees may neither be required to, nor volunteer, to work more than those hours.

The Union stresses that on June 15, 2006 twelve ODL Carriers were available to work. They had a total of 21.65 hours amongst them. Similarly, on June 16, 2006 there were four ODL carriers available. They had 7.73 work hours. Yet, on June 15, 2006 non-ODL Carrier Fast was required to work 9.41 hours. Not only was he required to work, he was required to work on his non-scheduled day. Additionally Section 8.5. F prohibits the Employer from working non-ODL employees more than eight hours on their non-scheduled day. Fast worked over nine hours. Additionally, Macgregor and Lance worked a total of 1.29 hours of overtime on assignments other than their own. Both are non-ODL Carriers. As pointed out above, ODL Carriers were available. Similarly, on June 16, 2006 when non-ODL Carrier MacCleay was required to work 2.05 hours of overtime, there were four ODL carriers with 7.73 work hours available who should have worked rather than MacCleay in the view of the Union.

The Union anticipates an argument from the Employer that it may schedule Carriers simultaneously. That is not entirely the case in its view. Simultaneous scheduling may occur only when there is a bona-fide operational necessity. Further, it may occur only from time-to-time, per the JCAM at p. 8-26. In this situation the Employer knew in advance of its manpower needs for June 15 and 16, 2006. Fast was scheduled to report. Similarly, when on June 16, 2006 MacLeary was worked 1.75 hours the Employer could easily have dealt with whatever manpower shortages it expected by requiring ODL Carriers to report early.

Included in the text of the Agreement at page 160 is the MOU between the Postal Service and two unions, the APWU and the NALC. As the Union contends it should be read, that MOU mainly applies to members the APWU who work in the clerk craft. There is included as well text known as the "Letter Carrier Paragraph." That was included to protect the interests of Carriers. Arbitrator Mittenthal came to consider the MOU in 1990 in case No. H4C-NA-C-30. The Union urges that Mittenthal be read to stress that mandatory overtime was to occur only from time-to-time. As indicated above, the Union disputes the notion that the overtime on June 15 and 16, 2006 fell into the "time-to-time" concept. Rather, it urges the application of the "rule of reason." That cannot apply in this situation as ODL Carriers were available.

Again pointing to the Letter Carrier Paragraph in the MOU regarding overtime the Union stresses it is an enforceable obligation on the Employer. There is a hierarchy of employees that the Employer is required to use when

auxiliary assistance is required. It does not have to use ODL Carriers if to do so would place them in a penalty overtime situation. There is an exception to that as well. Prior to working a non-ODL Carrier overtime on a non-scheduled day or off his or her own assignment, the Employer must use a Carrier from the ODL. That is the case even if the Carrier would be working in penalty overtime.

As the Union sees it, the Employer has attempted to draw its defense in this matter from a publication of the Postal Service and the APWU, the JCIM. The JCIM is inapplicable to this dispute as it is an interpretive manual for the Postal Workers and the Employer. It is the JCAM, a product of the NALC and the Postal Service, that must be consulted in this situation. When that is done, the Letter Carrier Paragraph in the overtime MOU must be given great emphasis. It is the language of the MOU that governs this situation and it prohibits the action taken by the Employer in Fredericksburg according to the Union.

The Union is aware that the Employer will defend its action with reference to the window of operation. Assuming that the Service meets the window 70% of the time, a number put forward by the Employer, that means it does not meet it on about 93 delivery days. That far exceeds any conception of from "time-to-time." To the contrary, the Employer must be held to the provisions of Article 8 and the Overtime MOU. When non-ODL Carriers were worked on June 15 and 16, 2006 it constituted a violation of the Agreement according to the Union. There cannot be an exception for what it regards as an extra-contractual concept, the window of operations.

When the Employer negotiated the Agreement implicit in it was the commitment to hire sufficient staff to carry out its terms. That is not the case in Fredericksburg. Four Carriers have retired and not been replaced. Had that occurred this situation might not have developed. As the Union sees it, it is the responsibility of the Employer to adequately staff its operation. As in Fredericksburg it did not do so, that should be held against the Employer the Union urges.

The Union postulates a scenario in which the need for Mr. Fast would not have occurred. ODL Carriers could have been required to report early to case mail. The Employer knew that work had to be performed because Mr. Fast had been directed to report. The President of the Local Union indicated in the grievance procedure that he had never run out of mail when brought in early to case more than one route. The same could have occurred in this situation. Had all available ODL Carriers come in early there would have been no need to work non-ODL Carriers. The same situation could have transpired on June 16, 2006.

Any defense by the Employer that it faced a staff shortage due to people off on annual leave should be rejected the Union contends. It is the Employer that approve annual leave. The Employer knows how many people will be off on annual leave. This event occurred in June, 2006 which is a prime-time leave period. This is known to the Employer. It should have staffed accordingly. Similarly, that there were two carriers absent on sick leave should have been foreseen in the Union's view. Given the size of Fredericksburg, two carriers absent on sick leave should be considered as normal. In June, 2006 there was

one carrier on military leave on another on light duty. This was known to the Employer and should have been planned for according to the Union.

The Union urges the grievance be sustained. It proposes a remedy consisting of an amount of administrative leave being granted to the non-ODL employees who worked equal to the overtime they worked on the days in question. It also asks that a 100% payment be awarded to non-ODL Carriers who worked on June 15 and 16, 2006. Finally, it proposes that the ODL employees receive payment at the overtime rate for all hours worked by the non-ODL employees on June 15 and 16, 2006.

POSITION OF THE EMPLOYER: There is in Fredericksburg a window of operations. That window was established to get mail to postal patrons in timely fashion and is not disputed by the Union. At Article 3 the Agreement confers broad authority on the Employer to manage its business and direct its employees. Similarly, Article 8 permits the Employer to utilize overtime in certain circumstances. Neither was breached in this situation the Postal Service contends. On June 15, 2006 there existed in Fredericksburg vacant routes that could not be covered by people on the Overtime Desired List. Twenty-one percent (21%) of the Carrier workforce was absent. Some were on annual leave. Two were sick. One was on light duty due to pregnancy and another was absent due to being on long term military leave. Even when the Employer required one non-ODL Carrier to work there remained the need to staff two regular routes and two auxiliary routes. Plus, two hours of assistance were necessary for the pregnant Carriers. Thus, two ODL Carriers, Kibler and Coffey were scheduled to

report at 6:30 a.m. to case vacant routes. All 12 hour ODL Carriers worked to the close of the window of operations or as close to the close of the window as practicality would permit. Had the Service utilized non-ODL Carriers it would have been difficult, or impossible to meet the window of operations.

On June 16, 2006 there were vacant routes that could not have been completed by ODL employees within the window of operations. Twenty-five percent (25%) of the workforce was absent. Nine Carriers were on annual leave, two on sick leave and there were the Carriers on military and pregnancy leave. Two ODL Carriers were called in to work early. As the Service sees it, it acted prudently and responsibly on June 16, 2006.

Even if the Employer had staffed the Fredericksburg operation as suggested by the Union it still would have utilized non-ODL Carriers to work within the window of operations. In fact, had non-ODL Carriers not been worked the Employer would have experienced a delay in collections. This would have necessitated a special trip to the Richmond Processing Plant by a Clerk, on overtime. That discounts the use of the vehicle with the attendant costs of fuel and wear and tear. Costs such as these are not contemplated within Article 8 the Service contends. Furthermore, the Union did not establish that ODL Carriers were available for work within the Window of Operations. Failing that, there can be no violation of the Agreement.

It is permissible to schedule both ODL and non-ODL employees to meet a Window of Operations. This was determined by Arbitrator Mittenthal in Case No. H4C-NA-C-30. (1991). The Mittenthal decision is amplified by the Memorandum

of Understanding (MOU) regarding overtime found in the Agreement at pages 161-162. The MOU specifically contemplates situations in which non-ODL employees may be required to work overtime.

There have been a number of recent arbitration decisions in the Richmond district dealing with the issues of a Window of Operations and overtime. In Case Numbers K01N-4K-C 06201804, K01N-4K-D 0612511, K01N-4K-C 06075182 and K01N-4K-C 06075191 Arbitrators Lurie, Bowers, Duda and Rosen all upheld the use of non-ODL Carriers in situations similar to this. These decisions stand for persuasive authority on this issue and should be followed the Employer urges.

Many years ago, in the mid-1980's, the parties discussed the manner in which Article 8 was to be implemented. Included in the discussions was the manner in which ODL and non-ODL carriers were to be scheduled. It was agreed that in certain circumstances the Employer was permitted to use ODL and non-ODL carriers simultaneously. These circumstances included the failure to meet dispatch schedules, standards of service and other time-critical requirements. Those were the circumstances confronting the Fredericksburg operation on June 15 and 16, 2006 according to the Service.

For the Union to prevail in a dispute concerning the use of ODL and non-ODL Carriers in a window of operation it must show that the Postal Service used a non-ODL Carrier when an ODL Carrier was available within the window or that use of the Window was unreasonable or a mechanism to avoid recourse to the ODL. As the Union cannot prove that in this situation the Employer contends the grievance should be denied.

DISCUSSION: To reiterate, this dispute involves Window of Operations actions in Fredericksburg. Unlike the situation in other disputes, the Union is not challenging the Window of Operations. In Fredericksburg as elsewhere, it is accepted that the Employer has authority to establish a Window to meet its obligations to customers. Article 3, the Management Rights article, provides ample authority to the Postal Service to establish a Window of Operations as part of its fundamental managerial authority.

Article 3 continues to provide that the managerial authority of the Employer is "subject to the provisions of the Agreement...." Relevant to this dispute that brings into play Article 8, the overtime article, and the Memorandum of Understanding that accompanies it.

Article 8, Section 8.5 G provides that "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) hour in a service week." Particular attention should be given to the word "available" in the sentence above. If it is the case that Carriers on the ODL were available, or could be reasonably been made available, a violation of Section 8.5. G has occurred.

It came to be that the parties agreed upon an interpretive memo regarding overtime use. That is the MOU found at pages 160-161 of the Agreement. Pertinent to this situation the MOU provides that it is the intent of the parties to "protect the interests of employees who do not wish to work overtime, while recognizing that bona fide operational requirements do exist that necessitate the

use of overtime from time to time." That language contemplates a balancing test. The interests of employees not desiring overtime must be protected on the one hand; on the other hand, there may be circumstances requiring them to work overtime. It is the language of Article 8, supplemented by the MOU that must be applied to this dispute.

Carrier Fast is a non-ODL Carrier. On June 15, 2006 he was scheduled to work 9.41 hours. Article 8.5.F provides that no regular full-time employee will be scheduled to work "over eight (8) hours on a non-scheduled day...." Fast exceeded that standard. Whether or not he was properly called-in to work is beside the point at this juncture. He worked in excess of the standard set out on Section 8.5.F. The Agreement was breached in his situation.

On June 15, 2006 there were 12 ODL Carriers who had not worked to 12 hours. Their available hours totaled 21.65. On June 16, 2006 4 ODL Carriers were available. They had a total of 7.73 hours. PTF Tosh was available as well on the 16th. Tosh had 1.14 available work hours. Thus, there was a potential 8.87 hours of work available from ODL or PTF Carriers on June 16, 2006.


At Section 8.5.G the Agreement provides that employees not on the ODL may be required to work overtime "only if all available employees" on the overtime desired list have worked up to 12 hours per day. That requirement was not met in this situation. ODL Carriers were available to work. They were not worked.

This is not a situation where unforeseen circumstances compelled the use of non-ODL Carriers. It is the case that Carriers were absent on annual leave.

That was known to management in advance of June 15 and 16, 2006. So too was the absence of a Carrier on military leave and the fact that one Carrier was on light duty due to pregnancy. Two Carriers were absent on sick leave. Such a circumstance should not be unexpected. Arbitrator Mittenthal in Case No H4C-NA-C-19 & 21 dealt with this situation. It was his view that absent an emergency or unforeseen circumstances employees on the ODL must be assigned to work overtime. (Referenced in Case No. B01N-4B-C- 04104119, Campagna, arb. 2005, p. 8). There was no emergency on June 15, and 16, 2006. The circumstances facing the Fredericksburg Post Office in regards to staffing were foreseeable. The record shows that ODL Carriers were available to work. One Carrier, Fast, worked in excess of any conceivable number of hours permitted by Article 8, Section 8.5.F. The conclusion is inescapable that the Employer has violated the Agreement in this situation.

AWARD: The grievance is sustained. Those non-ODL Carriers who worked on June 15 and 16, 2006 are to be paid an additional one-half time for all hours worked. Those ODL Carriers who worked on June 15 and 16, 2006 are to be paid at the overtime rate for all hours worked by non-ODL Carriers on June 15, and 16, 2006. Non-ODL Carriers who worked on June 15 and 16, 2006 are to have their leave balances credited for all hours worked on those days.

Signed and dated this 4th day of January, 2008 at Solon, OH.



Harry Graham
Arbitrator