

REGULAR ARBITRATION PANEL

In the Matter of the Arbitration

between

UNITED STATES POSTAL SERVICE

and

**NATIONAL ASSOCIATION OF
LETTER CARRIERS, AFL-CIO**

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Grievant:

Class Action

Post Office:

Orange, NJ

USPS Case No.:

A98N-4A-C00183637

NALC Case No.:

0R1400

GTS No.:

25849

USPS Case No.:

A98N-4A-C00207604

NALC Case No.:

0R3500

GTS No.:

27486

BEFORE:

JOAN ILIVICKY, Arbitrator

APPEARANCES:

**For the U.S. Postal Service: Linda S. Kelly, Labor Relations Specialist
Northern New Jersey District**

For the Union: Peter P. Maglio, First Vice President
NJ Merged Branch 38, NALC

Place of Hearing: USPS, 2 Federal Square Plaza, Newark, NJ

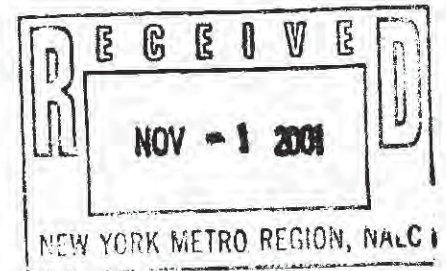
Date of Hearing: May 7, 2001

Date of Award: October 30, 2001

Relevant Contract Provision: Article 8

Contract Year: 1998-2001

Type of Grievance: Contract

**SUMMARY OF AWARD:**

The Service violated Article 8.5 of the National Agreement by inequitably distributing overtime opportunities and overtime hours during the first two quarters of the year 2000. The carriers who received less than an equitable share of such overtime opportunities/hours shall be made whole by the payment of a monetary sum to be calculated by the parties in accordance with this Award. The Arbitrator retains jurisdiction to resolve disputes concerning the sums to be paid.

JOAN ILIVICKY

INTRODUCTION:

Pursuant to the terms and conditions of the Collective Bargaining Agreement between the United States Postal Service and the National Association of Letter Carriers, the Undersigned was designated to hear and render an Award on the issue set forth below. A Hearing was held May 7, 2001 at the Office of the United States Postal Service, 2 Federal Square Plaza, Newark, NJ. Linda S. Kelly, Labor Relations Specialist, represented the Postal Service ("Management" or "Service") and Peter P. Maglio, First Vice President, NJ Merged Branch 38, appeared on behalf of the NALC ("Union"). Post-Hearing Briefs dated July 17, 2001 and July 11, 2001 were submitted by the Service and the Union respectively.

The parties were afforded full opportunity to develop their respective positions by testimony through examination of witnesses, by documentary evidence and by oral and written argument.

ISSUE:

Did Management at the Orange, NJ Post Office, violate Article 8.5C.2.b and c of the National Agreement in quarters one and two of the year 2000? If so, what shall be the remedy?

RELEVANT CONTRACT LANGUAGE

Article 8

Section 5. Overtime Assignments

When needed, overtime work for full-time employees shall be scheduled among qualified employees doing similar work in the work location where the employees regularly work in accordance with the following....

C.2.b. During the quarter every effort will be made to distribute equitably the opportunities for overtime among those on the "Overtime Desired" list.

C.2.c. In order to insure equitable opportunities for overtime, overtime hours worked and opportunities offered will be posted and updated quarterly.

BACKGROUND:

During the first and second quarter of the year 2000, the Union advised Management in the Orange, NJ, station that overtime was disproportionately being offered to carriers at the Orange Post Office thereby creating inequities among the carriers on the overtime desired list (ODL). As contractually agreed, the ODL was maintained by Management and administered by Louis Fascia, Manager, Customer Services, who the Union believed was not abiding by the requirements of the National Agreement in assigning overtime. In addition, the Union maintained that (a) overtime was not properly charted, and (b) that the manner in which overtime was assigned was contrary to contractual requirements.

On September 7, 2000, based on the Union's complaints, Luis A. Hernandez, Postmaster, Orange, NJ Post Office, issued a Letter of Warning (Union Exhibit "1") to Louis Fascia, Manager, Customer Services based upon his failure "to properly administer

overtime opportunities in accordance with the National Agreement, Article 8, Section 5 notwithstanding repeated reminders by the Postmaster.

The Letter of Warning notes that Mr. Fascia “gave no reasonable explanation for [his] disregard of [the Postmaster’s] instructions.” The Letter of Warning included a warning that “...future deficiencies will result in more severe disciplinary action being taken against you. Such action may include suspensions, reduction in grade and/or removal from the Postal Service.”

A first class action grievance, USPS Case No. A98N-4A-C 00183637 OR1400, was filed on behalf of sixty seven (67) carriers who during the first quarter of the year 2000 worked a total of 4,656.90 hours of overtime, an arithmetic average of 69.50 hours per carrier.

In this grievance, a chart of the distribution of overtime hours for the first quarter of 2000 (Jt. Exhibit 2A) reveals that 48 of the 67 carriers in the class action worked at or more than the average number of overtime hours (69.5), 11 carriers worked between 60 and 69.4 hours, 4 carriers worked between 50.0 and 59.9 hours and 4 worked 49.9 hours or less, specifically, one carrier who worked no hours, one who worked 16.06 hours and one who worked 31.91 hours.

Based upon the foregoing facts, carriers claimed that overtime was inequitably and inappropriately distributed during the first quarter and the Union filed a grievance asserting that each carrier was entitled to 81.5 hours of overtime, the same being the amount of overtime assigned to the carrier with the highest number of overtime hours, less the total overtime hours worked or overtime opportunities offered, per carrier, for the quarter, in all, the total sum of 804.32 hours. (Jt. Exhibit 2A, TAB 13)

A second class action grievance, USPS Case No. A98-4A-C 00207604 3500, was filed on behalf of forty seven (47) carriers, who worked during the second quarter of the year 2000 a total of 4,268.27 hours of overtime, an arithmetic average of 90.81 hours per carrier.

In this grievance, a chart of the distribution of overtime hours for the second quarter of 2000 (Jt. Exhibit 2B) reveals that 30 of the 47 carriers in the class action worked at or more than the average number of overtime hours (90.81), 12 carriers worked between 90.80 and 80.0 hours, 3 carriers worked between 79.9 and 70 hours and 2 carriers worked between 69.9 and 64.0 hours, specifically, one who worked 64.0 hours and one who worked 69.0 hours.

Based upon the foregoing facts, carriers claimed that overtime was inequitably and inappropriately distributed during the second quarter and the Union filed a grievance asserting that each carrier was entitled to 101.0 hours of overtime, the same being the amount of overtime assigned to the five carriers who each had the highest number of overtime hours worked or overtime opportunities assigned, per carrier, for the quarter, in all, the total sum of 477.73 hours. (Jt. Exhibit 2B, TAB 12)

Inasmuch as the above-discussed grievances involved the same issues, the parties agreed to combining them into a single arbitration proceeding.

POSITION OF THE PARTIES:

The Union contends that Management disregarded the provisions of Article 8.5 of the National Agreement during the first two quarters of the year 2000:

- a) When Management distributed overtime opportunities and hours in an inequitable manner as documented by the charts of distribution of overtime;
- b) When Supervisor Anderson distributed overtime opportunities in a non-rotating manner;
- c) When Supervisor Anderson brought in carriers on five non-scheduled days as a means of equalizing overtime opportunities; and
- d) When overtime assignments were incorrectly charted and incorrectly assigned.

Management contends that the provisions of Article 8.5 of the National Agreement were complied with during the first two quarters of the year 2000, arguing:

- a) That the National Agreement does not require that overtime be equalized;
- b) That the differences in the distribution of overtime are due to (1) Carriers working their own route overtime when ODL overtime is available; (2) Limited Duty Status; (3) Carrier in penalty overtime; (4) More opportunities at end of quarter; (5) Unavailable; and (6) Mail volume.
- c) That it is appropriate to assign overtime as work-assigned overtime if a carrier works on more than one route as part of his regular route;
- d) That the Union waived its right to grieve when it failed to grieve similar alleged inequalities in the distribution of overtime opportunities and hours during the past eight years at the Orange, NJ Post Office;
- e) That the Union is wrongfully attempting to achieve at arbitration what it could not achieve at the bargaining table;

- f) That the Union failed to establish “a willful disregard of the contract” or the grant of disparate treatment;
- g) That the Union failed to establish that the inequitable distribution of overtime in one quarter was not corrected by Management in the following quarter;
- h) That the Union wrongfully relies on evidence not submitted during the grievance procedure;
- i) That the Union failed to submit the best evidence as to the distribution of overtime opportunities (the ETC everything reports);
- j) That Management is not obligated to apply the same rules of equitable distribution of overtime to carriers who were unavailable for overtime during a quarter.

OPINION:

It cannot be disputed that the carriers did not equitably share overtime hours in the first and second quarters of 2000. The charts of overtime hours for said periods at said Post Office demonstrate a substantial disparity between the carriers receiving overtime hours. The charts further demonstrate that 19 carriers received less than the average number of hours of overtime received by the carriers at the Post Office during the first quarter of 2000 and that 17 carriers received less than the average number of hours of overtime received by the carriers at the Post Office during the second quarter of 2000.

Such inequitable distribution of overtime hours during the two quarters violates Article 8.5 of the National Agreement. Such violation was confirmed by the Letter of Warning dated September 7, 2000 issued by the Postmaster to Manager, Customer Services, Louis Fascia. Such violation was further confirmed by Arbitrator Bernstein

who held in HIN-5G-C 2988, *et al*, that Management must make every effort to distribute overtime fairly although such distribution need not be equal. Specifically, Bernstein held that “in the actual distribution of overtime opportunities... the Service was obligated to at least try very hard to make the distribution as fair as possible.”

Bernstein concluded that “distribution should be ‘fair’ to the carriers on the overtime list without regard to the Service.” (Emphasis Supplied) Bernstein explains that foregoing statement by concluding that Management should have no interest in (and be indifferent to) how overtime is distributed. Bernstein states that “unless Management is playing favorites”, distribution must “appear to be fair from the standpoint of the carriers who appear on the list.”

Management responded to the Union’s position and Arbitrator Bernstein’s Opinion by contending that there was no inequity in overtime opportunities and/or overtime hours during the two quarters.

In addition to the foregoing, the Union contends that Supervisor Anderson violated Article 8.5 of the National Agreement by distributing overtime opportunities in a non-rotating manner. Anderson’s policy constituted a violation of the National Agreement because the carriers were denied equitable distribution of overtime opportunities. That is not to say that the Service could not distribute overtime opportunities in a non-rotating manner were such distribution a means of compliance with Article 8.5. For example, a carrier who receives less than an equitable distribution of overtime opportunities/hours may be called for overtime on a non-rotating basis in order to secure a “fair” number of overtime opportunities/hours.

Similarly, Anderson's policy of calling carriers in on five non-scheduled days during the first quarter violated Article 8.5 of the National Agreement because it denied equitable distribution of overtime hours and equitable distribution of overtime opportunities. There would be no violation of the National Agreement in employing Anderson's policy if by calling carriers in on non-scheduled days, carriers would be afforded the opportunity to secure a "fair" number of overtime opportunities/hours.

Finally, the Union contends the Service's policy of making multiple assignments of overtime as work-assigned overtime to a carrier with multiple routes necessarily resulted in a reduction of overtime opportunities for carriers on the ODL and an inequitable distribution of overtime opportunities/hours.

Management's position is that equalization of overtime is not required by the National Agreement. However, Article 8.5C.2.b of the National Agreement mandates that every effort be made to distribute equitably overtime opportunities and Article 8.5C.2c mandates that overtime hours worked and overtime opportunities offered both must be posted "to ensure equitable opportunities for overtime." It is not disputed that equitable means fair and while equal may be fair under the National Agreement, equality of opportunity/hours is not mandated. What is mandated is that every effort be made to distribute the opportunities/hours for overtime in an equitable manner.

The Service recites a number of reasons why overtime was not distributed equally, including limited duty status, penalty overtime, unavailability and mail volume among others. It cannot be disputed that the foregoing circumstances may prevent equality of distribution in a particular quarter notwithstanding the Service's effort to distribute overtime equitably. Clearly, the Service would not have violated Article 8.5 of the National Agreement under any or all of the foregoing circumstances. Nevertheless,

the National Agreement as interpreted by Arbitrator Gamser and others, requires that inequity in the distribution of overtime opportunities/hours must be rectified either by make-up opportunities/hours in the following quarter or by monetary compensation. In this case, the record is insufficient to establish that make up opportunities/hours were offered to carriers in following quarters or that monetary compensation was paid.

The Service assigned overtime as work-assigned overtime to Carrier DePinto. Mr. DePinto worked more than one route and for that reason the Service claimed that work-assigned overtime was appropriate for each such route. However, the assignment of overtime as work-assigned overtime necessarily removes overtime from the ODL. While the Service does not contest the foregoing, it maintains that the practice is not violative of the National Agreement. While that issue is not before the Arbitrator in this case, if the consequences of the foregoing practice results in an inequitable distribution of overtime opportunities/hours, such inequity must be corrected in the following quarter as provided in the Gamser Award.

Management correctly argued that a right to grieve may be waived if similar violations were accepted by the Union without protest. However, the documents submitted to the Arbitrator in this case, demonstrate that inequitable distribution of overtime opportunities/hours has been an ongoing issue in the New York Metro area. In addition, the efforts of Manager Fascia, however unsuccessful, to comply with the National Agreement and the fact that a Letter of Warning was issued to the Manager by the Postmaster both evidence the fact that full compliance with the National Agreement remained an issue at the Orange, NJ Post Office.

The Service properly contends that the Union may not secure at Arbitration, what could not be achieved at the bargaining table. However, this grievance was filed to

enforce the very rights secured at the bargaining table but withheld from the Orange, NJ carriers.

While "a willful disregard of the contract" or the grant of disparate treatment may be elements of the Union's burden in arbitration cases, neither issue is an element of this grievance which seeks the enforcement of Article 8.5 rights regardless of any willfulness or disparate treatment by the Service.

The Service properly maintains that the Union cannot succeed in this case unless the inequitable distribution of overtime opportunities/hours was not corrected in the following quarter. Based upon the fact that maintenance of the records pertaining to the equitable distribution of overtime opportunities/hours is a burden of the Service, it is inappropriate to shift the burden of compliance in the following quarter from the Service to the Union. And, the Union in this case established Article 8.5 noncompliance by the Service.

The Service correctly asserts that part of the Union's case is documentary evidence first submitted in Arbitration, specifically, the Letter of Warning issued to Manager Fascia and the Form 3972's. Since these documents were maintained by the Service, it cannot claim surprise as an evidentiary objection and if there were surprise, the Service could have, but did not, request additional time to respond. In addition, no objection was made during the Arbitration Hearing with regard to the questions put to the Postmaster concerning his issuance of the Letter of Warning. With regard to the Form 3972's, these documents were furnished without objection by the Service at the Arbitrator's request together with the ETC everything reports which the Service voluntarily submitted. None of the foregoing documents, which incompletely set forth the attendance records for the quarters, were relied upon by the Arbitrator in reaching the

conclusions pertaining to the grievance. However, the documents will be necessary and essential to the Service in order to be in compliance with the remedy set forth in this Award.

With respect to Management's argument that the ETC everything reports, the claimed best evidence for the distribution of overtime, was not submitted by the Union, that contention was rendered moot by Management's submission of the said reports for the Arbitrator's consideration.

The Service properly contends that the rules of equitable distribution of overtime opportunities/hours must take into consideration the availability of carriers on the ODL. The Arbitrator agrees and finds that when a carrier was not available for overtime during a quarter, the carrier's share of overtime opportunities/hours shall be reduced proportionately. The same finding shall apply when a carrier was not available for overtime for a substantial portion of a quarter.

After reviewing the evidence and arguments of the parties, the Arbitrator finds that Article 8.5 of the National Agreement was violated by the Service when it failed to distribute overtime opportunities/hours in an equitable manner during the first two quarters of the year 2000 and when the Service failed to rectify such inequitable distribution of overtime/hours during following quarters.

A review of the charts of overtime hours for the two quarters conclusively documents inequitable distribution of overtime opportunities/hours. The Service was obligated to correct the inequitable distribution in each of the respective following quarters. The ETC everything reports, the 3972's and the other documents submitted to

the Arbitrator did not establish that the necessary corrective action was taken by the Service in the respective following quarters.

The Union proposed a method for correcting the Service's failure to equitably distribute overtime opportunities/hours in each of the quarters. Pursuant to such method, the Union argued that each carrier should be paid a sum equal to the difference between the highest number of hours worked by a carrier on the ODL during the quarter less the number of hours worked by such carrier. Applying the foregoing calculation, the Union concluded that 804.32 hours should be distributed among the carriers on the ODL during the first quarter to equalize each carrier's hours of overtime with the carrier who had the greatest number of overtime hours. Applying the same calculations, the Union concluded that 477.73 hours should be distributed among the carriers on the ODL during the second quarter to equalize each carrier's hours of overtime with the carrier who had the greatest number of overtime hours.

The Arbitrator rejects the Union's method of correcting the Service's inequitable distribution of overtime opportunities/hours for the following reasons:

- 1) The method unfairly burdens the Service;
- 2) The method creates a windfall for carriers, and
- 3) The method is unfair and punitive, rather than compensatory.

The Arbitrator determines that the appropriate method of correcting the Service's inequitable distribution of overtime opportunities/hours is to apply a formula which will determine the average number of overtime hours worked by all carriers during a quarter. The application of such formula will be equitable since each carrier who worked less than

the average number of hours will be compensated by the payment of a sum equal to each carrier's overtime hourly rate of pay times the difference between the average number of hours and the hours actually worked.

ADJUSTMENTS:

I. In applying the foregoing formula for achieving equitable distribution of overtime opportunities/hours, adjustments must be made for those carriers, if any, who received additional hours of overtime opportunities in a following quarter to correct an inequitable distribution of overtime opportunities/hours during a previous quarter.

II. In addition, applying the foregoing formula for achieving equitable distribution of overtime opportunities/hours, adjustments must be made for those carriers, who were available for only part of a quarter.

III. Furthermore, an adjustment must be made in a sum equal to the total hours of work-assigned overtime which were based upon multiple routes for a single carrier by the restoration to the overtime hours to the ODL.

Inasmuch as a substantial period of time has elapsed since the end of the second quarter of the year 2000 it is impractical if not impossible to correct the inequitable distribution of overtime opportunities/hours in a following quarter at this late date. Consequently, the Arbitrator determines that an alternate method of correcting such inequality must be applied, namely, the payment of monetary compensation.

AWARD:

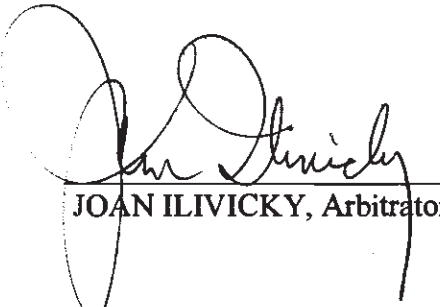
Management at the Orange, NJ Post Office violated Article 8.5C.2.b and Article 8.5C.2.c of the National Agreement in quarters one and two of the year 2000.

Management shall pay each carrier at the Orange, NJ Post Office who worked less than the average number of overtime hours for a quarter, a sum equal to the average number of overtime hours worked in each quarter less the number of overtime hours such carriers actually worked in the quarter.

The parties shall make the adjustments heretofore described in paragraphs I, II and III of the Opinion (the Adjustments), when calculating the appropriate compensation to correct inequitable distribution of overtime opportunities/hours.

The Arbitrator shall retain jurisdiction for a period of sixty (60) days from the date of the Award for the purpose of resolving any disputes between the parties with regard to the monetary sums to be paid to the carriers.

DATED: October 30, 2001



JOAN ILIVICKY, Arbitrator