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Collective Bargaining Report

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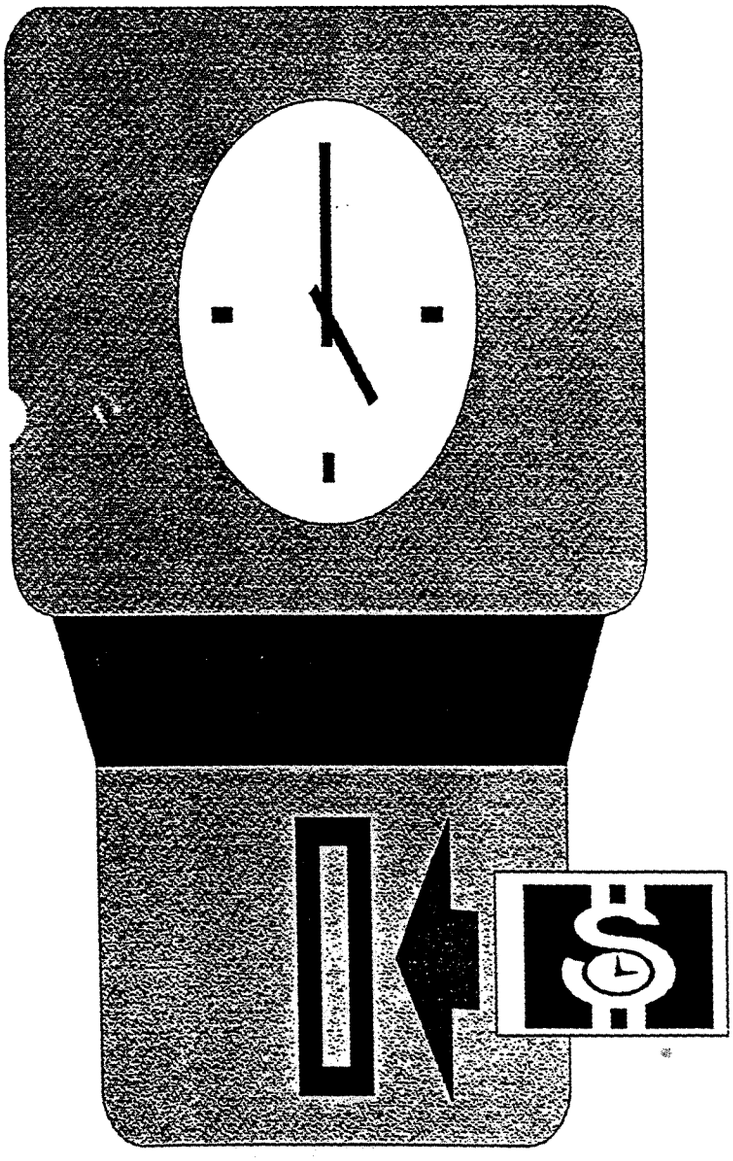

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Analysis

INTRODUCTION

The assignment of overtime is governed by Article 8 of the National Agreement between the APWU and the USPS. The parties reconsidered and substantially revised Article 8 in the 1984 Collective Bargaining Negotiations. That revision was undertaken in an attempt by the parties to deal with a continuing severe problem of excessive overtime imposed on postal employees.

As expressed in a Memorandum of Understanding first negotiated by the parties in 1984, the parties recognize:

> *[t]hat excessive use of overtime is inconsistent with the best interests of postal employees and the Postal Service, it is the intent of the parties in adopting changes to Article 8 to limit overtime, to avoid excessive mandatory overtime, and 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.*

In addition, the APWU adheres to a basic philosophical position which has been fundamental in organized labor–that people who would otherwise not have an opportunity to work and earn a decent living, such as unemployed workers or part-time flexible employees with insufficient hours, should be given an opportunity to work after regular employees have worked a reasonable number of hours at a fair rate of pay. Thus, premium pay has been recognized as a deterrent against excessive overtime work assignments by management, and an encouragement to management to spread work among workers who would otherwise be underemployed or unemployed.

Although the parties carefully considered Article 8 in 1984 and reached agreement on important principles, a number of problems arose over the interpretation and the application of certain provisions of Article 8. Early 1992 marked the last in a series of national level arbitrations pertaining to these disputes over the overtime agreements reached in 1984.

This special issue of the Collective Bargaining Report will attempt to highlight and summarize issues that have been resolved and to clarify the application of Article 8's overtime provisions.

OVERTIME LIMITATIONS AND PAY RATES

The key overtime pay provisions of the National Agreement are found in Article 8 Sections 4 and 5. Article 8, Section 4.A states that:

> *Overtime pay is to be paid at the rate of one and one-half(1 1/2) times the base hourly straight-time rate.*

Article 8, Section 4.B requires that overtime be paid for work performed "only after eight (8) hours on duty in any one service day or forty (40) hours in any one service week."

> *Article 8 Section 4.C sets out a penalty overtime provision, which requires that penalty pay be paid at "two (2) times the base hourly straight time rate." Penalty overtime is to be paid to full-time regular employees for any overtime work in contravention of Article 8.5.F. That section states:*
>
> *"F. Excluding December, no full-time regular employee will be required to work overtime on more than four (4) of the employee's five (5) scheduled days in a service week or work over ten (10) hours on a regularly scheduled day, over eight (8) hours on a non-scheduled day, or over six (6) days in a service week."*

Penalty overtime will also be paid to part-time flexible employees for all work in excess of ten (10) hours in a service day or fifty-six (56) hours in a service week (Article 8.4.E). This section also excludes December. The double time rates apply when the limitations are exceeded.

The parties have agreed, in a Memorandum of Understanding dated October 19, 1988 [See APPENDIX, page 58-59], that the Employer may not permit or require employees to work beyond twelve hours in a day or sixty hours in a week; and employees have no right to demand to work beyond those limitations. [1]

OVERTIME DESIRED LISTS

Article 8, Section 5 provides for Overtime Desired Lists (ODLs) to be used for selection of employees for overtime. An ODL contains names of full-time regular employees who wish to work overtime. The lists are established at the local level through local negotiations. Such negotiations should determine whether the overtime desired list will be by section or by tour. The circumstances of each individual office and the preferences of the local membership will determine which type of list is more suitable for that office.

Locals may negotiate multiple overtime desired lists having separate lists

1 *Recognizing that mistakes may be made, and employees may on rare occasions work beyond twelve hours in one day or sixty hours in one week, the parties have also agreed that the appropriate remedy in such instances shall ordinarily be compensation at an additional premium of fifty percent of the base hourly straight-time rate for the hours worked beyond twelve or sixty.*

for before tour, after tour and non-scheduled day overtime.[2] Sectional overtime desired lists can be divided by pay area, by tour, and by incoming or outgoing sections. Employees on "sectional" ODLs may not be used in other sections to avoid the payment of penalty pay.

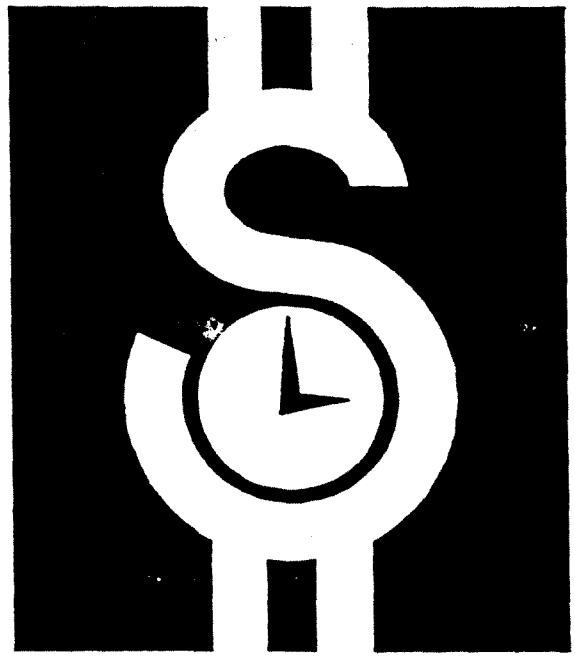
It must also be noted that there is no automatic right to overtime even though an individual is on an ODL.[3] Individuals on the Overtime Desired Lists who are selected to work overtime must be qualified to perform the work and be available to perform the work. To be qualified an employee must have the "necessary skills" to perform the overtime. Qualified employees on the applicable ODL must "be selected in order of seniority on a rotating basis.[4]

Article 8, Section 5.C.1.b prevents overtime assignments to employees who are absent or on leave.[5] An employee who is absent or on leave is considered unavailable. An employee is also considered unavailable after that employee has reached twelve hours in a service day or sixty hours in a service week.[6]

When an ODL does not give the USPS sufficient qualified people to meet the overtime needs of the service, management may assign overtime to qualified full-time regular employees not on the list. The following example is given in the Memorandum of Understanding first reached by the parties in 1984, and reprinted in the back of the current Collective Bargaining Agreement:

> *"if there are five available employees on the overtime desired list and five not on it, and if 10 work hours are needed to get the mail out within the next hour, all ten employees may be required to work overtime. But if there are two hours within which to get the mail out, then only the five the overtime desired list may be required to work."*

When overtime work is required of people not on the ODL, management is required to assign the work first to more junior employees on a rotating basis. Employees with greater seniority who are not on the ODL are to be the last employees required to work overtime.



SIGNING-UP ON THE ODL

The National Agreement requires that full-time regular employees desiring to work overtime during the quarter should place their name on the overtime desired list two weeks prior to the start of each calendar quarter. [Article 8 Section 5.A]

Two national level settlements have dealt with what happens to an employee once on the list. These settlements have addressed the right of an employee to withdraw his/her name from a list and the right to carry his/her name forward when the employee successfully bids on another tour.

On August 7, 1985 the APWU and USPS settled cases #H1C-1E-C-41245 and #H1C-1E-C-42449 [See APPENDIX, page 57]. The question raised in these grievances was whether an employee should be permitted to carry forward his/her name on the ODL when he/she is the successful bidder on a different tour. The parties agreed that "an employee may opt to bring his or her name forward from one overtime desired list to another if an employee is the successful bidder on a different tour, and will be placed on the list in accordance with their seniority." However, if the employee is not on any list at the beginning of the quarter the employee may not place his/her name on the list until the beginning of the next quarter.

In Case #H4C-4LC-34379 [See APPENDIX, page 60] the issue presented was whether an employee could remove his/her name from an overtime desired list during the quarter. The parties agreed that an employee could remove his/her name from the list at the

2 *See April 16, 1985 Agreement in APPENDIX, Page 61-62*

3 *See AIRS Case Numbers 500152, 10396, 8600, 6429, 13731*

4 *Note, however, that the employee on the ODL who is to be selected, in accordance with the ODL procedure does not have to be the best qualified employee available to work overtime. The employee on the ODL need only meet the basic qualifications of the job. See AIRS Case Number 7740*

5 *See AIRS Case Numbers 288, 352, 10205*

6 *See discussion on USPS Case Number H4C-NA-C-27 and 12/60 hours limitations at page 4 of Analysis*

employee's request. However, management does not have to honor the request if the employee is needed for overtime work on the day of the request or if the employee was scheduled for overtime in the near future.

IMPROPERLY PASSED-OVER WHILE ON THE ODL

In 1975 the APWU and USPS settled a national level grievance in Case #AB-N-2476 [See APPENDIX, page 55]. This case involved an interpretation of the 1973 National Agreement determining what happens when an employee on the ODL is improperly passed over by management in the selection of overtime and who has the necessary skills and is available, and another employee on the list is selected for the overtime work out of rotation. The parties agreed that the following would apply.

- An employee who is passed over shall, within ninety (90) days of the date the error is discovered, be given a similar make-up overtime opportunity for which he has the necessary skills;

- Should no similar make-up overtime opportunity present itself within ninety (90) days subsequent to the discovery of the missed opportunity, the employee who was passed over shall be compensated at the overtime rate for a period equal to the opportunity missed.

This agreement also provides that if an employee on the overtime desired list is passed over for an employee not on the list the employee passed over shall be paid for an equal number of hours at the overtime rate for the missed opportunity. These same principles apply in cases involving penalty overtime pay, except that management may spread overtime work among employees on the ODL, by seniority to avoid paying penalty overtime rates.

NATIONAL LEVEL AWARDS

Can An Employee Refuse Overtime?

In case #H4C-NA-C-19 [See TEXT, page 29] a dispute arose over the application of Article 8.5.F and G. The issue presented was whether employees on the overtime desired list have the option of accepting or refusing overtime work beyond the Section 5.F limitations. The arbitrator found that the conflict arose because of the apparent conflict in the language of 5.F and G. Article 8.5.F requires that full-time regular employees "will not be required to work overtime ... in excess of 10 hours on a scheduled day, or more than 8 hours on a non-scheduled day, or more than four of five scheduled days in a service week." On the other hand, 8.5.G says that employees on the overtime desired list "may be required to work up to twelve...hours in a day and sixty ... hours in a service week..." The APWU argued that the contract language leaves room for employees to volunteer to do overtime work beyond the 8.5 limitations but they cannot be required to do so. The arbitrator rejected this argument. He held that "the employees Section 5.F right to resist certain overtime is subordinated to management's broader right to such overtime."

NOTE: In national case # H8T-4H-C-10343, AIRS No. 99, the arbitrator found that management's initiation of treatment hours for an on-the-job injury that were different than the grievant's normal tour of duty, required the USPS to pay overtime to the employee since the change of hours was not at the request of the employee.

Penalty Overtime on a Holiday

On April 3, 1987, Arbitrator Mittenthal decided a case [See TEXT, page 35] raising two issues: (1) whether the USPS can refuse to follow Article 11.6 and any applicable LMOU to avoid scheduling holiday work to workers who would be entitled to receive penalty pay; and 2) whether employees, by volunteering to work on a holiday, have made themselves available to work more than 8 hours on the holiday. The arbitrator held that the USPS could not ignore the "pecking order" when scheduling holiday period work under Article 11.6 in order to avoid penalty overtime payments required by Article 8. The parties reiterated the above ruling in a MOU on October 19, 1988 [See APPENDIX, page 58-59] and also agreed to remedy past and future violations of the above understanding as follows:

> *1. full-time employees and part-time regular employees who file a timely grievance because they were improperly assigned to work their holiday or designated holiday will be compensated at an additional premium of 50 percent of the base hourly straight time rate.*
>
> *2. For each full-time employee or part-time regular employee improperly assigned to work a holiday or designated holiday, the Employer will compensate the employee who should have worked but was not permitted to do so, pursuant to the provisions of Article 11 Section 6, or pursuant to a Local Memorandum Understanding, at the rate of pay the employee would have earned had he or she worked on that holiday.*

The second issue in the case arose because management tried to avoid using ODLs on holidays by treating people who signed up for holiday work as if they were also volunteering to work overtime on the holiday. The arbitrator held that management may not treat a regular employee who volunteers for holiday work as having volunteered for up to twelve hours on a holiday. Instead, management must use applicable ODLs to schedule work beyond eight (8) hours on a holiday. Because Article 11 does not speak to the length of a holiday assignment, Article 8 must be applied, and regular volunteers are contractually obligated to work eight hours. Additional work may be assigned only in compliance with Article 8.

12/60 Hour Limitations

Three national level arbitrations have considered the interpretation of Article 8.5.G.2 and its 12/60 hour ceilings. In the first case Arbitrator Mittenthal, [#H4C-NA-C-27] [See TEXT, page 16] upheld the Union's interpretation of Article 8.5.G.2 which requires management to release from work employees who reach their 60 hour limit during a regularly scheduled day.

On June 9, 1986 the arbitrator tackled the question of the appropriate remedy for violating Article 8.5.G.2 and its limits [See TEXT, page 20]. He found that the remedy for violation did not lay in the "penalty overtime pay" provisions which are encompassed by Articles 8.4.D, 4F, and 5F since the intent of Section 5.G.2 is to prohibit working employees beyond 12 hours in a day and 60 hours in a week. He found that the remedy is not necessarily limited to double time pay, but could be a larger or smaller sum, notwithstanding the provisions of Section 4.D, 4.F and 5F. The arbitrator stated "...there are likely to be varying degrees of culpability..." in section 5.G.2 violations (e.g. willful disregard of ceilings, innocent failures to observe ceilings, emergency, employee request, etc...). Thus he ruled that a single remedy should not be embraced as the automatic remedy in all cases.

In consideration of the above award, the parties reached agreement on a remedy when employees are worked beyond the 12 hour or 60 hour limitations. The parties agreed that "(i)n those limited instances where this provision is or has been violated ..., full-time employees will be compensated at an additional premium of 50 percent of the base hourly straight time rate for those hours worked beyond the 12 or 60 hour limitations."[7] The parties emphasized that this additional compensation "should not be construed as an agreement by the parties that the Employer may exceed the 12 and 60 hour limitation with impunity." In other words, if chronic violations were to continue or a manager could be shown to violate the 12 hour or 60 hour limitation willfully, additional remedies might be imposed.

In September 1987 Arbitrator Mittenthal addressed yet another issue concerning the 12/60 hour limitations [See TEXT, page 13]. The APWU asked the arbitrator to rule that an employee who reaches the 60 hour work limitation, and is sent home, is entitled to be paid for the remaining regularly scheduled hours in the employee's tour. The arbitrator held that the employee was entitled to the hours because they were part of the employee's "guaranteed" work week. In other words, he found that an employee, having been sent home on his regularly scheduled day before the end of his tour on account of the 60 hour ceiling and having experienced no temporary change of schedule, must be paid for the hours lost from the regular schedule.

It is important to note that once an employee reaches the 60 hour limit that employee must be considered unavailable for any additional overtime. An employee's tour of duty must be terminated once the employee reaches the 60th hour of work (comprising the regular schedule and overtime), in accordance with the Mittenthal award.

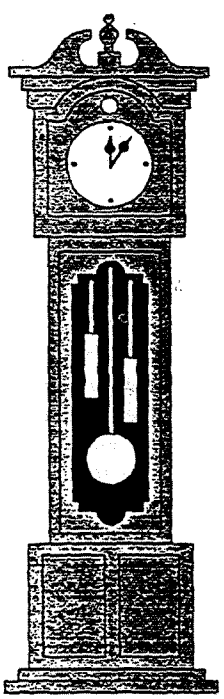
In their October 19, 1988 Memorandum of Understanding, the Postal Service and the APWU defined this limitation within the context of overtime worked during a week. The Memorandum states, in part,

> *As a means of facilitating the foregoing, the parties agree that excluding December, once a full-time employee reaches 20 hours of overtime within a service week, the employee is no longer available for any additional overtime work. Furthermore, the employee's tour of duty shall be terminated, once he or she reaches the 60th hour of work, in accordance with Arbitrator Mittenthal's National Level Arbitration Award on this issue ....*

These paragraphs from the Memorandum impose the obligation on management to not "work" employees over the 60-hour limitation. However, if the 60th work-hour arrives and the employee has not yet completed their regular schedule for the week, this also obligates management to "pay" the employee for these hours that cannot worked because of the 60-hour limitation.

Simultaneous Scheduling of Overtime

On January 14, 1991 Arbitrator Mittenthal issued a decision in what is to be the last major issue involving Article 8. [See Text page 46] (#H4C-NA-C 30 concerned the simultaneous scheduling of overtime w for employees on the overtime des list and employees not on the list. union contended that the parties ag in the Article 8 Memorandum to simultaneous scheduling to situat where "such scheduling is necessa meet the dispatch schedules, ser standards, and other time critica quirements identified in the fa operating plan." The USPS ins that there was no such limitation that management was free to con "existing practices."



The arbitrator upheld the USP tion. He stated that the Art Memorandum and the example did not create a new criterion for taneous scheduling. It did no mo

7 *See October 19, 1988 Memorandum of Understanding at page 58 of APPENDIX*

embrace the "existing practice." Then he found that the parties agreed that whatever practices were in existence on this subject before December 1984 would continue in effect after December 1984.

The APWU was disappointed with Mittenthal's award. The arbitrator fell short of agreeing with the APWU that "simultaneous scheduling" could occur in only a very few circumstances which are "time critical" in nature. However, the award does not mean that the Postal Service can arbitrarily simultaneously schedule OTDL employees and non-OTDL employees. It still must have "legitimate and valid" operational reasons under circumstances that previously promoted simultaneous scheduling at the facility.

Now the battle on this issue shifts to locally filed grievances and regional arbitration. In order to prevail in simultaneous OTDL scheduling disputes one or more of the following criteria can be shown.

- There was nothing time critical.
- There was no operational window.
- The simultaneous scheduling was simply to avoid the payment of penalty pay.
- Establishing that prior to 1984, before penalty pay, the employer did not schedule the OTDL and non-OTDL employees in a like fashion.
- Or, even if they had a practice of simultaneously scheduling employees on and off the list, this scheduling was due solely to the constraints of Article 8.5.F and not due to operational reasons.

Use of PTFs and Casuals Before ODL Employees

Two awards have dealt with the issue of using part-time flexible employees (M8-W-0027) [See TEXT, page 43] and casuals (HlC-4K-C-273444) [See TEXT, page 40] for overtime instead of scheduling full-time regular employees who are on the overtime desired list.

The Mail Handlers Union brought a national level case [See TEXT, page 43] involving Article 8.5 and the use of part-time flexible employees before using full-time regular employees on the overtime desired list. The arbitrator found that Article 8.5 only describes how overtime is to be distributed when management chooses to assign such overtime to full-time regular employees. He held that the overtime desired list creates an order of preference but that order of preference pertains only to overtime distribution among full-time regulars. Nothing in Article 8.5 requires that overtime be offered to full-time regulars before it can be offered to part-time flexible employees.

A few years later Arbitrator Zumas carried the above ruling one step further [See TEXT, page 40]. He found that the USPS did not violate Articles 7 or 8 in using casual employees on overtime instead of scheduling full-time regular employees who were on the overtime desired list. He found that "casual employees are non-career employees who, as part of the supplemental work force, perform duties assigned to bargaining unit positions on a limited basis. They are not restricted to working straight time, and many perform overtime." He found that there is no restriction as to how these casual employees may be utilized, except that part-time flexibles should be utilized at the straight time rate prior to the casuals. The arbitrator concluded by rejecting the union's contention that overtime is a benefit that casuals are not entitled to.

Scheme Study Time

Another issue that the parties have attempted to deal with is scheme study time and its counting toward the daily and weekly limitations. In an April 16, 1985 agreement [See APPENDIX, page 61-62] the parties agreed on how the hours of scheme study time would count toward the limitations. The example the parties gave in the agreement states that if an employee, who otherwise would be available for 12 hours work, is brought in for one hour of scheme study before tour, that employee is then available for an additional 11 hours of work on that day.

The agreement also states that if the employee ultimately qualifies and is placed in the assignment, compensation for that hour would be as if the employee had worked that hour. In other words if the "work hour" is in excess of the restrictions in 8.5.F the compensation would be at the penalty rate. However, if the employee fails to qualify the employee is not entitled to any additional compensation or overtime due to being engaged in scheme study.

The M-5 Handbook reflects the above in codified form and lists alternatives for an employee who has bid or been assigned to a preferred duty assignment which requires scheme knowledge. [See APPENDIX, page 54] It allows the senior bidder to take annual leave for training and testing. Then "where the senior bidder passes the appropriate examination and accepts the position, the annual leave will be converted to hours worked and the employee's annual leave balance would be recredited." [M-5 Section 412.1.a; See APPENDIX, page 54]

The senior bidder may also have the option of entering scheme training and testing outside the employee' s regularly scheduled hours. [M-5 Section 412.1.b; See APPENDIX page 54] This time will not be paid. The employee should record the time on a Form 2432. If the employee passes the appropriate examination and accepts the position, the employee will be compensated at the appropriate overtime rate.

Recent Regional Level Arbitration Awards

During the past four years, arbitrators have had the opportunity to apply Article 8.5 in regional level arbitration. The following are brief summaries of a number of these awards.

12 Hour Limitation

No violation of Article 8 due to USPS's failure to assign overtime beyond 12 hours during December. Employees on Tour 1 were not assigned overtime in excess of 12 hours per day from December 18 through 23. Nothing in Article 8.B required USPS to assign overtime to employees on Overtime Desired List during December beyond 12 hours before assigning overtime to employees not on the list. Also, no evidence existed that aggrieved employees were available to work.

AIRS Case No. 13892

OT Assignments to PTFs

Assignment of overtime to part-time flexibles rather than full-time regular volunteers violated LMOU. LMOU "pecking order" established that regulars on ODL and volunteer regulars were to be scheduled ahead of PTFs. Though Mittenthal ruling in Cases M8-W0-0027 and M8-E-0032 established that Art. 8 doesn't have to be offered to FTRs ahead of PTFs, once local management decided to use ODL it was bound by LMOU pecking order. Penalty overtime ordered for ODL FTRs; OT for non-ODL FTRs.

AIRS Case No. 300073

Qualifications to Perform OT

Arbitrator held that USPS did not violate the national agreement when it assigned a Maintenance Control Technician to work on the same Form as grievant, a Tool & Parts Clerk. Arbitrator found it clear that the clerk and technician performed different work. Technician was given an assignment which the clerk was not qualified to perform. Union failed to prove that grievant could have performed the available overtime work.

AIRS Case No. 300213

No violation of Article 8.5 when USPS passed over grievant who was on the ODL for overtime work and selected employee who was not on ODL. Evidence showed that the OT work required employee with scheme knowledge and grievant had not worked scheme for about 5 years thus he was not "qualified" to perform the work.

AIRS Case No. 400199

Remedy for Violations

USPS did not violate National Agreement by refusing to pay the grievants, who were not on the ODL, penalty overtime pay in excess of that provided for in Article 8, Section D. Article 8 is clear that ODL employees should be used 12 hours before non-ODL, however, controversy in this dispute arose as to nature of penalty. Union wanted 2 1/2 times regular rate. No authority in Article 8.D for arbitrator to fashion this type of remedy. Mittenthal award #H4N-NA-C 21 doesn't apply.

AIRS Case No. 400207

Management did not violate Article 8.5.G.2 when it required specific employees from the maintenance unit to work in excess of 60 hours. The parties stipulated that the employees did in fact work over 60 hours and the issue boiled down to what remedy the arbitrator should fashion. Arbitrator found that although there was a technical violation of Article 8 he did not believe a penalty beyond what has been paid was justified.

AIRS Case No. 14296

Special Conditions Excusing Resort to ODL

USPS did not violate Article 8.5.G by assigning overtime to the Tour 2 non-ODL employees while working Tour 3 ODL volunteers 10 hours on the day in question. Heavy mail volume forced management to call two OD employees and three non-OD employees in early, since FSM requir a minimum of 5 employees to opera Article 8.5.G is not absolute bar to utilization of non-ODL employees OT even though ODL employees h not worked up to 12 hours in that d

AIRS Case No. 400

Arbitrator held grievant had not inappropriately denied overtime though he was on the Overtime De List. USPS has the right to dete when overtime will be worked, cially, as here, when service star need to be met. Since mail nee be delivered the next day, it s most feasible to call a non-ov desired list employee to work time. Article 8.5 does not app USPS decides what overtime ho be worked.

AIRS Case No.

Arbitrator found USPS did n national agreement nor LMOU required Tour III employee OTDL) to work overtime i calling in Tour I emplo OTDL). LMOU provided OT Tours. Such language wou quire USPS to call in empl one tour to assist those o although this could be enough time existed in ord Tour I after trucks arrived was needed to work overt regular time.

AIRS Case

Management violated calling blanket overtime

ing the ODL. No emergency existed and in fact management violated its own policy in its action.

AIRS Case No. 15344

Management violated the National Agreement when it assigned non-ODL employee in lieu of grievant, an ODL employee, for an overtime assignment. USPS could not show there was an operational need to make such an assignment.

AIRS Case No. 14088

Maximizing Use of ODL Employees

USPS violated Art.8.5.G by failing to utilize the ODL employees for the maximum amount of overtime; up to 12 hours. Arbitrator found that this case was decided on its own individual facts. He emphasized that management normally has the authority to decide how the employees will be assigned and who will work OT. In this case it simply decided that there would be a crew of 17 to man the LSM and called both ODL and non-ODL employees. There was no effort made to maximize the ODL employees for OT.

AIRS Case No. 400345

Grievant, the only ODL employee on Tour, was denied opportunity to work maximum of twelve hours. Grievant given two hours OT. Arbitrator's remedy was to award two hours pay at the penalty overtime rate.

AIRS Case No. 16901

Availability of Qualified Employees

Arbitrator held that the USPS is entitled to and must be able to provide a scheme qualified crew to process the mail. However, arbitrator remanded to determine which employees would have been available. USPS should have called on those who were on Overtime Desired List first, and if needed, then it could call on those not on list. It appeared the supervisor held over those not on the Overtime Desired List because it was convenient.

AIRS Case No. 400391

Arbitrator held that USPS did not violate the national agreement when it used Mail Processing Equipment Mechanics to perform HVAC duties instead of calling in Building Equipment Mechanics who were on the OTDL. Although avoidance of overtime payments is not a valid reason for disregarding restrictions of Art.7.2, USPS was not required to call in BEMs if the MPEs were qualified. Arbitrator found that supervisor in charge was best qualified to determine qualifications of MPEs.

AIRS Case No. 400642

Service did not violate Article 8.5 of the National Agreement by depriving the grievant of overtime assignments. Though the grievant was a full-time regular employee on the overtime desired list, the union failed to meet its burden of proving that the grievant was qualified for the overtime work. Overtime may have been available for scheme qualified employees, but grievant had not passed scheme examination.

AIRS Case No. 400662

Grievance of USPS failure to assign OT to employee on ODL denied. Grievant on ODL was bypassed for OT when determined by USPS he did not have scheme skills needed for assignment. Union argued that non-scheme qualified clerk on ODL should have been utilized before clerk not on ODL. Held, no automatic right to OT for ODL employees under Article 8 Section 5; employee must also be qualified to perform work. If there is no qualified ODL employee, USPS has right to utilize non-ODL employees.

AIRS Case No. 500152

Management did not violate Article 8 by utilizing a junior employee on overtime to cover expeditor duties. Arbitrator found that grievant did not possess the necessary qualifications to work the OT on weekdays, even though she had been utilized as an expeditor on weekends. It is incumbent on the grievant to demonstrate she did in fact possess the necessary qualifications.

AIRS Case No. 16896

Management violated Article 8.5 when it gave OT to individual not on ODL. Grievant on the ODL possessed the necessary skills required on the OT assignment. Arbitrator found that his ruling was not intended to say that management may never assign an employee to OT out of line of seniority in the absence of indication of necessary special qualification on the ODL.

AIRS Case No. 16874

USPS did not violate Article 8.5 when it scheduled grievant, who was not on the ODL, to work 8 hours OT on his nonscheduled day. The arbitrator found that there were no employees on the ODL "available" to work. The three qualified employees on the ODL were already working their regular schedules.

AIRS Case No. 500356

Management did not violate the National Agreement when it did not assign grievant overtime assignment. Overtime required scheme qualified individual. Grievant was not.

AIRS Case No. 16732

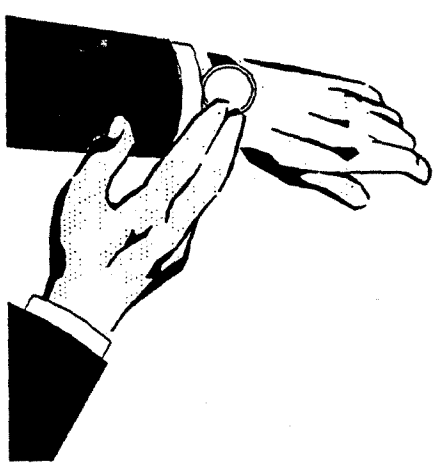
USPS violated Article 8.5 when it utilized an employee not on ODL over the grievant who was on the ODL. Grievant was qualified for the position. USPS wanted someone more qualified. Arbitrator found that neither convenience nor a desire to have more qualified employees on a given task is of any import given the established contractual rights for those who sign up for OT.

AIRS Case No. 14126

Maintenance Craft Overtime by Tour/Occupational Group

USPS did not violate the NA in not offering grievant overtime opportunity. It is clearly stated in the LMOU that the ODL for the Maintenance craft will be by tour and occupational group. Grievant was on ODL, but was not on the tour where the vacancy occurred. Also, no need to fill vacancy through OT work. Qualified employee was able to fill vacancy without the need for the scheduled OT. USPS decides when OT is needed.

AIRS Case No. 400576



Removal of Employee from ODL

Removal of employee from Overtime Desired List constituted a violation of the national agreement. USPS could not force employee to remove his name from the OTDL merely because he sought to be excused from OT on one occasion. Grievant had requested and been denied time off to process an appeal he was taking before the National Labor Relations Board. Standards set out in Article 8.E are not so rigid as to prevent employee from being excused when he or she hasn't abused privileges.

AIRS Case No. 400686

Utilization of Employees not on ODL

Grievance of Service's utilization of employees not on ODL is denied. Union argued that employees on ODL should have been utilized for OT work instead of employees not on ODL and relied on language in LMOU restricting use of non-ODL's to "critical time periods." The arbitrator held that nothing in LMOU restricts operation of Article 8, Section 5, which grants rights to management to determine when OT is to be worked with non-ODL employees.

AIRS Case No. 500115

ODL Employee in "Dual Position"

Arbitrator concluded USPS violated Article 8.5 when it overlooked grievant for overtime when she was on Overtime Desired List. Grievant was working "dual position"; performing duties in Tour I Incoming Section & PSDS section. Arbitrator held although some of duties changed, her bid position & place on incoming Section ODL had remained same. Since still on same ODL, she was improperly denied 46 hours overtime work.

AIRS Case No. 500384

Overtime on Non-Scheduled Day

USPS failed to utilize grievant for work from the ODL on her non-scheduled day. Fact that grievant was projected to have worked about 60 hours and therefore was denied opportunity violates Article 8.5. Grievant was to be compensated at the applicable rate taking into account the penalty pay provisions found in Articles 8.4 and 8.5 based upon the finding that grievant should have been permitted to work 8 hours on her second non-scheduled day.

AIRS Case No. 17136

Remedy - Make Up Overtime

USPS violated Article 8 when it signed Tour 3 outgoing manual tribution overtime to MPL operators. LMOU subsequent to bey/Gildea letter found that the ren for violating Article 8 would b allow the employee to make up any overtime. Although this conflicts Filbey/Gildea letter the arbitr upheld the LMOU language an lowed employees to make up los portunity rather than payment.

AIRS Case No. 1

Pursuant to a settlement agree grievants were to be given mal opportunity with 90 days of sign settlement. Union contended thi not done and employees should be pensated 8 hours OT for failure bitrator found that this was too and awarded grievant a make-u portunity within 90 days of this a

AIRS Case No.

Arbitrator found the USPS t violated Article 8 when it by employees for overtime oppor He found that USPS hand employees for the job in qu Employees on the ODL were a and qualified and should hav utilized. Grievants were to b whole for the overtime losses i by providing them with suffici portunities to make up the OT.

AIRS Case Nc

Overtime for VOMA Employee

VOMA employee name sh have appeared on the clerks C the assignment of two hours improper. However, remedy by the union including the awa hour of OT pay to each cl punitive. The remedy was two hours OT pay to the employee from the OTDL.

AIRS Case N

Overtime by Section and Tour

USPS did not violate Article 8.5 when it utilized a PTF in an overtime status in lieu of a regular employee who was on the ODL. Union's contention that since it negotiated specific rules in regard to the opportunity to use PTF's prior to regulars on overtime that it is bound by that Local Memo. Arbitrator rejected this contention finding Article 30 only authorized the parties to determine whether ODL's shall be by section and/or Tour.

AIRS Case No. 16924

Management violated Article 8 and the Local Memo of Understanding when they worked Tours 1 and 3 OTDL on Tour 2. Local agreement held OT to be by section and Tour. Arbitrator held that affected employees be paid the appropriate night differential and/or Sunday premium.

AIRS Case No. 16789

Management violated Article 8.5.G when it assigned non ODL employees to perform OT work on operations other than the 115 belt without first utilizing Tour III ODL employees to their contractual maximum number of hours. The arbitrator awarded 2.3 hours of overtime to the by passed employees.

AIRS Case No. 15367

Arbitrator held that "when seeking to obtain employees for OT work in one section from another section, management must first offer the work to qualified employees by tour who are on the OTDL from that section. In addition such offer must be consistent with applicable seniority provisions. Finally, the Postal Service has the right to select the section for its work requirements and need not go to another section's OTDL once it exhausts the OTDL in the selected section if it can meet its work requirements from non-OTDL qualified employees from the selected section."

AIRS Case No. 16763

Posting of ODL

No violation by management in removing ODL at 8:00 a.m. on day before start of new quarter. Arbitrator rejected union's contention that two weeks prior to the start of each quarter required management to extend the posting for precisely two weeks from the beginning of the new quarter up until the moment when the new quarter started. Precisely two weeks, 24 hours per day is not specified in the National Agreement as the proper posting time.

AIRS Case No. 16751

Mandatory Overtime for Non-ODL Employee

Mandatory overtime required in this case was in violation of National Agreement. Six hours of OT to be paid to those who would have been qualified to do the work. In addition, the employees that were required to work OT were to be paid one hour of administrative leave.

AIRS Case No. 15104

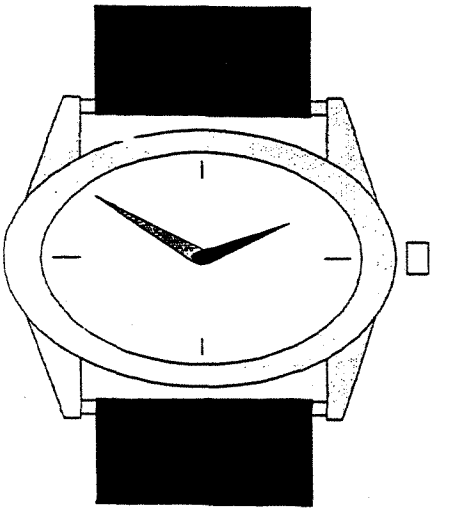
Contrary to management's position, the arbitrator found that management violated Article 8.5.G when it forced non-ODL employees to work OT and did not permit grievants to work 12 hours, though they were available and willing to perform productive work. Each to be paid 2 hours of penalty overtime.

AIRS Case No. 14830

ODL Employee on Annual Leave

Management violated Article 8.5 by failing to call the grievant in for OT. Grievant was on the ODL. No emergency existed on the day in question. In fact management had knowledge that employee would be on annual leave. Grievant to be compensated for 8 hours on each of the days in question.

AIRS Case No. 16767



OT and Limited Duty Status

The USPS did not violate the National Agreement when it allowed the grievant to place name on OTDL but never assigned him OT because of his limited duty status. Grievant was found physically unable to perform the required work. Postmaster not required to tailor make an OT assignment just because name on OT list.

AIRS Case No. 16010

Obligation to Contact Absent ODL Employee

Grievant improperly bypassed for OT when he was on the ODL and employee who was called to work was not. Supervisor failed to contact grievant who was available for work.

AIRS Case No. 15377

Arbitrator found that grievant was bypassed for overtime work. Union position that had the employees on OT list been asked to work overtime, and refused, or if they agreed to work and additional personnel had nevertheless been needed, then outside help could have been brought in. However, grievant was not called, nor asked to stay before his tour ended.

AIRS Case No. 14426

Management did not violate Article 8 by denying the grievant the opportunity

to work two hours of pre-shift overtime and/or two hours of post-shift overtime. An employee may be passed over if the employee is absent on the day the scheduling assignment is made.

AIRS Case No. 15294

Management did not violate Article 8.5 when it did not call grievant, who is on the ODL, to work OT. The Arbitrator found that even though grievant was on the ODL, an employee absent from work on the day of the OT is not entitled to be assigned OT.

AIRS Case No. 14829

ET-9 Overtime

USPS violated National Agreement when it assigned an ET-8 to do work normally performed by ET-9. Arbitrator awarded grievant four hours of OT. management also violated Article 7 in its assignment.

AIRS Case No. 14179

12 Hours for ODL Employees

Management did not violate Article 8.5 when it did not utilize Tour 1 employees in excess of 12 hours when Tour 2 employees who were not on ODL were called in to work overtime during the Christmas rush. There is no obligation on management to work ODL employees more than 12 hours before using non-ODL employees.

AIRS Case No. 13892

Penalty Overtime Pay

Management violated Article 8.5.6. It forced non-ODL employees to work overtime and did not permit the grievants to work 12 hours though they were available and willing to perform the work. Grievants awarded two hours of penalty overtime pay.

AIRS Case No. 500936

Out of Schedule Overtime

Employer detailed 16 LSM clerks from Tour 2 to Tour 1 without Union concurrence. The clerks, having been assigned outside their regular schedule, are contractually entitled to out of schedule overtime.

AIRS Case No. 14182

Change of Duty Schedule

USPS violated Article 8.5 by not accommodating the grievant by changing his duty schedule in order to testify at an EEO hearing. Therefore grievant was compensated time and one half for the hours that he was required to testify at the EEO hearing.

AIRS Case No. 14839

Equitable Distribution of OT

Management did not violate Article 8. Union's statistics did not show that management failed to make every effort to distribute overtime equitably as required by Article 8. The varying hours can be explained by special skills, scheduling realities and availability. There was no showing that specific opportunities were denied.

AIRS Case No. 14886

Obligations to ODL Employees

Article 8 and LMOU required USPS to assign OT work to ODL employees if they have not exhausted their obligations per Section 5G, to cover a full shift of one employee. Employer may not select one non-ODL employee to fill in for that shift even if no single ODL employee is available to perform the OT work, and two or more ODL employees must be used to cover the full shift of the one absent employee. Non-ODL employee may be assigned only if all available employees on the ODL have worked 12 hours in a day or 60 hours in a service week.

AIRS Case No. 14516

12 Hours and ODL

USPS violated the National Agreement when it did not utilize clerks on the ODL, up to a maximum of 12 hours, the last two of which would have been on penalty OT pay, when instead, for reasons that the USPS said were operationally necessary, employees were worked overtime who were not on the overtime desired list. Employees to be compensated for two hours at the penalty OT rate.

AIRS Case No. 14154

Avoidance of OT

USPS did not violate the National Agreement or Local Memo since there was no proof that detail made was purely to avoid the payment of overtime. However, the arbitrator found that this conclusion did not give management carte blanche to schedule and detail as it pleases. He stated that it should always consider alternative ways of scheduling when overtime questions are possible.

AIRS Case No. 15625

USPS did not violate Article 8 when it arranged to have work performed which denied the grievant an opportunity to work overtime. The arbitrator found that the Article 8 provisions are not triggered by management's decision to temporarily transfer an employee to duties he/she is capable of performing at straight time.

AIRS Case No.15367

Not Contingent to Tour

Management did not violate the National Agreement when it did not schedule grievants for 12 midnight to 2:00 a.m. OT when their "off-time" was 11:00 p.m., and offered work to non-ODL employees. Arbitrator found that employee cannot be made available by forcing management to put him on an unneeded hour of overtime nor by calling him in with a four hour guarantee.

AIRS Case No. 1534

Full - Text Section

Article 8 - National Level Arbitration

The complete text of the awards, court opinions, and administrative decisions reported in the CBR are included in this section. Except for the deletion of introductory headings, these cases are presented in their entirety. Editing of the award or decision within the text is limited to exceptionally long decisions where text is deleted for space reasons. Deletion of text is indicated by a string of asterisks *******. This indicates that a paragraph of text or several paragraphs have been deleted for space reasons. No deletion of text within paragraphs is made.**

If you have questions about overtime issues or are in need of copies of arbitration awards cited in this CBR, please contact the Industrial Relations Department at 1300 L. Street, NW, Washington, D.C. 20005 or by telephone at (202) 842-4273

CBR 92-04 SPECIAL ISSUE
AIRS NO.: 12065

ARTICLE 8 ARBITRATION AWARD
USPS NO.: H4N-NA-C-21 (3rd issue)
H4C-NA-C-27
ARBITRATOR: MITTENTHAL, R.
DATE OF AWARD: September 11, 1987

TEXT OF AWARD

Subject: Pay Consequences of Application of 60-Hour Work Limitation

Statement of the Issue: Whether an employee sent home in the middle of his tour on a regularly scheduled day, because of the bar against employees working more than 60 hours in a service week, is entitled to be paid for the remainder of his scheduled day?

Statement of the Award: The Unions' request for the hypothetical employee involved in this case is granted. This employee, having been sent home on his regularly scheduled day before the end of his tour on account of the 60-hour ceiling and having experienced no temporary change of schedule, must be paid for the hours he lost that day.

Contract Provisions Involved: Article 7, Section 1; Article 8, Sections 1, 2, 4, 5 and 8; Article 19; and the Article 8 Memorandum of the July 21, 1984 National Agreement. Various Postal Service handbooks and manuals.

* * * * * * * * * * *

BACKGROUND

This grievance concerns the pay consequences, if any, of Management sending an employee home before he completes a regularly scheduled day because of the 60-hour work limitation in Article 8, Section 5G2 of the National Agreement. The Unions insist that he is entitled to be paid for the regularly scheduled hours he lost, that these hours are part of his guaranteed workweek. The Postal Service disagrees.

To better understand the issue, it would be helpful to consider a hypothetical example. Suppose "X" is a full-time regular on the overtime desired list (ODL). Suppose further that his regular schedule for a given week was Monday through Friday on day tour and that he worked the extra hours indicated below:

	S	S	M	T	W	T	F
Hours Scheduled		8	8	8	8	8	8
Extra Hours		8	4	4	4	4	
Actual (Total) Hours		8	12	12	12	12	8

All of the extra hours, eight on Sunday and four on Monday through Thursday, were paid for at the overtime rate (time and one-half) or the penalty overtime rate (double time). At the end of "X"s Thursday tour, he had worked a total of 56 hours. My original award in this case (dated May 12, 1986) held that Article 8, Section 5G2 establishes "an absolute bar against an employee working more than 60 hours in a service week." Management was hence obliged to send "X" home after four hours of work on Friday, his last regularly scheduled day.

The Unions also raised the pay question, the pay consequences of strict enforcement of the 60-hour limitation. My award expressed the issue in these words:

> "...Whether an employee sent home on a regularly scheduled day before the end of his tour, on account of the 60-hour ceiling, is nevertheless guaranteed a full eight hours' pay for the day? Or, referring to the hypothetical example and assuming "X" is sent home after four hours' work on Friday because he has at that point completed 60 hours, whether he is entitled to pay for the other four hours he did not work that day?"

I addressed this issue from the standpoint of Section 432,6 (Guaranteed Time) of the Employee & Labor Relations Manual and the "guarantee provisions" of Article 8, Section 8C. But the ambiguities in the latter contract clause and the absence of any detailed argument on this point led me to remand this phase of the dispute to the parties for further consideration. After extensive discussion, they were unable to resolve the pay question and they returned the matter to the arbitrator. A hearing was held on April 21, 1987. Post-hearing briefs were received on June 26, 1987.

The Unions claim that "X" is entitled to be paid for the four hours he lost on Friday due to the 60-hour work limitation.*1 They believe this claim is justified by two basic propositions. First, they maintain that "full-time regular employees are guaranteed 8 hours pay for each of their 5 regularly scheduled days, whether worked or not, absent a valid temporary change of schedule." They rely on the history of pay guarantees for regularly scheduled hours (particularly the Salary Act of 1965 and the subsequent ***Groettum*** rulings), the contract language with respect to the regular five-day schedule (particularly Article 7, Section 1A1 and Article 8, Section 1), the terms of various Postal Service manuals and handbooks (particularly Part 434.612 of the ELM and EL-401 the Supervisor' s Guide to Scheduling and Premium Pay), and the admissions made by Postal Service representatives in this very case.

*FOOTNOTE *1 That four hours' pay would evidently be in the form of administrative leave.*

Second, they maintain that the "1984 changes to the overtime provisions of Article 8 do not nullify this guarantee for employees who are sent home because of the 60-hour limit." They stress the purpose behind the 1984 overtime amendments (specifically, to reduce overtime). They contend this purpose would be undermined by allowing Management to substitute overtime hours for regularly scheduled straight time hours (for example, permitting "X"s four overtime hours on Thursday to take the place of his final four regularly scheduled hours on Friday). Moreover, they say Management's position in this case "would actually have the perverse effect of diminishing the disincentives to use of overtime established by the Agreement."

The Postal Service argues that this pay issue "has already been decided by this arbitrator in his earlier opinion and award." It refers to the comments made in that award regarding Article 7, Section 1A1 and Article 8, Section 1 and contends "these provisions did not construct any entitlement - or requirement - to work." Its position is that where a full-time regular is sent home during a regularly scheduled tour because of the operation of the 60-hour work limitation, he has "no guarantee of work or pay based upon..." the above Article 7 and 8 contract clauses. It also cites the comments in the earlier award on "guaranteed time" under Part 432.6 of the ELM. It notes that this manual language "does not provide an independent basis for the payment of 'guaranteed time'..." to "X" and that one must therefore look to the National Agreement. But, it emphasizes, the parties agree that the "guarantee provisions" of the National Agreement, specifically, Article 8, Section 8, are not applicable to the hypothetical problem in this case.

The Postal Service further urges that the "guaranteed time" concept relates, with the exception of the "carrier rounding rule", only to "an overtime situation." It relies, in support of this proposition, on the F-21 and F-22 Handbooks. It observes that the pay question here concerns the final four hours of "X"s regularly scheduled tour on Friday, a straight time situation. It concludes that the "guaranteed time" concept therefore has no application to the four straight time hours in dispute. For these reasons, it believes a full-time regular sent home during his regularly scheduled tour because of the 60-hour ceiling is not entitled to be paid for the remainder of that scheduled tour. It insists that the lost hours are properly treated as leave without pay.

DISCUSSION AND FINDINGS

It should be stressed at the outset that the earlier award addressed three separate issues, I held (1) that the Unions' grievances with respect to the 60-hour limitation in Article 8, Section 5G2 were arbitrable, (2) that this contract provision established "an absolute bar against employees working more than 60 hours in a service week", and (3) that the pay consequences of this 60-hour ceiling on our hypothetical "X" could not be decided on the basis of the limited evidence and argument then before me. Consequently, this third issue was remanded to the parties for further discussion. I did speculate, however, as to possible considerations which might influence a decision on the third issue. Part of that speculation dealt with Article 8, Section 8, the "gua provisions" of the National Agreement. The parties hav agreed that Article 8, Section 8 is not relevant to th question. The answer lies elsewhere.

Any analysis of the problem must begin with c Management admissions. The Postal Service argued earlier case that "Article 7, Section 1 and Article 8, Se 1 and 2C constructed a core schedule for full-time reg and that "a full-time regular is guaranteed that basic schedule." For example, Article 8, Section 1 speaks "normal workweek" being "forty (40) hours per week, (8) hours per day ..." The full-time regular is thus p "guaranteed" those core hours, those hours which are p his regularly scheduled week. The original award st however, that Management could not insist on the emp working his "guaranteed" hours if, by doing so, he v exceed the 60-hour ceiling.

The Postal Service's position now seems to be that 60-hour ceiling prevents an employee from working c regularly scheduled hours, those hours cannot be consi part of any "guarantee." It contends that the employee c properly be paid, in these circumstances, for the regu scheduled hours he lost. The Unions, on the other hand, to say that the "guarantee" insures the employee eith regularly scheduled hours or, where some such hours c be worked because of a contract prohibition, pay in li those hours. It recognizes just one exception, name timely change in schedule which alters the employee's l in a given week.

Thus, the crux of this dispute is the parties' diffe conceptions of the scope of the "guarantee." A fair rea of certain Postal Service handbook and manual lang reveals that the "guarantee" is a good deal broader tha Postal Service is prepared to concede. The EL-401 H book, described as "a management tool to assist in continuing maintenance of time and attendance in compli with the Fair Labor Standards Act..., postal pol and...contractual agreements", is particularly helpful. IVB is entitled "Work Schedule Guarantees." It qu Article 8, Section 1 in full and then adds by way of illu tion:

> "...if you [Management] work a full-time employ hours [on one of his regularly scheduled eight-h tours], *then release him* from duty for lack of work, *incur the obligation* [apparently under Article 8, S tion 1] *to pay 2 hours.* These 2 unworked hours charged to administrative leave." (Emphasis added)

This point is made even more forcefully in other EL- examples:

> "...a maintenance employee who normally reports at 4 p.m. was called in at 9:00 a.m. because of a ma mechanical problem. His work was completed at 11 a.m. His supervisor directed him to go ahead and w until 5:30 p.m., then go home for the day. The superv

mistakenly assumed that a management-initiated scheduled change would keep the workhours to 8. ***Since the employee was order to clock out at 5:30 p.m. and not given the opportunity to work his regular tour, the Postal Service is liable for*** 6-1/2 hours of postal overtime for the period between 9:00 a.m. and the start of the scheduled tour at 4:00 p.m., 1-1/2 hours at the straight time rate for the period between 4:00 p.m. and 5:30 p.m., ***PLUS 6-1/2 hours of administrative leave at the straight time rate for the unworked portion of the employee's scheduled tour between 5:30 p.m. and 12:30 a.m.*** In this example, the Postal Service receives 8 hours' work but pays for 14-1/2 hours." ***Part IIB*** (Emphasis added)

"...a supervisor plans ahead and notifies an employee by the Wednesday of the preceding service week to ***work a temporary schedule the following service week from 6:00 a.m. to 2:30 p.m., instead of his regular schedule from 8:00 a.m. to 4:30 p.m.*** The employee is paid 2 hours' 'out-of- schedule premium' for the hours worked from 6:00 a.m. to 8:00 a.m. and 6 hours straight time for the hours worked from 8:00 a.m. to 2:30 p.m. ... If the same situation occurred, except that ***the notification requirement was not met,*** the time between 8:00 a.m. and 4:30 p.m. - the regular schedule - is payable as straight-time hours. ***If the employee was sent home at 2:30 p.m., he must be paid*** for the two hours between 6:00 a,m. and 8:00 a.m. at the overtime rate; straight-time pay for the period from 8:00 a.m. to 2:30 p.m., ***plus two hours' administrative leave at the straight-time pay for the period from 2:30 p.m. to 4:30 p.m." Part IIID3*** (Emphasis added)

All of this EL-401 language clearly shows that a full-time regular, who has not received proper notice of a schedule change, is entitled to work all of his regularly scheduled hours. And when he is sent home early on one of his regularly scheduled tours due to lack of work (or due to his having completed eight hours as a result of his having reported early at supervision's request), he is entitled to be paid for the hours he lost. He appears to be "guaranteed" eight hours' pay for each of his regularly scheduled tours.

The ELM reaches much the same conclusion. Parts 434.611 and 434.612 concern "out of schedule premium." Where Management asks a full-time regular to work a "temporary schedule" different from his regularly scheduled workday or workweek and where it gives him timely notice of such a change, he receives "out of schedule premium" (i.e. , time and one-half) for any hours worked "outside of, and instead of. . ." his regularly scheduled hours. However, if the notice requirement is not met, then -

"...the employee is entitled to work his regular schedule. Therefore, any hours worked in addition to the employee's regular schedule are not worked 'instead of' his regular schedule. Such additional hours worked are not considered as 'out of schedule premium' hours. Instead, the are paid as overtime hours [time and one-half] worked in excess of 8 hours per service day or 40 hours per service week." ***Part 434.612b*** (Emphasis added)

This notice requirement would be meaningless if regularly scheduled hours were not "guaranteed." Consider the following comparison. Management provides an employee with the necessary notice and substitutes a 7:00 a,m. to 3:30 p.m. tour for his regularly scheduled 3:30 p.m. to 12 midnight tour on a given day. Part 434.611 says he is entitled to out-of-schedule premium (time and one-half) for his changed shift hours. Absent such notice, however, Part 434.612 says he is entitled to overtime (ordinarily, time and one-half) for such hours. Assuming there were no "guarantee", the end result would be the same (time and one-half for the changed hours) whether Management gave the required notice or not. That plainly could not have been what the ELM intended. Where the notice requirement is not satisfied, according to 434.612b, "the employee is entitled to work his regular schedule.,." In these circumstances, the regularly scheduled hours are "guaranteed." And, according to EL-401, if Management does not permit the employee to work his "guaranteed" hours due to lack of work (or certain other reasons), it must nevertheless pay him for his lost hours.

None of this is expressly stated in the National Agreement. But Article 19 provides that "those parts of all handbooks, manuals and published regulations of the Postal Service, that directly relate to wages, hours or working conditions...shall contain nothing that conflicts with this [National] Agreement, and shall be continued in effect...." The terms of the EL-401 and ELM, quoted above, concern "wages" and "hours" for bargaining unit employees. They do not conflict with the language of the National Agreement.*2 They were not "change[d]", pursuant to the procedures set forth in Article 19, during the life of the Agreement. They therefore were "continued in effect..." and were binding obligations on Management at the time this dispute arose. When Article 8, Section 1 and this EL-401 and ELM language are read together, there can be little question that the parties contemplated that the "normal work week" would, in most circumstances, "guarantee" a full-time regular all of his regularly scheduled hours.

*FOOTNOTE *2 The parties agree that Article 8, Section 8C relates only to part-time employees with flexible schedules and is therefore inapplicable to the facts of this case.*

The present case, our hypothetical "X", and the situation described in the EL-401 both involve an employee sent home during his regularly scheduled hours. Only the reasons for this action differ. EL-401 refers to someone sent home due to lack of work or due to his completing eight hours' work before the end of his tour on account of having reported early. "X" was sent home because he could not work beyond the 60-hour ceiling established by Article 8, Section 5G2. The question is whether this distinction calls for a result different from the one provided in the EL-401. I do not think so. The crucial consideration is that "X", like his fellow employee in the EL-401, was sent home during his regularly scheduled hours through no fault of his own. He did not ask to leave

early; he was not removed due to misconduct or due to some breach of duty by others. His regularly scheduled hours on Friday were cut short because supervision, knowing he had not yet worked his last regularly scheduled day, failed to limit his overtime to 20 hours. Had supervision taken his accumulated overtime hours into consideration, the problem would never have arisen and "X" could have worked his last regularly scheduled day without exceeding 60 hours.*3 Because "X" was in no way at fault, he should be treated no differently for purposes of the "guarantee" than his fellow employees in the EL-401.

*FOOTNOTE *3 Management can avoid the kind of problem posed in this case by simply limiting ODL employees to nor more than 20 hours' overtime during a week. This was acknowledged by the Postal Service in questions and answers it prepared on the impact of the 1984 National Agreement.*

None of these findings are undermined by the Postal Service argument. The earlier award held that the 60-hour work limitation had to be applied whenever an employee reached this ceiling regardless of the "normal work week" and "full-time employee" definitions in Article 8, Section 1 and Article 7, Section 1, respectively, Or, to put the proposition:

> "16. If overtime is needed on a non-scheduled day, and the appropriate employee on the ODL will exceed the 60 hour week limit if he is scheduled to work his non-scheduled day, is he still scheduled to work the overtime?
>
> No. Since the work hour guarantees of Article 8, Section 8 would apply, this employee would exceed the 60 hour limit designated in Article 8, Section 5.G.2. Therefore, he is not considered to be available and would not be scheduled for this overtime assignment."

Such arrangements would be consistent with one of the parties' main objectives in negotiating the Article 8 changes, namely, "to limit overtime..." See the first paragraph of the Article 8 Memorandum.

Somewhat differently, a full-time employee's regularly scheduled hours must be cut short at the point at which he has accumulated 60 hours in a service week. The Postal Service insists that the arbitrator, by ruling that regularly scheduled hours can be limited in this fashion, necessarily limited the pay the employee could receive for such hours. Its position seems to be that to the extent to which regularly scheduled hours cannot be "guaranteed" because of the 60-hour ceiling, they cannot be paid for either.

This argument, however, reads far too much into the earlier award. My references there to Articles 7 and 8 dealt largely with the arbitrability issue. My concern was with *hours*, whether a full-time employee could be required to work more than 60 hours where this extra time involved regularly scheduled hours. My award did not decide the *pay* question, that is, the pay consequences of the 60-hour work limitation. The present opinion shows that a full-time employee is ordinarily entitled to pay for regularly scheduled hours n worked through no fault of his own. That concept was plainl embraced by the Postal Service in the EL-401. It is proper applicable to our hypothetical "X" in the circumstances this case.

The Postal Service relies also on the F-21 and F-22 Tim & Attendance Handbooks. It points to Part 222.14 of th F-21 which says, "Guaranteed time for all employees excep ing regular carriers (See 222.53) applies only in an overtim situation." It emphasizes that the hypothetical in this ca concerns straight time hours, rather than overtime hours, a hence does not call for the application of the "guarantee time" provisions.

The difficulty with this claim is that the EL-401 and P 434.612 of the ELM clearly recognize that a "guarante exists for straight time hours as well. The EL-401 expres speaks of the employee being paid for regularly schedul hours not worked, the same situation as the present ca And, indeed, one of the exhibits attached to the F- authorizes the payment of "guaranteed time" for straight ti hours not worked. See, in this connection, Exhibit 222. which instructs the timekeeper to record certain straight ti hours not worked in a "Guaranteed Time box" that identif "the time as guaranteed time." All of this seems to contrad the Part 222.14 language. It seems evident, in other wor that the Postal Service contemplated "guaranteed time" certain regularly scheduled hours not worked. That is exa ly what the Unions are seeking in these grievances.

For the foregoing reasons, the ruling is that "X" was entit to be paid for the four regularly scheduled hours he l because of the application of the 60-hour ceiling.

AWARD

The Unions' request for the hypothetical employee invol in this case is granted. This employee, having been s home on his regularly scheduled day before the end of tour on account of the 60-hour ceiling and having experien no temporary change of schedule, must be paid for the h he lost that day.

CBR 92-04 SPECIAL ISSUE
AIRS NO.: 7973

ARTICLE 8 ARBITRATION AWARD
USPS NO.: H4N-NA-C-21 (3rd Issue)
H4C-NA-C-27
ARBITRATOR: MITTENTHAL, R.
DATE OF AWARD: May 12, 1986

TEXT OF AWARD

Subject: Arbitrability - Proper Scope of 60-Hour W Limitation - Pay Consequences of Application of 60-H

Limitation where Employee Sent Home Before End of Tour on Regularly Scheduled Day

Statement of the Issues: Whether the Unions' claims in this case are arbitrable? Whether, assuming the dispute is arbitrable, the 60-hour limitation is an absolute bar to an employee working beyond 60 hours in a service week? Whether, assuming such a bar, an employee sent home in the middle of his tour on a regularly scheduled day is entitled to be paid for the remainder of his scheduled day?

Contract Provisions Involved: Article 7, Section 1; Article 8, Sections 1, 2, 4, 5 and 8; Article 15, Section 4; Article 19; and the Article 8 Memorandum of the July 21, 1984 National Agreement.

Statement of the Award: The grievances are arbitrable and are granted to the extent set forth in the foregoing opinion. Article 8, Section 5G2 does establish an absolute bar against employees working more than 60 hours in a service week. The question raised as to the pay consequences of this bar is remanded to the parties for further consideration. Should they be unable to resolve the matter within a reasonable period, any of them may return the problem to national level arbitration for a final ruling.

BACKGROUND

These grievances concern the meaning of the 60-hour work limitation in Article 8, Section 5G2. The Unions insist this limitation is an absolute ceiling on the number of hours an employee may work in a service week and must be honored in all cases, regardless of the pay consequences. The Postal Service disagrees, asserting that an employee may work more than 60 hours when necessary to complete his tour on a regularly scheduled day at straight time rates. It also alleges that the Unions' claim is not arbitrable. Both the arbitrability question and the merits (assuming the dispute is arbitrable) are before me for decision.

To better understand the issue in these grievances, it would be helpful to consider a hypothetical example. Suppose "X" is a full-time regular on the overtime desired list (ODL). Suppose further that his regular schedule for a given week was Monday through Friday on day tour and that he worked the extra hours indicated below:

	S	S	M	T	W	Th	F
Hours Scheduled			8	8	8	8	8
Extra Hours		8	4	4	4	4	
Actual (Total) Hours		8	12	12	12	12	8

His eight hours' work on Sunday, a non-scheduled day, was paid for at the overtime rate (time and one-half) pursuant to Article 8, Section 4B. His extra four hours' work on Monday through Thursday, scheduled days, was paid for as follows: two hours at the overtime rate (time and one-half) pursuant to Article 8, Section 4B, and two hours at the penalty overtime rate (double time) pursuant to Article 8, Section 4C.

The Unions emphasize that "X", as of the end of his Thursday tour, had worked a total of 56 hours. They argue that the 60-hour limitation in Article 8, Section 5G2 prohibited Management from working him more than four hours on Friday, his final scheduled day. They believe that Management was obligated to send him home after four hours on Friday and that he would nevertheless have been entitled to eight hours' pay for the day under the terms of Article 8 and the Employee & Labor-Relations Manual (ELM).

The Postal Service contends, at the outset, that the grievances are not arbitrable because "the result sought [by the Unions] would require changes to existing contract language." Moreover, it has a quite different view of Article 8, Section 5G2. It says the 60-hour limitation is not an absolute bar to an employee working more than 60 hours in a service week. It regards this limitation as an overtime administration rule, as a means of determining the point at which Management must cease using someone from the ODL and assign available overtime instead to a non-ODL employee. It stresses that no overtime is involved in the situation before the arbitrator, that "X" simply completed his final scheduled day at straight time rates. It maintains that the 60-hour limitation cannot reasonably be read, under the circumstances of this case, to prohibit "X" from finishing this regularly scheduled day even though he thereby worked 64 hours in the week. Any other conclusion, it notes, would deny "X" his right to five service days, each consisting of eight hours, in his service week. It states also that to grant these grievances would be to provide "X" with eight hours' pay on Friday for four hours' work, a result which would improperly add a new guarantee provision to the terms of Article 8, Section 8.

The relevant terms of the 1984 National Agreement state:

Article 7 - Employee Classifications

"Section 1. Definition and Use

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

1. ***Full-Time. Employees in this category ...shall be assigned*** to regular schedules consisting of ***five (5) eight (8) hour days*** in a service week..." (Emphasis added)

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 for full-time regular employees will be forty hours per week, eight hours per day within nine (9) consecutive hours...

"Section 2. Work Schedules

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...

"Section 5. Overtime Assignments

G. Effective January 19, 1985, 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) 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...); 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...*

"Section 8. Guarantees

A. An employee called in outside the employee's regular work schedule shall be guaranteed a minimum of four (4) consecutive hours of work or pay in lieu thereof where less than four (4) hours of work is available...

B. When a full-time regular is called in on the employee's non-scheduled day, the employee will be guaranteed eight hours work or pay in lieu thereof.

C. The Employer will guarantee all employees at least four (4) hours work or pay on any day they are requested or scheduled to work in a post office or facility with 200 or more man years of employment per year..." (Emphasis added)

Article 8 - Memorandum

"Recognizing that excessive use of overtime is inconsistent with the best interests of postal employees and the Postal Service, *it is the intent of the parties in adopting changes to Article 8 to limit overtime, to avoid excessive mandatory overtime, and 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. *The parties have agreed to certain additional restrictions on overtime work,* while agreeing to continue the use of overtime desired lists to protect the interests of those employees who do not want to work overtime, and the interests of those who seek to work limited overtime. The parties agree this memorandum does not give rise to any contractual commitment beyond the provisions of Article 8, but is intended to set forth t underlying principles which brought the parties to agr ment..." (Emphasis added)

DISCUSSION AND FINDINGS

The Postal Service claims these grievances are not bitrable because to grant what they seek "...would req changes to existing contract language." It notes the Unic insistence that employees be sent home at the end of 60 ho work even though they are then in the midst of a regul scheduled day at straight time rates. It contends that cutt short a regularly scheduled day would improperly change definitions of both a work week under Article 8, Sectio and 2C and a fill-time employee under Article 7, Sectio It states, referring to the hypothetical example, that Unions would permit "X" to work just four hours on Fri and would thus deny him part of his regularly scheduled days, "each consisting of eight (8) hours", in a service w In its opinion, such a result conflicts with the language o National Agreement.

This argument is not persuasive. To begin with, Ar 8, Sections 1 and 2C refer to a "*normal* work week..." plain implication is that there may occasionally be an *ab mal* work week, something other than five days "e consisting of eight (8) hours." Assume for the moment Article 8, Section 5G2 is an absolute bar to emplo working beyond 60 hours in a week. The application of prohibition might well result in an employee working than eight hours on a regularly scheduled day. In hypothetical, for instance, the prohibition would f Management to send "X" home after four hours on Fri his last regularly scheduled day. Such a result would change the definition of a "normal work week." It w merely demonstrate that a "normal work week" is n constant, that deviations are possible. Other provisio the National Agreement may impact an employee's sch and cause him to work less than eight hours on a regu scheduled day. Hence, the Unions could prevail here wi effecting any change in the language of Article 8, Secti and 2C.

The same type of analysis can be made with respe Article 7, Section 1. That provision defines full employees as those who are "...*assigned* to regular sche consisting of five (5) eight (8) hour days in a service w Being "assigned to" such a regular schedule is one t actually working this schedule is quite another. The fac a full-time employee works less than eight hours on c his regularly scheduled days does not change his statu does not alter the Article 7, Section 1 definition. He re a full-time employee because he was "assigned to appropriate schedule for full-time employees. Henc Unions could prevail here without effecting any char the language of Article 7, Section 1.

These observations reveal that the Postal Service arg cannot be evaluated without first interpreting the "n

work week" and "full-time employee..." definitions. Its arbitrability claim is based on a faulty view of these definitions. Neither Article 7, Section 1 nor Article 8, Sections 1 and 2C stand in the way of the Unions' construction of Article 8, Section 5G2. The crucial issue here is the ***breadth*** of the 60-hour limitation in Section 5G2. Is that limitation applicable in any and all circumstances as the Unions believe? Or is that limitation inapplicable to work on a regularly scheduled day at straight time rates as the Postal Service believes? This dispute raises "interpretive issues" under Articles 7 and 8 and is therefore arbitrable. A decision in the Unions' favor would not require the arbitrator to go beyond the language of the National Agreement. Such a decision would be "limited to the terms and provisions of...." Articles 7 and 8 as cited above. What the Postal Service seems to be saying is that the Unions' view of the 60-hour limitation would be inconsistent with the "normal work week" and "full-time employee..." definitions. But this argument is not supported by a fair reading of these definitions.*1

*FOOTNOTE *1 Unions state too that an employee sent home before the end of a regularly scheduled day on account of the 60-hour limitation is entitled to eight hours' pay. Its position is that he must be paid for whatever hours he is not allowed to work that day. That claim also raises "interpretive issues" and is arbitrable.*

Turning to the merits of the dispute, the parties disagree on the scope of Article 8, Section 5G2. This provision says ODL employees "...excluding December, shall be limited to...no more than sixty (60) hours of work in a service week." These words clearly establish a ceiling OD the number of hours an ODL employee may work during a week. They flatly prohibit anyone working more than 60 hours. That was, initially at least, the Postal Service's position as well. In the April 5, 1985 letter which prompted these grievances, the Postal Service stated that "12 hours per day and 60 hours in a service week are to be considered upper limits beyond which full-time regular employees are not to be worked." That is precisely the view the Unions take in this arbitration.

However, the Postal Service has qualified its position. It regards Section 5G as an ***overtime*** rule, as a means of determining the point at which Management must cease using someone from the ODL and assign available ***overtime*** instead to a non-ODL employee. It maintains that when an ODL employee is working a regularly scheduled day at ***straight time***, he should be allowed to complete his day even though it takes him beyond the 60-hour limitation. It believes such an arrangement is permissible because the disputed work (i.e., the hours beyond 60) involved straight time hours and because Section 5G was largely concerned with overtime hours.

This argument is undermined by a variety of considerations. First, Section 5G1 and 2 speak only of "hours" or "hours of work." Nowhere in this portion of 5G is any distinction drawn between straight time hours and overtime hours. The 60-hour ceiling was obviously intended to count all hours worked, whether straight time or overtime. The Postal Service does not really challenge these observations. Rather, it says the 60 hour limitation should only come into play when the hours in excess of 60 are overtime hours. But nothing in the language of 5G2 suggests that the 60-hour limitation could only be triggered by an overtime assignment. Had that been the parties' intention, they surely would have so.

If Section 5G meant only to "defin[e]...the relationships involving the overtime desired list...", as the Postal Service asserts, the parties would have stopped with 5G1. For the relationship between non-ODL and ODL employees was fully spelled out by the end of 5G1. The extra language in 5G2, the 60-hour ceiling, obviously had some larger purpose. It has nothing to do with the relationship between non-ODL and ODL employees.

Thus, what the Postal Service seeks in this case is to add another exception to the 60-hour limitation. Section 5G2 presently says "excluding December...", Management may not work ODL employees beyond 60 hours. 'Now the Postal Service asks that this exclusion be enlarged to encompass certain straight time hours as well. But, as I have already explained, the language of 5G2 simply does not support this additional exclusion.

My view of the matter is reinforced by the recent negotiations. NALC President Sombrotto testified that the following remarks were made at the bargaining table at the time the 5G2 concept was discussed:

> "The idea of the twelve- and sixty-hour restrictions were that no employee would be either required or to volunteer to work over sixty hours and that management's representative, ***the then Postmaster General, made it clear that those were absolute limitations that would not and could not be violated..."*** (Emphasis added)

This testimony was not contradicted by any Management witness. Hence, the purpose of 5G2 was to create an absolute bar against employees working more than 60 hours.

Moreover, Management can avoid the kind of problem posed in the hypothetical example by limiting ODL employees to no more than 20 hours' overtime during a week. This was acknowledged by the Postal Service in questions and answers it prepared on the impact of the 1984 National Agreement:

> "16, If overtime is needed on a non-scheduled day, and the appropriate employee on the ODL will exceed the 60 hour week limit if he is scheduled. to work his non-scheduled day, is he still scheduled to work the overtime?
>
> No. Since the work hour guarantees of Article 8, Section 8 would apply, this employee would exceed the 60 hour limit designated in Article 8, Section 5.G.2. Therefore, he is not considered to be available and would not be scheduled for this overtime assignment."

Such arrangements would be consistent with one of the parties' main objectives in making the Article 8 changes, namely, "to limit overtime..."*2

*FOOTNOTE *2 See the first paragraph of the Article 8 Memorandum.*

For these reasons, my ruling is that Article 8, Section 5G2 is an absolute bar to employees working more than 60 hours in a week. Management was required to send hypothetical "X" home after four hours on Friday, after he had completed 60 hours of work in the week.

There remains the pay issue, the pay consequences of strict enforcement of the 60-hour limitation. Whether an employee sent home on a regularly scheduled day before the end of his tour, on account of the 60-hour ceiling, is nevertheless guaranteed a full eight hours' pay for the day? Or, referring to the hypothetical example and assuming "X" is sent home after four hours' work on Friday because he has at that point completed 60 hours, whether he is entitled to pay for the other four hours he did not work that day?

The Unions rely on Section 432.6 (Guaranteed Time) of the ELM. That provision states in part:

> ".61 Explanation. Guaranteed time is paid time not worked under the guarantee provisions of collective bargaining agreements for periods when an employee has been released by his supervisor and has clocked out prior to the end of a guaranteed period..." (Emphasis added)

According to this "explanation", the ELM does not provide an independent basis for the payment of "guaranteed time." It refers back to the "guarantee provisions" of the National Agreement. It calls for payment of "guaranteed time" only to the extent that the disputed hours are "paid time not worked" under such "guarantee provisions." Hence, the Unions' claim cannot be sustained on the basis of the ELM alone.

The "guarantee provisions" are found, in Article 8, Section 8. Only one such provision, Section 8C, seems relevant to the issue raised in this case:

> "C. The Employer will *guarantee* all *employees at least four (4) hours* work or *pay on any day they are* requested or *scheduled to work* in a post office or facility with 200 or more man years of employment per year. All employees at other post offices and facilities will be guaranteed two (2) hours work or pay when requested or scheduled to work." (Emphasis added)

This clause shows that the guarantee for "X" on Friday, his last scheduled day in the week, was "at least four (4) hours ...pay..."*3 The underscored words, however, are ambiguous. They could be interpreted to mean a flat four-hour guarantee for anyone fitting this Section 8C description. Or they could be interpreted to mean a guarantee of no less than four hours, perhaps more where past practice or some other contract clause so dictates. The parties did not provide arbitrator with any detailed argument as to the proper in pretation of Section 8C. Nor did they offer any evidenc to what the practice had been when employees are sent h after four hours on a regularly scheduled day through no 1 of their own but rather through the operation of some cont clause. That practice, if one exists, might prove to 1 compelling consideration in this case.

*FOOTNOTE *3 This discussion shall assume the hypoti cal case concerns a post office with "200 or more man y of employment per year."*

For these reasons, a final ruling on the pay issue at time is not possible. This matter is remanded to the pa for further consideration in light of this discussion.

AWARD

The grievances are arbitrable and are granted to the e set forth in the foregoing opinion. Article 8, Section does establish an absolute bar against employees wo more than 60 hours in a service week. The question r as to the pay consequences of this bar is remanded t parties for further consideration. Should they be unal resolve the matter within a reasonable period, any of may return the problem to national level arbitration for a ruling.

CBR 92-04 SPECIAL ISSUE
AIRS NO.: 8283

ARTICLE 8 ARBITRATION AWARD
USPS NO.: H4N-NA-C-21 (4th Issue)
H4C-NA-C-27
ARBITRATOR: MITTENTHAL, R.
DATE OF AWARD: JUNE 9, 1986

TEXT OF AWARD

Subject: Arbitrability - Remedy for Violation of 1 Daily or 60-Hour Weekly Work Limitation

Statement of the Issues: Whether the Unions' claim case are arbitrable? Whether a violation of Article 8, 5G2, i.e., working an employee more than 12 hours i or 60 hours in a service week, justifies a remedy apa or beyond the penalty overtime pay provided by A Section 4C and D? If so, what should the remedy be

Contract Provisions Involved: Article 8, Sections and Article 15, Section 4 of the July 21, 1984 N Agreement.

Statement of the Award: The grievances are arbitr are granted to the extent set forth in the foregoing c

BACKGROUND

These grievances concern the appropriate remedy for a violation of the work ceilings stated in Article 8, Section 5G2, namely, 12 hours in a day and 60 hours in a service week. The Unions urge that any hours worked beyond these limitations should be paid for at two and one-half times the straight time rate. The Postal Service claims that the negotiated remedy is two times the straight time rate and that anything beyond such double time cannot be justified under the terms of the National Agreement. It believes the Unions are seeking to add a new penalty overtime pay clause to Article 8 and are thus seeking to modify the National Agreement. For this reason, it maintains the grievances are not arbitrable.

The relevant provisions of Article 8 should be quoted:

Section 4 - Overtime Work

"A. Overtime pay is to be paid at the rate of one and one-half (1-1/2) times the base hourly straight time rate.

"B. Overtime shall be paid to employees for work performed only after eight (8) hours on duty in any one service day or forty (40) hours in any one service week. Nothing in this Section shall be construed by the parties or any reviewing authority to deny the payment of overtime to employees for time worked outside of their regularly scheduled work week at the request of the Employer.

"C. ***Penalty overtime pay is to be paid at the rate of two (2) times the base hourly straight time rate.*** Penalty overtime pay will not be paid for any hours worked in the month of December.

"D. Effective January 19, 1985, ***penalty overtime pay will be paid to full-time regular employees for any overtime work in contravention of the restrictions In Section 5.F.***

"F. Wherever two or more overtime or premium rates may appear applicable to the same hour or hours worked by an employee, there shall be no pyramiding or adding together of such overtime or premium rates and only the higher of the employee's applicable rates shall apply." (Emphasis added)

Section 5 - Overtime Assignments

"F. ...excluding December, no full-time regular employee will be required to work overtime on more than four (4) of the employee's five (5) scheduled days in a service week or work over ten (10) hours on a regularly scheduled day, over eight (8) hours on a non-scheduled day, or over six (6) days in a service week.

"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 a 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...***" (Emphasis added)

In Case Nos. H4N-NA-C-21 (3rd issue) and H4C-NA-C-27, it was held that the underscored words in Section 5G2 constituted "an absolute bar to employees working more than 60 hours in a week." These words obviously are also an absolute bar to employees working more than 12 hours in a day. The 12-hour and 60-hour language in Section 5G2 establishes ceilings on the number of hours an employee may work. These ceilings, however, do not apply to work performed in the month of December.

The present case concerns the consequences of Management working an employee beyond 12 hours in a day or 60 hours in a week, the consequences of a ***violation*** of Section 5G2.

The Postal Service believes there should be no special consequences, at least none other than those already provided for in Article 8. It argues that no one can work more than 12 hours in a day or 60 hours in a week "without having contravened the limitations in Section 5.F." It says work over 12 or 60 therefore calls for penalty overtime pay, double time, pursuant to Section 4C and D. It stresses the broad reach of penalty overtime pay to "***any*** overtime work in contravention of the restrictions in Section 5.F." It claims that payment of some further penalty for work over 12 or 60, as requested by the Unions, would violate the "no pyramiding" language in Section 4F and would improperly create a new penalty overtime pay rate by arbitral fiat.

The Unions contend that working someone beyond the 12 or 60 limitations is a violation of Section 5G2 and that such a violation should not go unremedied. They urge that mere payment of penalty overtime pay is not sufficient to deter Management from ignoring the work limitations imposed by 5G2. They view penalty overtime pay as simply a negotiated rate of pay for certain overtime work, not as a remedy for Management's failure to honor the 12 or 60 ceiling. They emphasize the parties' "pattern...of using an additional one-half of straight time pay increment as appropriate compensation for each successive layer of obligation and responsibility involving extended working hours." Specifically, they note that typical overtime work is paid for at ***one and one-half*** times the straight time rate and that penalty overtime work is paid for at ***two*** times the straight time rate. They see the "next step" in this "logical progression" as an "additional one-half of straight time pay." They ask, accordingly, that a violation of the 12 or 60 ceiling be paid for at ***two and one-half*** times the straight time rate.

DISCUSSION AND FINDINGS

The Postal Service claims, at the outset, that these grievances are not arbitrable. It notes that the parties have carefully written into Article 8 several overtime pay provisions, one and one-half times straight time for certain overtime work and two times straight time for other overtime work. It believes the Unions seek in this case to establish "an additional category of wage payment", two and one-half times straight time for work beyond 12 hours in a day or 60 hours in a week. It insists, however, that the parties have already created a rate for such work in Article 8, namely, two times straight time, and that the Unions' request for something more conflicts with this part of the National Agreement. It sees the grievances as a means of imposing a new penalty overtime pay clause on the Postal Service, a means of penalty overtime pay clause on the Postal Service, a means of "creat[ing] a *general* remedy, to be applied *generally* by other arbitrators, as well as the parties themselves." It urges that a ruling in the Unions' favor would modify Article 8 and thus go beyond the terms of the National Agreement. Such a result is, in its opinion, expressly forbidden by Article 15.

This argument is not persuasive. When Management works someone more than 12 hours in a day or 60 hours in a week, it has violated Section 5G2. Contract violations should, where possible, be remedied. The Postal Service claim that the parties have already provided a remedy for this violation in Sections 4D and 5F, namely, double time, is plainly incorrect. That will be made clear later in my discussion of the merits of the dispute. No remedy for a Management violation of the Section 5G2 work ceilings was written into Article 8. But the parties' silence does not mean that I am without power to fashion an appropriate remedy. One of the inherent powers of an arbitrator is to construct a remedy for a breach of a collective bargaining agreement *4 The U.S. Supreme Court recognized this reality in the *Enterprise Wheel* case:

> "...When an arbitrator is commissioned to interpret and apply the collective bargaining agreement, he is to bring his informed judgment to bear in order to reach a fair solution of a problem. This is especially true when it comes to formulating remedies. There the need is for flexibility in meeting a wide variety of situations. The drafts men may never have thought of what specific remedy should be awarded to meet a particular contingency.*5

*FOOTNOTE *4 As Arbitrator Gamser observed in Case No. NC-S-5426, "...to provide for an appropriate remedy for breaches of the terms of an agreement, even where no specific provision defining the nature of such remedy is to be found in the agreement, certainly is found within the inherent powers of the arbitrator."*

*FOOTNOTE *5 United Steelworkers of America v. Enterprise Wheel & Care Corp., 80 S. Ct. 1358, 1361 (1960).*

The Unions propose a single, uniform remedy for each and every violation of Section 5G2. The Postal Service disagrees with this approach. It considers the Unions' position to be tantamount to an effort to place a new penalty overtime pay clause in Article 8. This argument, however, misconstrues the thrust of the Unions' case. Once a contract violation is held to have occurred, the parties are free to urge whatever remedy they believe would be appropriate. A single, uniform remedy, if adopted here, would not modify the terms of the National Agreement. It would merely announce in advance the money consequences of Management violating Section 5G2 by working an employee beyond the 12 or 60 limits. It would not constitute another form of "penalty overtime pay" because that concept deals with *permissible* overtime under Section 5F, overtime contemplated by the parties. Work beyond the 12 or 60 limits involves *impermissible* overtime under Section 5G2, overtime expressly prohibited by the parties. The fact is that the Postal Service itself seeks a single, uniform remedy, namely, double time, for each and every violation of Section 5G2.

Thus, this case involves nothing more than a quarrel over the appropriate remedy for a Section 5G2 violation. That quarrel raises "interpretive issues" under the National Agreement. The remedy set forth later in this opinion does not modify Article 8 or otherwise ignore the terms of this Agreement. The dispute is arbitrable.

The Postal Service contends that the remedy for this contract violation is expressly stated in Article 8 and that no other remedy is warranted. It relies on Section 4D which calls for "penalty overtime pay", two times straight time, "for any overtime work in contravention of the restrictions in Section 5.F." It asserts that work beyond the 12 or 60 limits contravenes these restrictions and hence must be paid for at double time, nothing more.

This argument fails for several reasons. First, the Postal Service gives Section 5F a breadth that provision simply does not possess. *Not all* work beyond 60 hours contravenes the Section 5F restrictions.*6 These restrictions relate to number of hours of work in a day, number of days of work in a week, and number of overtime days in a week. They do not cover the number of hours of work in a week. Hence, Section 5F does not automatically apply to hours worked beyond 60. Those hours do not necessarily generate penalty overtime pay. For instance, if the hours beyond 60 fall within one of the employee's regularly scheduled tours, he would receive straight time for such work.*7 In these circumstances, Section 5F would offer no remedy whatever for Management's failure to honor the Section 5G2 prohibition of work beyond 60 hours.

*FOOTNOTE *6 All work beyond 12 hours in a day, on the other hand, does contravene the Section 5F restrictions.*

*FOOTNOTE *7 See, in this connection, the hypothetical example constructed in Case Nos. H4N-NA-C-21 (3rd issue) and H4C-NA-C-27. There, the employee's regular schedule was Monday through Friday on day tour. He worked 8 hours*

Sunday, 12 hours Monday through Thursday, and 8 hours Friday. His final 4 hours on Friday were over the 60-hour ceiling. But these hours, being part of his regularly scheduled tour, would be compensated at straight time rather than penalty overtime (or overtime).

Second, work beyond 12 or 60 may often be a "contravention of the restrictions in Section 5.F." But such work has another effect as well. It is a contravention of the restrictions in Section 5G2, a violation of the work ceilings erected by Section 5G2. The penalty overtime pay provisions in Sections 4D and 5F have nothing to do with these work ceilings. They certainly cannot be read to excuse a violation of Section 5G2. It follows that Sections 4D and 5F do not provide a remedy for a violation of Section 5G2.

Third, the same point can be made more forcefully by examining the purpose of these provisions. Sections 4D and 5F are a means of ***discouraging*** certain overtime work by making the Postal Service pay a higher premium, double time, for such work. Section 5G2 has an entirely different goal, the ***prohibition*** of any work beyond the 12 or 60 limits. The Unions' complaint here is not with the rate of pay for work over 12 or 60. It is not seeking to discourage penalty overtime pay situations. Rather, its position is that Management ***may not*** work anyone over 12 or 60. It requests a remedy which will enforce the Section 5G2 prohibition.

The Postal Service further contends that the remedy sought by the Unions, two and one-half times straight time for work beyond 12 or 60, conflicts with the "no pyramiding" ban in Section 4F. That provision says, "Wherever two or more overtime or premium rates may appear applicable to the same...hours worked..., there shall be no pyramiding...and only the higher of the applicable rates shall apply." This argument is without merit. For the "no pyramiding" principle only addresses the "overtime or premium rates" set forth in the National Agreement. The money sought by the Unions here is not such an "overtime or premium rate." It is a suggested ***remedy*** for a violation of Section 5G2. A "premium rate" and a remedy (even when expressed in terms of some multiple of straight time pay) are different concepts. Hence, the fact that the Postal Service pays double time for most work over 12 or 60 does not preclude, in appropriate circumstances, a remedy which would require a further payment beyond double time. Section 4F cannot be read as a device for limiting the amount of a money remedy for a violation of Section 5G2.

For these reasons, I find that the remedy for a violation of Section 5G2 is not necessarily limited to double time. It could be a larger sum notwithstanding the provisions of Sections 4D, 4F and 5F.

This does not mean, however, that the single, uniform remedy proposed by the Unions, two and one-half times straight time, must be embraced. For not all violations of Section 5G2 are likely to be the same. Some may involve a willful disregard of the 12 or 60 work ceilings; others may be an innocent failure to appreciate the significance of these ceilings. Some may be a response to an emergency situation; others may simply occur in the normal course of postal operations. Some may be induced by the employee's own request; others may be strictly the product of supervision's wishes. The point is that there are likely to be varying degrees of culpability in violations of Section 5G2. The arbitrator should consider these kinds of matters in fashioning a proper remedy. That is precisely what the Supreme Court must have had in mind when it referred to the arbitrator's "need...for flexibility" in formulating remedies to "meet...a wide variety of situations." I therefore will not grant the single, uniform remedy requested by the Unions. The remedy will depend on the facts of each case as it comes along.

AWARD

The grievances are arbitrable and are granted to the extent set forth in the foregoing opinion.

CBR 92-04 SPECIAL ISSUE
AIRS NO.: 8944

ARTICLE 8 ARBITRATION AWARD
USPS NO.: H4N-NA-C-21
ARBITRATOR: MITTENTHAL, R.
DATE OF AWARD: JUNE 26, 1986

TEXT OF AWARD

Subject: Arbitrability - Remedy for Violation of Letter Carrier Overtime Distribution Rule in Memorandum

Statement of the Issues: Whether NALC's claim in this case is arbitrable? Whether a violation of the "letter carrier paragraph" of the Article 8 Memorandum (i.e., working a carrier overtime on his own route on his regularly scheduled day where he is not on the overtime desired list and has not signed up for such "work assignment" overtime and where someone on the overtime desired list could have handled such overtime) calls for a money remedy?

Contract Provisions Involved: Article 8, Sections 4 and 5; Article 15, Section 4; and the Article 8 Memorandum of the July 21, 1984 National Agreement. Also the Fritsch-Sombrotto May 25, 1985 Supplemental Agreement.

Statement of the Award: The grievance is arbitrable. No money remedy is appropriate for a violation of the "letter carrier paragraph" of the Article 8 Memorandum.

BACKGROUND

This case involves a dispute as to what remedy, if any, is appropriate for a violation of the "letter carrier paragraph" of the Article 8 Memorandum. NALC insists that a money award should be granted to the two employees affected by

each violation, the carrier who was required to work against his wishes and the carrier on the overtime desired list (ODL) who should have worked. The Postal Service believes that neither person is entitled to any money remedy and that the grievance is in any event not arbitrable.

Prior to the 1984 National Agreement, all of the overtime distribution rules were found in Article 8, Section 5. Before each calendar quarter, full-time regular letter carriers "who wish to work overtime...shall place their names on a 'Overtime Desired' list" (Section 5A). Those lists (ODLs) are "established by craft, section or tour..." (Section 5B). When overtime is needed, "employees with the necessary skills having listed their names will be selected from the list" (Section 5C2a). Management is obliged to make "every effort...to distribute equitably the opportunities for overtime among those on the list" (Section 5C2b). There is however, one significant exception:

> "Recourse to the 'Overtime Desired' list is not necessary in the case of a letter carrier working on the employee's own route on one of the employee's own route on one of the employee's regularly scheduled days." (Section 5C2d)

Thus, no ODL employee would have a legitimate complaint where a non-ODL employee worked overtime on his own route on his regularly scheduled day.

All of these provisions were carried forward into the 1984 National Agreement. In addition, an Article 8 Memorandum was negotiated by the Postal Service and APWU. Its terms were later accepted by NALC as well but only after the Postal Service had agreed to add to the Memorandum the following qualification of the Section 5C2d exception:

> "In the Letter Carrier Craft, where management determines that overtime or auxiliary assistance is needed on an employee's route on one of the employee's regularly scheduled days and the employee is not on the overtime desired list, the employer will seek to utilize auxiliary assistance, when available, rather than requiring the employee to work mandatory overtime."

The meaning of this clause is not really in dispute. A letter carrier is unable to handle all the work on his route within his eight-hour tour on his regularly scheduled day. He is not on the ODL. Management has agreed it "will seek" in this situation to "utilize auxiliary assistance... rather than requiring the employee [the regular carrier] to work mandatory overtime." This "auxiliary assistance" can take different forms. For example, Management may use a part-time flexible carrier or an unassigned regular at straight time to perform the extra work on the regular carrier's route. Or Management may "pivot" a portion of this route (i.e., reassigning the extra work) to some other carrier whose workload is relatively light that day. Or Management may assign the extra work at overtime rates to some carrier on the ODL. Whichever of these courses Management follows, it will have prevented the regular carrier from being "requir[ed]...to work mandatory overtime" on his own route.

This clause, the so-called "letter carrier paragraph" in the Memorandum, has itself been limited by a May 28, 1985 supplemental agreement. That agreement created another overtime list, unrelated to the ODL. It gave full-time letter carriers an opportunity to sign up for overtime on "their work assignment on their regularly scheduled days." After a carrier has signed up, he is expected to work overtime on his own route on his regularly scheduled days.*1 When this occurs, the "letter carrier paragraph" is inapplicable and no ODL carrier would have a valid complaint against a non-ODL carrier who signed for and performed his "work assignment" overtime.

*FOOTNOTE *1 Management can still use "auxiliary assistance" to avoid overtime*

The present case hence involves the following assumptions. A carrier, "X", is unable to complete all the work on his route on his regularly scheduled day. He is not on the ODL; he has not signed up for "work assignment" overtime. Management cannot provide anyone, i.e., a part-time flexible or an unassigned regular, at straight time rates to handle "X"s extra work. Nor can it "pivot" a portion of his route. One or more carriers on the ODL are available to do the extra work. Management disregards them and requires "X", against his wishes, to perform this work at overtime rates. It thereby ignores its promise in the "letter carrier paragraph" that it "will seek...auxiliary assistance...rather then requiring...["X"] to work mandatory overtime." It has violated the Memorandum.

The issue is what remedy, if any, is appropriate for this violation.

NALC urges that the carrier, "X", forced to work overtime on his own route when ODL employees were available, should receive an additional one-half of his straight time pay. It notes he was given time and one-half for the overtime in question. It asks that he be paid double time for this violation of his rights under the "letter carrier paragraph." It urges further that the ODL carrier who should have worked the overtime on "X"s route should be paid time and one-half for the hours he lost. It believes this is a lost overtime opportunity from the standpoint of those on the ODL, an opportunity which cannot be regained through any administrative adjustment in the ODL.

The Postal Service disagrees. It contends that "X" was paid the correct contractual rate for overtime work on his route on a regularly scheduled day. It contends that no ODL carrier is entitled to any money remedy for Management's failure to abide by the "letter carrier paragraph." It notes that Article 8, Section 4D calls for time and one-half for overtime work "after eight (8) hours on duty in any one service day..." It stresses that Article 8, Section 5C2d permits Management in any event to choose a regular carrier to work overtime on his own route instead of resorting to ODL carriers. It relies also on the following sentences in the Memorandum: "The parties

agree this memorandum does not give rise to any contractual commitment beyond the provisions of Article 8..." and "In the event these [Memorandum] principles are contravened, the appropriate correction shall not obligate the employer to any monetary obligation..." Its conclusion is that no remedy whatever is appropriate here.

The Memorandum should be quoted because of its critical importance to an understanding of this dispute:

> "Recognizing that excessive use of overtime is inconsistent with the best interests of postal employees and the Postal Service, it is the intent of the parties in adopting changes to Article 8 to limit overtime, to avoid excessive mandatory overtime, and 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. The parties have agreed to certain additional restrictions on overtime work, while agreeing to continue the use of overtime desired lists to protect the interests of those employees who do not want to work overtime, and the interests of those who seek to work limited overtime. ***The parties agree this memorandum does not give rise to any contractual commitment beyond the provisions of Article 8,*** but is intended to set forth the underlying principles which brought the parties to agreement.
>
> "The new provisions of Article 8 contain different restrictions than the old language. However, the new language is not intended to change existing practices relating to the use of employees not on the overtime desired list when there are insufficient employees on the list available to meet the overtime needs. For example, ...
>
> "The parties agree that Article 8, Section 5.G.1., does not permit the employer to require employees on the overtime desired list to work overtime on more than 4 of the employee's 5 scheduled days in a service week, over 8 hours on a nonscheduled day, or over 6 days in a service week.
>
> "Normally, employees on the overtime desired list who don't want to work more than 10 hours a day or 56 hours a week shall not be required to do so as long as employees who do want to work more than 10 hours a day or 56 hours a week are available to do the needed work without exceeding the 12-hour and 60-hour limitations.
>
> ***"In the Letter Carrier Craft, where management determines that overtime or auxiliary assistance is needed on an employee's route on one of the employee's regularly scheduled days and the employee is not on the overtime desired list, the employer will seek to utilize auxiliary assistance, when available, rather than requiring the employee to work mandatory overtime.***
>
> ***"In the event these principles are contravened, the appropriate correction shall not obligate the employer to any monetary obligation, but instead will be reflected in a correction to the opportunities available within the list.*** In order to achieve the objectives of this memorandum, the method of implementation of these principles shall be to provide, during the 2-week period prior to the start of each calendar quarter, an opportunity for employees placing their name on the list to indicate their availability for the duration of the quarter to work in excess of 10 hours in a day. During the quarter the employer may require employees on the overtime desired list to work these extra hours if there is an insufficient number of employees available who have indicated such availability at the beginning of the quarter..." (Emphasis added)

An arbitration hearing in this case was held in Washington, D.C. on January 8, 1986. Post-hearing briefs were submitted by the parties on February 7, 1986; reply briefs were submitted on February 28.

DISCUSSION AND FINDINGS

The Postal Service initially argues that this grievance is not arbitrable. It insists that NALC seeks the "creation of a new contract term", namely, a "general remedy" to be applied to each and every case in which Management ignores the principles set forth in the "letter carrier paragraph" of the Memorandum. It claims such a "blanket provision" can be properly achieved through collective bargaining or interest arbitration but not through grievance arbitration. It maintains also that the money remedy sought by NALC conflicts with that the parties stated in the Memorandum, "...the appropriate correction shall not obligate the employer to any monetary obligation..." It says the adoption of NALC's position would erase this language from the Memorandum, an act beyond the arbitrator's authority.

This argument is not persuasive. When Management does not "seek" anyone from the ODL and instead requires a carrier to work "mandatory overtime" on his route on his regularly scheduled day even though he has not signed up for such "work assignment" overtime, it has violated the Memorandum. Contract violations should, where possible, be remedied. The parties are free to urge whatever remedy they believe would be appropriate. NALC urges a uniform money remedy, time and one-half for the ODL carrier who should have performed the overtime work and an additional one-half of straight time for the carrier who actually performed the overtime work. The Postal Service says this remedy conflicts with certain portions of Article 8 and the Memorandum. Whether this claim is correct depends upon how one *interprets* the relevant language of Article 8 and the Memorandum. This dispute thus raises "interpretive issues" under the National Agreement and is arbitrable. The Postal Service position, although couched in terms of arbitrability, really concerns the merits of the dispute, that is, the appropriate remedy for this Memorandum violation.

Assuming NALC's request does not produce the kind of conflict alleged by the Postal Service, then surely adoption

of the uniform money remedy would not modify the National Agreement. For this remedy would simply announce in advance the money consequences of Management violating certain letter carrier rights under the Memorandum. Such an arrangement might be unwise because of the variety of circumstances under which the violation might arise and because of the need to allow arbitrators flexibility in formulating a remedy appropriate to the precise circumstances before them. But the money remedy would not exceed the arbitrator's powers under the National Agreement. Much the same question was raised and decided against the Postal Service in Case No. H4N-NA-C-21 (4th issue).

Turning to the merits, NALC contends that a money remedy is proper whenever the "letter carrier paragraph" is violated in the manner involved in this case. It asks for a money payment both for the non-ODL carrier who is improperly required to work overtime and for the ODL carrier who is improperly denied this overtime opportunity. The Postal Service disagrees. It believes no money remedy is proper for either carrier.

The Postal Service points to the first sentence in the sixth paragraph of the Memorandum, "In the event these principles are contravened, ***the appropriate correction shall not obligate the employer*** [Postal Service] ***to any monetary obligation...***" (Emphasis added). These words demonstrate that the parties intended no money remedy for a violation of the Memorandum's "principles." The immediately preceding paragraph, the so-called "letter carrier paragraph", contains one such "principle." It states, when read in conjunction with the May 1985 supplemental agreement, that overtime on an individual carrier's route on his regularly scheduled day must be assigned in a certain manner. Thus, according to the sentence above, no money remedy would seem to be appropriate for violation of this "letter carrier paragraph."

However, this sentence has not been fully quoted. It goes on to say that the remedy for a Memorandum violation "...will be reflected in a correction to the opportunities available within the list [ODL]."

What the parties contemplated was a remedy for the improper assignment of overtime as between two or more employees "within the list." No "correction" of overtime opportunities "within the list" is possible for the kind of violation being discussed here. For an adjustment in the ODL cannot recapture for ODL carriers the overtime opportunity which they lost to the non-ODL carrier. That opportunity is lost forever. And, similarly, an adjustment in the ODL cannot recapture for the non-ODL carrier the overtime hours he should not have been required to work. The point is that the sentence barring a money remedy, when read in its entirety, does not seem applicable to the facts of this case. Where, our concern is not with two employees "within the list" but rather with the improper assignment of overtime as between a non-ODL employee and an ODL employee.

These observations are supported by other language in the sixth paragraph and by the Memorandum's bargaining history. The Memorandum was initially the product of negotiations between the Postal Service and the American Postal Workers Union. Their concern, in agreeing to the first sentence of the sixth paragraph, was to make clear the consequences of Management selecting the wrong person from the ODL in assigning overtime. They provided for an overtime make-up opportunity for the employee who had been improperly bypassed. They plainly did not have in mind the situation where the non-ODL employee is required to work. They had in the past agreed on a money remedy for the ODL employee who lost an opportunity to a non-ODL employee. NALC later agreed to the Memorandum, insisting upon the addition of the "letter carrier paragraph" as the price of its consent. But this additional paragraph did not alter the scope of the sentence barring a money remedy. That sentence applied to the assignment of overtime as between two or more employees "within the list."

This view of the sixth paragraph, the sentence barring a money remedy, does not mean the grievance must be decided in NALC's favor. For there is another, more crucial consideration. It supports the Postal Service's position.

A close comparison of Article 8, Section 5C2d and the "letter carrier paragraph" of the Memorandum is most revealing. ***Section 5C2d*** says Management ***may*** work a non-ODL carrier overtime on his own route on his regularly scheduled day without having to resort to the ODL.. Or, should Management so choose, it ***may*** work this overtime with someone from the ODL. Article 8 thus gives Management substantial ***discretion*** in assigning a carrier to overtime in this situation. The ***"letter carrier paragraph"***, when read along with the May 1985 supplemental agreement, establishes a quite different set of priorities. It ***requires*** Management to work a non-ODL carrier overtime on his own route on his regularly scheduled day if he has signed up for such "work assignment" overtime. If he has not signed up, then the Memorandum ***requires*** Management to "seek" people from the ODL before "requiring" the carrier in question to work "mandatory overtime" on his own route. In short, the very discretion granted Management by Section 5C2d is taken away by the "letter carrier paragraph."

All of this would be understandable if the parties had, in agreeing to the "letter carrier paragraph", eliminated Section 5C2d. But that was not done. Both provisions are presently part of the National Agreement. It should be stressed that the Memorandum states, in clear and unequivocal language, that "the parties agree this memorandum does not give rise to any contractual commitment beyond the provisions of Article 8..." The "letter carrier paragraph", as I have already explained, nullifies Management's discretion under Section 5C2d. It thus modifies Section 5C2d and goes "...beyond the provisions of Article 8." This would appear to mean that the "letter carrier paragraph" cannot be considered a "contractual commitment." But the Postal Service acknowledged at the arbitration hearing that the "letter carrier paragraph" is a commitment. To grant a money remedy for a violation of this commitment would penalize the Postal Service for exercising the discretion it still appears to possess under

Section SC2d. That would be a patently unfair result. Instead, the Postal Service should be ordered to cease and desist from any violation of the "letter carrier paragraph." Should the postal facility in question thereafter fail to comply with such an order, a money remedy might well be appropriate.

Accordingly, my conclusion is that no money remedy is justified for the assumed violation in this case.

AWARD

The grievance is arbitrable. No money remedy is appropriate for a violation of the "letter carrier paragraph" of the Article 8 Memorandum.

CBR 92-04 SPECIAL ISSUE
AIRS NO.: 7971(23) 7972(21)

ARTICLE 8 ARBITRATION AWARD
USPS NO.: H4N-NA-C-21 & H4C-NA-C-23
ARBITRATOR: MITTENTHAL, R.
DATE OF AWARD: MAY 5, 1986

TEXT OF AWARD

Subject: Arbitrability - Effect of Penalty Overtime Pay On Holiday Scheduling

Statement of the Issues: Whether the Unions' complaint in this case - *narrowly expressed* by the Unions as a protest against Management ignoring the "pecking order" in scheduling holiday work because of penalty overtime pay considerations or *broadly expressed* by the Postal Service as a protest against Management refusing to grant penalty overtime pay to any holiday work - is arbitrable under the terms of the National Agreement?

Contract Provisions Involved: Preamble; Article 8, Section 4 and 5; Article 11, Section 1 through 6; Article 15, Section 4; Article 30; and Article 43 of the July 21, 1984 National Agreement.

Statement of the Award: The grievances in this case are arbitrable.

BACKGROUND

These grievances protest the Postal Service's interpretation of Article 11, the holiday work and holiday scheduling language of the 1984 National Agreement. The Postal Service, insists these grievances are not arbitrable because the Unions' position, if adopted, would modify the terms of Article 11 and would require the arbitrator to go beyond the provisions of the National Agreement. The Union disagrees. Only this question of arbitrability is before me in this proceeding.

Article 11 is the "holidays" clause. It states the holidays to which the employees are entitled (Section 1), the eligibility conditions for holiday pay (Section 2), and the method of calculating holiday pay (Section 3). It notes that when a holiday falls on an employee's non-scheduled day, he shall take his holiday on his "scheduled workday preceding the holiday" (Section 5B).*2 It also explains how employees are to be paid when they work on their holiday (Section 4) and how employees will be scheduled for such holiday work (Section 6).

*FOOTNOTE *2 For example, if the employees's non-scheduled days are Tuesday and Wednesday and the holiday falls on a Wednesday, he would take his holiday on Monday, his "scheduled workday preceding the holiday."*

In order to understand this dispute, the latter two provisions should be quoted at length:

"Section 4. Holiday Work

A. An employee required to work on a holiday other than Christmas shall be paid the base hourly straight time rate for each hour worked up to eight (8) hours in addition to the holiday pay to which the employee is entitled as above described.

B. An employee required to work Christmas shall be paid one and one-half (1-1/2) times the base hourly straight time rate for each hour worked in addition to the holiday pay to which the employee is entitled as above described."

"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 Wednesday preceding the service week in which the holiday falls.

B. As many full-time and part-time regular 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.

C. ..."

Some elaboration on the meaning of this contract language would be helpful. Section 6A demands that a holiday work schedule be posted by a certain time. Section 6B establishes rules as to who can be placed on

the schedule. Its main purpose is to require that "full-time and part-time regulars" be given holidays off to the extent possible. It calls upon Management to "excuse" from holiday work "as many..." of them "as can be spared." It nevertheless recognizes that these regulars may sometimes be required to work on their holidays. But it says this cannot happen "unless all casuals and part-time flexibles are utilized to the maximum extent possible" including overtime and "unless all full-time and part-time regulars...who wish to work on the holiday have been afforded an opportunity to do so." Thus, all regular-volunteers must be used for holiday work before Management can compel regular, non-volunteers to perform such work. The precise order of choosing employees, commonly referred to as the "pecking order", is left to the local parties. Article 30B, item 13, provides for local implementation with respect to "the method of selecting employees to work on a holiday."

Section 4 deals with the applicable rate of pay for the employee who is selected to work a holiday pursuant to the above "pecking order." Ordinarily, he receives straight time for his holiday work in addition to holiday pay. But if he works on Christmas Day, he receives time and one-half for his holiday work in addition to holiday pay. There are other exceptions as well. the March 4, 1974 Settlement Agreement spells out various circumstances in which the employee is entitled to time and one-half, rather than straight time, for holiday work. For instance, where Management fails to post the holiday schedule in a timely fashion, an employee who works the holiday receives time and one-half. And the employee who works on a holiday which falls on his non-scheduled day also receives time and one-half. Apparently the terms of the Settlement Agreement have remained in effect since 1974 and are still binding on the parties.

Article 8 is also involved in this dispute. Prior to the 1984 National Agreement, it provided overtime pay for work performed "after eight (8) hours on duty in any one service day or forty (40) hours in any one service week" (Section 4B). It provided further for overtime pay for work outside the regularly scheduled work week, i.e. , for work on the employee's non-scheduled days (Section 4B). It referred to a single overtime rate, time and one-half (Section 4A).

In the 1984 national negotiations', the Unions proposed several changes in Article 11. One was to "correct Article 11 to reflect the Martin Luther King, Jr. holiday." Another was to "increase. ..the premium paid for work on a holiday or designated holiday." The former proposal was submitted to the Kerr interest arbitration panel which held that the King birthday should be an additional holiday beginning in 1986. The latter proposal was evidently an attempt to raise any existing "premium" for holiday work from time and one-half to double time. It was dropped by the Unions during negotiations and was never placed before the Kerr panel.

The 1984 negotiations led to significant changes in Article 8. The most important one, for purposes of this case, was the establishment of "penalty overtime pay" of "two (2) times the base hourly straight time rate" (Section 4C). The manner in which this penalty premium was to be applied is set forth in Sections 4 and 5 of the 1984 National Agreement:

> *"Section 4...D.* Effective January 19, 1985, penalty overtime pay will be paid to full-time regular employees for any overtime work in contravention of the restrictions in Section 5.F.
>
> *"Section 5...F.* Effective January 19, 1985, excluding December, no full-time regular employee will be required to work overtime on more than four (4) of the employee's five (5) scheduled days in a service week or work over ten (10) hours on a regularly scheduled day, over eight (8) hours on a non-scheduled day, or over six (6) days in a service week."

In short, employees who work beyond these Section 5F restrictions are entitled to penalty overtime pay.

The Postal Service advised the Unions of its interpretation of Article 11 in mid-April 1985. It asserted that volunteering for holiday work would be considered by Management as indicating a willingness to work up to twelve hours per day. It asserted further that a holiday schedule would continue to be based on the "pecking order" created by Article 11, Section 6B and local implementation but that Management was not obligated to follow the "pecking order" if, by doing so, it incurred penalty overtime pay. Both Unions objected to this interpretation. NALC grieved, alleging that "pecking orders, however established, must be followed by the Postal Service." Its position was that the "pecking order" could not be disregarded because of penalty overtime pay considerations. APWU grieved, taking the same position as NALC on the "pecking order" question. It urged that an employee's right to holiday work pursuant to Article 11, Section 6B and local implementation could not be affected by any Article 8 changes in overtime compensation. It added too that employees scheduled for holiday work "are available to work the number of hours they would normally be available for if it were not a holiday schedule."

At the arbitration hearing and in its post-hearing brief, the Postal Service moved away from the notion of "pecking order" exceptions due to penalty overtime pay. It raised the larger issue suggested by the parties' earlier exchange of views. It argues that Articles 8 and 11 are separate and distinct, that pay for holiday work is determined by Article 11 and the Settlement Agreement alone, and that therefore the new penalty overtime pay language of Article 8 cannot be applied to holiday work. It claims the higher premium for holiday work the Unions are seeking to obtain through arbitration is the same premium they were unable to obtain in the 1984 negotiations. It stresses that this higher premium proposal was withdrawn in the 1984 negotiations and cannot properly be resuscitated in this arbitration. The Unions disagree with this analysis of the National Agreement and insist there is a true interrelationship between Articles 8 and 11.

An arbitration hearing in this case was held in Washington, D.C. on December 19, 1985. Post-hearing briefs were submitted on March 12, 1986; reply briefs were submitted on March 28. and April 1, 1986.

DISCUSSION AND FINDINGS

Only those disputes which the parties have agreed to arbitrate are subject to the arbitration procedures of the National Agreement. It is clear from the language of Article 15, Section 4 what is arbitrable:

> "Section 4A(6)...All decisions of arbitrators will be limited to the terms and provisions of this Agreement, and in no event may the terms and provisions of this Agreement be altered, amended, or modified by an arbitrator. ..
>
> "Section 4D(l) Only cases involving interpretive issues under this Agreement or supplements thereto of general application will be arbitrated at the National level."

The Postal Service claim, briefly stated, is that the Unions' grievances do not raise "interpretive issues" under the National Agreement and that were the arbitrator to grant the grievances and allow penalty overtime pay for holiday work he would "modif[y]" the terms of the National Agreement and thus ignore the "limit[s]" placed on his authority. For these reasons, it believes these grievances are not arbitrable. It places special emphasis upon the 1984 negotiations, particularly the Unions' withdrawal of their request for an increase in any premium rate for holiday work.

This argument is not at all convincing. The Unions allege that a Management refusal to follow the "pecking order" in scheduling holiday work would be a violation of Article 11, Section 6B even though strict application of the "pecking order" would result in penalty overtime pay under Article 8, Section 4D. They allege that a Management refusal to grant penalty overtime pay for holiday work scheduled pursuant to Article 11, Section 6 (that is, where such penalty pay is called for by Article 8, Section 5F) would be a violation of Article 8, Section 4D. The grievances are based on the belief that there an interrelationship between Articles 8 and 11, that the overtime pay provisions (including penalty overtime pay) of Article 8 apply, when appropriate, to holiday work under Article 11. The Postal Service insists there is no such interrelationship. This dispute thus involves "interpretive issues" under Articles 8 and 11. The grievances are arbitrable.

The Postal Service nevertheless asserts that if the arbitrator were to allow penalty overtime pay for holiday work in appropriate circumstances, he would not have "limited" himself to the terms of the National Agreement but would instead have "modified" such terms. It contends that such arbitral behavior is expressly forbidden by Article 15, Section 4A(6). This argument may or may not be valid. Its validity, however, depends on whether or not the claimed interrelationship between Articles 8 and 11 exists. If the Unions are correct in saying there is an interrelationship, then granting the grievances would involve nothing more than contract interpretation. If the Postal Service is correct in saying there is no interrelationship, then granting the grievances may well involve contract "modifi[cation]".*3 Hence, this part of the Postal Service argument on arbitrability can only be answered after Articles 8 and 11 have been interpreted. The Postal Service position, although couched in terms of arbitrability, really concerns the merits of the dispute.

*FOOTNOTE *3 Indeed, if there is no interrelationship, denial of the grievances on the merits would seem to be the appropriate response.*

As for the 1984 negotiations and the Unions' withdrawal of their Article 11 proposal for a higher premium rate for holiday work, such evidence does not alter my conclusion that the grievances are arbitrable. The Unions' conduct in negotiations may be relevant evidence on the question of how Article 11 should be construed. Thus, according to the Postal Service, the withdrawal of this proposal necessarily means that the premiums for holiday work in Article 11 and the Settlement Agreement remain the same as they had been under the 1981 National Agreement. It believes the penalty overtime pay introduced in Article 8 in the 1984 National Agreement cannot modify the long-standing premiums established in Article 11 and the Settlement Agreement. The Unions reply that this argument misreads the language and purpose of the proposal and ignores the broad impact of Article 8 on pay for holiday work both before and after the 1984 National Agreement. It should be apparent from these remarks that the withdrawal of the proposal relates not to the arbitrability issue but rather to the "interpretive issues" posed by the arguments made in this case.

For these reasons, the Postal Service's position on arbitrability must be rejected.

AWARD

The grievances in this case are arbitrable.

CBR 92-04 SPECIAL ISSUE
AIRS NO.: 7875(19) & 7940(21)

ARTICLE 8 ARBITRATION AWARD
USPS NO.: H4C-NA-C-19 & H4N-NA-C-21
ARBITRATOR: MITTENTHAL, R.
DATE OF AWARD: APRIL 11, 1986

TEXT OF AWARD

Subject:Overtime Assignments - Right of Full-Time Regulars On Overtime Desired List to Refuse Certain Overtime

Statement of the Issues: Whether full-time regulars on the overtime desired list have the option of accepting or refusing work over eight hours on a non-scheduled day, work over six days in a service week, and overtime on more than four of five scheduled days in a service week? Or whether these employees be required to perform such work, even against their wishes? Whether full-time regulars not on the overtime desired list may be required to work overtime where those on the list have not exhausted their overtime obligation of twelve hours a day or sixty hours a week?

Contract Provisions Involved: Article 8, Sections 4 and 5 and the Article 8 Memorandum of the July 21, 1984 National Agreement.

Statement of the Award: The grievances are resolved in accordance with the foregoing discussion.

BACKGROUND

This case involves the interpretation and application of new overtime language in the 1986 National Agreement, specifically, Article 8, Section 5F and G. The parties have certain basic differences as to the rights of full-time regulars on the overtime desired list (ODL). The APWU contends that these employees have the ***option*** of accepting or refusing work over eight hours on a non-scheduled day, work over six days in a service week, and overtime on more than four of five scheduled days in a service week. The Postal Service and NALC disagree. They maintain that full-time regulars on the ODL have no such option and that they must accept assigned overtime subject only to the twelve-hour day and sixty-hour week restrictions.

This dispute is significant not just for those who have placed their names on the ODL. It also has a derivative impact on full-time regulars ***not on*** the ODL. For they can be required to work overtime only if all available and qualified employees on the ODL have reached the twelve-hour day and sixty-hour week limits. The APWU view of ODL employees' rights would make non-ODL employees more susceptible to an overtime draft while the Postal Service-NALC view would make non-ODL employees less susceptible to an overtime draft.

Some history of the overtime clauses, Article 8, Section 4 and 5, is necessary to a full understanding of the problem. Prior to the 1984 National Agreement, overtime was distributed in the following manner. ODLs were established "by craft, section, or tour...", whichever criterion was adopted by the local parties (Section 5B). Employees were free to sign (or not sign) the ODL. Thereafter, when overtime arose for the APWU unit, those on the ODL with the "necessary skills" were "selected in order of their seniority on a rotating basis" (Section 5C1a). When overtime arose for the NALC unit, those on the ODL list with the "necessary skills" were "selected" with Management being required to make "every effort...to distribute [such overtime] equitably among those on the list" (Section 5C2a and b).*1 There was just one over-time pay rate, namely, one and one-half times the straight time rate (Section 4A). Such overtime pay was due for any work over "eight (8) hours...in any one service day" or over "forty (40) hours in any one service week" (Section 4B).

*FOOTNOTE *1 However, recourse to the ODL was not necessary "in the case of a letter carrier working on the employee's own route on one of the employee's regularly scheduled days" (Section 5C2d).*

There were other important contract provisions as well. If the ODL did not produce sufficient qualified people, then employees "not on the list may be required to work overtime on a rotating basis with the first opportunity assigned to the junior employee" (Section 5D). Limits were placed on the amount of overtime a full-time regular could be required to work, regardless of whether or not he was on the ODL. Specifically, "no full-time regular...[*as] required to work overtime on more than five (5) consecutive days in a week... [Or] over ten (10) hours in a day or six (6) days in a week" (Section 5F). These restrictions, however, did not apply in the month of "December" or in "emergency situations".(Section 5F).

There was one national level arbitration with respect to the meaning of 5F. The grievant, an APWU clerk, was a full-time regular on the ODL. He reported two hours early on a scheduled day and completed ten hours' work by the end of his shift. Additional overtime was then necessary. The grievant asked to work such overtime but was refused. Management instead gave the overtime to employees who were not on the ODL but who had only worked eight hours that day. The Postal Service argued that the ten-hour limitation in 5F was both "a protection [for the grievant] against a mandatory assignment and a bar to any further overtime that day." The APWU conceded that Management could not require him to work beyond ten hours. But it urged that he was free to volunteer for the additional overtime and that, having done so, he had a superior right to the overtime because he was on the ODL.

Arbitrator Bloch upheld the APWU's position in a May 1983 award, Case No. H1C-4B-C-2129.*2 His ruling was that ODL employees could not be forced to work beyond the 5F limitations but could volunteer to do so. He reasoned that once the grievant volunteered, he had to be chosen for the overtime in preference to non-ODL people even though this overtime would have entailed his working more than ten hours. The arbitrator did not consider the reference to a ten-hour day in 5F as an absolute ceiling on ODL employees' daily hours.

*FOOTNOTE *2 It should be noted that NALC did not intervene in this case and that Arbitrator Block was not a member of the national arbitration panel which had jurisdiction over disputes between NALC and the Postal Service.*

Thereafter, I presume, APWU employees on the ODL had the option of accepting or refusing overtime beyond the 5F limitations. That seems to be borne out by a Step 4 pre-ar-

bitration settlement in April 1984. There, the Postal Service and APWU agreed that a full-time regular on the ODL "shall not be required to involuntarily work over 10 hours in a day, more than 6 days in a week, or work overtime on more than 5 consecutive days in a week." They agreed further that anyone selected for overtime pursuant to the overtime distribution rules "may volunteer to work..." beyond these restrictions and that Management would not violate Article 8 by granting the volunteer's request.

At about this same time, April 1984, the parties began negotiations for a new National Agreement. The Unions sought to create new restrictions on overtime including a requirement for advance notice and an increase in the overtime premium. Their objective, as in the past, was to limit overtime and to protect those who did not wish to work overtime. No real progress appears to have been made until November. The parties then reached agreement on penalty pay, two times the straight time rate, for overtime work beyond certain restrictions. They had trouble defining those restrictions, that is, describing the point at which penalty pay would begin. This difficulty was resolved on November 21 after a series of meetings. It was agreed that penalty pay would be applied to work over ten hours on a scheduled day, over eight hours on a non-scheduled day, over six days in a service week, and overtime on more than four of five scheduled days in a service week.

Notwithstanding this agreement, discussion of overtime issues continued. Postmaster General Bolger and APWU President Biller met on November 26 to deal with some disagreement which had recently surfaced. Bolger gave Biller a Postal Service proposal as to the wording of Article 8 and sent a copy to NALC President Sombrotto. That proposal included the following clause, Section 4G:

> "Nothing in this Article shall require the assignment of overtime to an employee, if such assignment shall result in the payment of penalty overtime pay, when there is another employee available for such overtime assignment who is not eligible for penalty overtime pay."

This language would have permitted Management to assign overtime to someone not on the ODL in order to avoid penalty pay to people on the ODL who were available for such overtime. Both the APWU and NALC found this arrangement unacceptable.

Discussions continued, Bolger and Biller meeting again on November 27. Biller suggested a clause which would have eliminated Section 4C above and would have added the following sentence to what had already been tentatively agreed upon:

> "Excluding December, employees volunteering for overtime 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..."

This was the first reference in the negotiations to these twelve-hour and sixty-hour ceilings. And, at least according to NALC, it was the first reference in the negotiations to employees "volunteering" for overtime as contrasted to employees signing the ODL. Earlier Postal Service suggestions as to "mandatory" overtime had been vigorously opposed by the APWU.

Another meeting, attended by Bolger, Biller and Sombrotto, took place on December 3. Bolger proposed a draft of how the Postal Service thought Article 8 should read. His proposal deleted the Section 4G language he had submitted on November 26 and added to Section 5F the sentence ("Employees volunteering for overtime...") Biller had submitted on November 27. Sombrotto objected to the latter sentence and urged it be replaced by a reference to persons on the ODL. His position was that those on the ODL be required to work overtime before anyone else was asked. After much discussion, it was apparently agreed that use of the ODL would be substituted for the language with respect to "employees volunteering..." The parties then instructed their attorneys to prepare contract language based on the understandings reached at this meeting.

The attorneys sought to comply with their instructions. They prepared a draft of Article 8, Section 5G, perhaps 5F as well. Both the Postal Service and NALC were satisfied that this draft accurately reflected the parties' agreement at the December 3 meeting. The APWU, however, disagreed and found the draft unacceptable. It went back to the Postal Service and sought further language changes. The Postal Service stood by the draft and refused to alter what it believed had already been agreed upon. This impasse between the Postal Service and APWU continued until sometime after the interest arbitration hearings had begun in December. Their differences were resolved through a series of meetings between December 10 and 17 which culminated in the execution of an Article 8 Memorandum. That Memorandum attempted to explain the "underlying principles" behind Article 8 but did not change any Article 8 language. NALC did not participate in any of these negotiations and did not sign the Memorandum. Nevertheless, the Article 8 Memorandum was made part of the 1984 National Agreement.

The relevant terms of Article 8 and the Memorandum presently read:

Section 4. Overtime Work

"C. Penalty overtime pay is to be paid at the rate of two (2) times the base hourly straight time rate. Penalty overtime pay will not be paid for any hours worked in the month of December.

"D. Effective January 19, 1985, penalty overtime pay will be paid to full-time regular employees for any overtime work in contravention of the restrictions in Section 5.F."*3

*FOOTNOTE *3 The provisions of Section 4A, B, and F remained the same as they had been in the 1981 National Agreement.*

Section 5. Overtime Assignments

"F. Effective January 19, 1985, excluding December, no full-time regular employee will be required to work overtime on more than four (4) of the employee's five (5) scheduled days in a service week or work over ten (10) hours on a regularly scheduled day, over eight (8) hours on a scheduled day, or over six (6) days in a service week.

"G. Effective January 19, 1985, full-time employees not on the 'Overtime Desired' list [ODL] 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) 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."*4

*FOOTNOTE *4 The provisions of Section 5A, B, C, D and E remained the same as they had been in the 1981 National Agreement.*

Article 8 Memorandum

"Recognizing that excessive use of overtime is inconsistent with the best interests of postal employees and the Postal Service, it is the intent of the parties in adopting changes to Article 8 to limit overtime, to avoid excessive mandatory overtime, and 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. The parties have agreed to certain additional restrictions on overtime work, while agreeing to continue the use of overtime desired lists to protect the interests of those employees who do not want to work overtime, and the interests of those who seek to work limited overtime. The parties agree this memorandum does not give rise to any contractual commitment beyond the provisions of Article 8, but is intended to set forth the underlying principles which brought the parties to agreement.

"The new provisions of Article 8 contain different restrictions than the old language. However, the new language is not intended to change existing practices relating to use of employees not on the overtime desired list when there are insufficient employees on the list available to meet the overtime needs. For example, if there are five available employees on the overtime desired list and five not on it, and if 10 workhours are needed to get the mail out within the next hour, all ten employees may be required to work overtime. But if there are 2 hours within which to get the mail out, then only the five on the overtime desired list may be required to work.

"The parties agree that Article 8, Section 5.G.1., does not permit the employer to require employees on the overtime desired list to work overtime on more than 4 of the employee's 5 scheduled days in a service week, over 8 hours on a nonscheduled day, or over 6 days in a service week.

"Normally, employees on the overtime desired list who don't want to work more than 10 hours a day or 56 hours a week shall not be required to do so as long as employees who do want to work more than 10 hours a day or 56 hours a week are available to do the needed work without exceeding the 12-hour and 60-hour limitations.

* * * *

*"The penalty overtime provisions of Article 8.4 are not intended to encourage or result in the use of any overtime in excess of the restrictions contained in Article 8.5.F."*5*

*FOOTNOTE*5 This Memorandum was incorporated in the National Agreement through the December 24, 1985 Kerr interest arbitration award.*

The parties discussed the meaning of these provisions in early April 1985. The Postal Service formally explained its position to the Unions in an April 5 letter. NALC disagreed and filed a grievance (H4N-NA-C-21, 1st issue) at the national level on July 2. APWU also disagreed and filed a grievance (H4C-NA-C-19) at the national level on July 3. Then each Union intervened in the other's grievance.

Arbitration hearings in this case were held in Washington, D.C. on December 18 and 19, 1985. Post-hearing briefs were submitted by all parties on February 7, 1986; reply briefs were submitted by the Postal Service and APWU on February 28.

DISCUSSION AND FINDINGS

One of the issues that prompted this arbitration appears to have been resolved. The Postal Service initially took the "position that it could assign overtime to non-ODL employees

to avoid incurring penalty pay to ODL employees for overtime work beyond the 5F limitations. Both APWU and NALC protested this view. And the Postal Service, by agreeing with NALC's construction of the contract language in question, has obviously changed its position on this matter. It is clear from the statements at the arbitration hearing and in the briefs that the Postal Service may not assign overtime to non-ODL employees to avoid incurring penalty pay to ODL employees.

The crucial issue here is whether ODL employees have the option of accepting or refusing overtime work beyond the 5F limitations. This problem is largely attributable to an apparent conflict between Section 5F and 5G of Article 8. The former provision concerns "full-time regular[s]..." which plainly encompasses ODL employees. It says such employees "will [not] be required to work overtime..." in the following situations: more than ten hours on a scheduled day, more than eight hours on a non-scheduled day, more than six days in a service week, and more than four of five scheduled days in a service week.*6 The latter provision says ODL employees "may be required to work up to twelve...hours in a day and sixty...hours In a service week..."

*FOOTNOTE*6 This last situation refers to the employee who works overtime on four scheduled days and is then asked to work overtime on his fifth scheduled day as well.*

The APWU concedes that the ten-hour limitation in 5F has been superceded by the twelve-hour limitation in 5G. But it insists that in all other respects the 5F limitations remain in effect, thus providing ODL employees with the option of accepting or refusing overtime beyond these limitations. It believes the 5F "will [not] be required..." language leaves room for employees to volunteer to do what they cannot be required to do. Its position is, accordingly, that ODL employees can work more than eight hours on a non-scheduled day, more than six days in a service week, and overtime on more than four of five scheduled days in a week only if they volunteer for such work. Absent such consent, it says, Management must look elsewhere to find someone to handle the overtime. It considers 5G to be simply a ceiling on the number of overtime hours an employee may volunteer to work. It maintains its view is supported by overtime administration under the prior National Agreement (particularly the Bloch award and the Step 4 settlement cited earlier) and the language of Article 8 and the Article 8 Memorandum.

The Postal Service and NALC contend that the prohibition in 5F, at least with respect to ODL employees, has been cancelled by the permissive language in 5G. They argue that ODL employees can be required to work up to twelve hours in a day and sixty hours in a week without regard to the 5F limitations. They urge that these employees do not have the option of accepting or refusing any overtime beyond the 5F limitations. They claim their view is supported by the clear and unambiguous language of Article 8, by the history of the 1984 negotiations, and by considerations of practicality.

A hypothetical example may be useful in bringing these arguments into sharper focus. Assume "X", a full-time regular, is on the ODL and has worked the following hours on his regularly scheduled days in a given week:

S	S	M	T	W	Th	F
		12	10	10	10	8

Assume further that two hours of overtime are needed at the end of his eight-hour shift on Friday and that only "X" and "Y", a non-ODL employee, are available for such overtime. Neither the twelve-hour daily nor sixty-hour weekly restrictions are relevant in this example.

The APWU emphasizes that these extra two hours on Friday for "X" would be "overtime on more than four...of [his]... five...scheduled days in a service week." It asserts that 5F says he "will [not] be required work overtime..." in such circumstances. It believes he therefore has the option of accepting or refusing this overtime. It claims that if he volunteers he has a right to the extra two hours ahead of "Y" or anyone else not on the ODL but that if he declines he cannot be compelled to work the overtime. It notes that only after he declines may Management assign "Y" to the overtime.

The Postal Service and NALC rely on the terms of 5G in alleging that "X" has no such option. They state that so long as "X" has not worked twelve hours on Friday or sixty hours in the week, he can be required to work the additional overtime on Friday. Indeed, they urge that "X" must be required to work this overtime in order to protect "Y" from an overtime draft.

For the following reasons, the Postal Service-NALC interpretation of Article 8 is far more persuasive.

Compare, to begin with, the terms of 5F ("will [not] be required...") and 5G ("may be required..."). The APWU says the former words mean that an ODL employee ***cannot be compelled*** to work beyond the 5F limitations. Assuming that is so, then the latter words must necessarily mean that an ODL employee be compelled to work up to twelve hours in a day. The employee's 5F right to resist certain overtime is subordinated to Management's broader 5G right to demand such overtime.

The point can be made more forcefully through a close examination of the language of 5G: "...Employees on the 'Overtime Desired' list...1.may be required to work up to twelve...hours in a day and sixty...hours in a service week..." Section 5G1 thus allows Management to insist upon a twelve hour "day" for ODL people. It ignores the distinction made in 5F between "regularly scheduled day" and "non-scheduled day." The parties' choice of the broadest possible word, "day", must have been intentional. They appear to have meant any "day", whether scheduled or not. The APWU admits that the 5F limitation of "ten...hours on a regularly scheduled day" has been overridden by the

twelve-hour day in 5G1.*7 By the same token, it seems to me, the 5F limitation of "eight...hours on a non-scheduled day" or "overtime on more than four...of the...five....scheduled days in a service week" are also overridden by the twelve-hour day in 5G1. And Management "being thus free to require twelve hours on a non-scheduled day, it would appear that the 5F limitation of "six...days in a service week" is likewise overridden. In other words, 5G1 is a far-reaching exception to all the limitations stated in 5F, not just to the ten-hour rule.

*FOOTNOTE*7 This admission undermines the APWU contention that 5G is little more than a statement of overtime ceilings (twelve and sixty) beyond which ODL employees cannot be required to work.*

Equally important is the recognition in 5G1 that Management, in requiring ODL employees to work up to twelve hours a day or sixty hours a week, is "*subject to* payment of *penalty overtime pay* set forth in Section 4.D *for contravention of Section 5.F...*" The underscored words reveal the parties anticipated that Management may find it necessary to "contraven[e]" the 5F limitations, that ODL employees "may be required to work..." overtime beyond those limitations. Nothing in this language suggests that the parties' concern was "contravention" of only one such limitation, the ten-hour rule. Their concern was much larger. They were dealing with *any* "contravention" of the 5F limitations. That is obvious also from the terms of 4D which call for "penalty overtime pay" for "any overtime work in contravention of the *restrictions* in Section 5.F." The reference is to *any and all* limitations found in 5F. The quoted language in 5G1 has the same broad reach. That being so, it would appear that the twelve-hour and sixty-hour language in 5G1 were meant to pertain to *any and all* limitations found in 5F.

Moreover, the Postal Service-NALC interpretation realistically integrates the overtime duty of ODL employees with the overtime draft of non-ODL employees. Section 5G1 says ODL people "may be required to work *up to twelve...hours in a day and sixty...hours in a service week*"; the first sentence of 5G says non-ODL people "may be required to work overtime only if all available... [ODL employees] have worked *up to twelve...hours in a day or sixty...hours in a service week.*" In short, non-ODL employees can be drafted for overtime at precisely the point at which ODL employees have exhausted their overtime obligation. Such symmetry assures the availability of someone to work the needed overtime. To qualify the ODL employees' obligation by allowing them the option to accept or refuse overtime beyond the 5F limitations would mean they could refuse overtime before they reached the twelve-hour and sixty-hour ceilings. That would mean in turn that non-ODL employees could refuse overtime because the ODL people had not reached these ceilings. The result in many situations would inevitably be that no one could be ordered to perform the necessary overtime and postal operations would suffer. That could hardly have been what the parties intended.

Consider, in this connection, the impact of the APWU interpretation in the hypothetical example mentioned earlier. The APWU would permit "X" to decline the additional two hours of Friday overtime. That would be his option because the work in question went beyond the 5F limitations. Because "X" had not yet reached the twelve-hour ceiling on Friday or the sixty-hour ceiling for the week, a non-ODL employee such as "Y" could also decline the overtime pursuant to 5G.*8 If both "X" and "Y" refused, the extra two hours of overtime would not be performed at all. It is difficult to believe the parties meant 5F and 5G to be read in such a way as to produce such a patently unreasonable result.*9

*FOOTNOTE*8 To the extent to which the APWU believes the overtime would have had to be worked by "Y" in the hypothetical example, its position would conflict with the plain meaning of first sentence in 5G.*

*FOOTNOTE*9 Note that the very first sentence in Section 5 provides: "When needed, overtime work for regular full-time employees shall be scheduled among qualified employees..." The APWU position would, in certain situations, deny Management this right to "schedule ...needed...overtime..."*

The Postal Service-NALC interpretation is further supported by the final sentence in 5C:

> "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."

This sentence says in effect that Management may pick and choose among ODL employees to avoid penalty overtime pay, to avoid working some of these employees beyond the 5F limitations. But the clear implication of these words is that Management "is...required" to use ODL employees for the overtime when all ODL employees have reached the point at which their next overtime assignment will bring penalty pay. Given this requirement, the ODL employees can hardly be said to have the option of accepting or refusing the overtime.*10

*FOOTNOTE*10 The further implication is that Management "is...required" to use ODL employees in preference to non-ODL employees even though the latter, if assigned to the overtime, would not receive penalty pay.*

Furthermore, the APWU argument contemplates ODL employees being given an opportunity to volunteer for overtime beyond the 5F limitations. This would entail ascertaining the wishes of ODL employees on a day-to-day basis depending on the need for overtime and each employee's accumulated "overtime hours in a given day or week." Article 8 says absolutely nothing about any such procedures. President Biller himself acknowledged in his testimony that the Article 8 language drafted by the parties' attorneys on December 3, 1984, did not permit ODL employees "the option to volun-

teer..." for work beyond the 5F limitations. Yet that draft language is exactly what now appears in 5F and 5G of the present National Agreement.

The APWU returned to the bargaining table with the Postal Service after December 3 because it believed the 5F and 5G language drafted by the attorneys did not really embrace the APWU view of ODL employees' rights. The result of these talks was the Article 8 Memorandum. The APWU asserts that the terms of the Memorandum, primarily the third paragraph, support its position in this case:

> "The parties agree that Article 8, Section 5.G.1, does not permit the employer to require employees on the ...[ODL] to work overtime on more than 4 of the employee's 5 scheduled days in a service week, over 8 hours on a non-scheduled day, or over 6 days in a service week."

These words seem to be directed at the matter in dispute, the interrelationship between 5F and 5G1. They state that 5G1 does not permit Management to require ODL employees to work overtime beyond the 5F limitations, except of course for the ten-hour limit on a regularly scheduled day. This is the very principle upon which the APWU rests its case. The difficulty with this claim, however, is that the parties agreed that the Memorandum "does not give rise to any contractual commitment beyond the provisions of Article 8..." I have already held that there is no "contractual commitment" in Article 8 to allow ODL employees the option of accepting or refusing overtime beyond the 5F limitations. It follows that nothing in the Memorandum can create such a "contractual commitment", such an ODL employee right. To rule otherwise would be to permit the Memorandum alone to establish contract rights not otherwise provided for in Article 8. Such a result is expressly forbidden by the Memorandum.

Nevertheless, to the extent to which there is ambiguity in Article 8, the APWU argues that it may use the Memorandum as an interpretive aid to clarify what the parties intended in 5F and 5G. For the purpose of the Memorandum was, by its own terms, to "set forth the underlying principles which brought the parties to agreement..."*11 This argument is not without appeal. But the fact is that when the overtime issues were settled at the December 3, 1984 negotiating session, there was no agreement that ODL employees could be required to work overtime beyond the 5F limitations only if they volunteered to do so. Nor did the 5F and 5G language drafted by the parties' attorneys provide for such volunteering, for an option to accept or refuse this kind of overtime. It was this contractual silence, the absence of any language embracing the volunteer or option concept, which prompted the APWU dissatisfaction with the attorneys' draft. The APWU insisted then on further negotiation with the Postal Service on this Article 8 question. Its action recognized in effect that 5F and 5G did not support the position it now takes. It could not secure a change in the Article 8 language and settled instead for the Memorandum. To allow the Memorandum to add to 5F and 5G what the parties clearly did not intend when they reached agreement on December 3 would, I believe, add a new "commitment" to Article 8. Once again, that is exactly what the Memorandum is not supposed to do.

*FOOTNOTE *11 I believe the words "brought the parties to agreement" refer to the agreement on Article 8, not the agreement on the Memorandum.*

As for the Bloch award and the Step 4 grievance settlement, both of these events occurred under a prior National Agreement. The new language added to the 1984 National Agreement, particularly 4D and 5G make these precedents of little value in this case.

My conclusion is that ODL employees do not have the option to accept or refuse overtime beyond the 5F limitations.*12 They can be required to perform such overtime.*13 The non-ODL employees may not be required to work overtime until the ODL employees have exhausted their overtime obligation under 5G.

*FOOTNOTE *12 The evidence and arguments before me plainly show that this is, contrary to the APWU claim, a principal issue in the present case.*

*FOOTNOTE *13 There is no need to determine the precise circumstances under which Management may require ODL employees to work overtime beyond the 5F limitations. That subject is covered in part by paragraphs 2, 4 and 6 of the Memorandum. According to paragraph 4, ODL employees who do not wish to work more than ten hours "normally...shall not be required to do so" provided other ODL employees are willing to work beyond ten hours. According to paragraph 6, those who place their names on the ODL are given the opportunity at such time to indicate their availability to work beyond ten hours in a day.*

AWARD

The grievances are resolved in accordance with the foregoing discussion.

CBR 92-04 SPECIAL ISSUE
AIRS NO.: 10374(23) & 10375(21)

ARTICLE 8 ARBITRATION AWARD
USPS NO.: H4N-NA-C-21(2nd issue) & H4C-NA-C-23
ARBITRATOR: MITTENTHAL, R
DATE OF AWARD: JANUARY 19, 1987

TEXT OF AWARD

Subject: Effect of Penalty Overtime Pay on Holiday Scheduling

Statement of the Issues:

Whether Management may ignore the "pecking order" in holiday period" scheduling, as established by Article 11,

Section 6B or a Local Memorandum of Understanding, in order to avoid payment of penalty overtime pay under Article 8?

Whether Management may treat regular employees who have volunteered for holiday period work, pursuant to the holiday scheduling process, as having volunteered for up to twelve hours on whatever day(s) they are asked to work?

Contract Provisions Involved: Article 8, Sections 4 and 5; Article 11, Sections 1 through 6; and Article 30 of the July 21, 1984 National Agreement.

Statement of the Award: The grievances are granted. Management may not ignore the "pecking order" in holiday period scheduling under Article 11, Section 6 in order to avoid penalty overtime pay under Article 8. Management may not treat regular volunteers for holiday period work as having volunteered for up to twelve hours on whatever day(s) they are asked to work. The remedy for this violation, the question of who is entitled to back pay for Management's failure to honor rights under Articles 8 and 11, is remanded to the parties for their consideration. Should they be unable to resolve this matter, the back pay issue may be returned to the appropriate arbitration forum for a final decision.

BACKGROUND

These grievances involve interpretive questions with respect to Article 11, the holiday work and holiday scheduling language of the 1984 National Agreement. Article 11, Section 6B establishes a "pecking order" for scheduling employees during a holiday period. The Postal Service insists that if compliance with the "pecking order" would result in some employee receiving penalty overtime pay, Management is free to bypass that employee to avoid the penalty overtime pay. The Unions disagree. They urge that any failure to follow the "pecking order" is a violation of Section 6B.

Article 11 is the "holidays" clause. It states the holidays to which the employees are entitled (Section 1), the eligibility conditions for holiday pay (Section 2), and the payment made for a holiday (Section 3). It notes that when a holiday falls on an employee's scheduled non-workday, he takes his holiday on his "scheduled workday preceding the holiday" (Section 5B). That is referred to as his designated holiday. Because of this contract provision, a single holiday may embrace a two- or three-day period. For example, if the official holiday occurs on a Monday, anyone regularly scheduled that day will have Monday as a holiday. An employee whose scheduled off days are Sunday and Monday will have his designated holiday on Saturday; an employee whose off days were Monday and some later day would have his designated holiday on Sunday. These latter employees receive holiday pay for their designated holiday, not for the official holiday pay for (Monday).

Article 11 also explains how employees are to be paid when they work on their holiday (Section 4) and how employees are to be scheduled for such holiday work (Section 6). In order to understand this dispute, these two provisions should be quoted at length:

"Section 4. Holiday Work

A. An employee required to work on a holiday other than Christmas shall be paid the base hourly straight time rate for each hour worked up to eight (8) hours in addition to the holiday to which the employee is entitled as above described.

B. An employee required to work Christmas shall be paid one and one-half (1/2) times the base hourly straight time rate for each hour worked in addition to the holiday pay to which the employee is entitled as above described."

"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 Wednesday preceding the service week in which the holiday falls.

B. As many full-time and part-time regular 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 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."

Some elaboration on the meaning of this contract language is necessary. Section 6A demands that a holiday work schedule be posted by a certain time. Section 6B establishes rules as to how the schedule is to be prepared. Its main purpose is to require that "full-time and part-time regulars" be given holidays off to the extent possible. It calls upon Management to "excuse" from holiday work "as many. . ." of them "as can be spared." It nevertheless recognizes that these regulars may sometimes be required to work on their holidays. But it says this cannot happen "unless all casuals and part-time flexibles are utilized to the maximum extent possible" including overtime and "unless all full-time and part-time regulars...who wish to work on the holiday have been afforded an opportunity to do so." Thus, all casuals, part-time flexibles and regular volunteers must be used for holiday work before Management can compel regular, non-volunteers to perform such work.

The precise order of choosing employees for holiday work, commonly referred to as the "pecking order", is left to the local parties. Article 30B, item 13 provides for local implementation with respect to "the method of selecting employees to work on a holiday." Of course, should the local parties fail to agree on a "pecking order", they would be bound by the terms of Article 11, Section 6B.

Section 4 deals with the applicable rate of pay for the employee who works his holiday (or designated holiday)

pursuant to the "pecking order." Ordinarily, he receives straight time for such holiday work (Section 4A) in addition to holiday pay. But if he works on Christmas Day, he receives time and one-half for such holiday work (Section 6B) in addition to holiday pay.

Because holiday scheduling involves more than the calendar holiday, employees are sometimes called upon to work during the holiday period on one or two of their regularly scheduled off days. Suppose, for instance, that the calendar holiday falls on Monday and that a regular volunteer has his off days on Sunday and Monday and hence his designated holiday on Saturday. If he is asked to work on Sunday (or Monday), he receives time and one-half for such work.*1 The parties appear to disagree on the basis for this payment. The Unions insist this overtime premium is required by Article 8, Section 4B. The Postal Service insists that pay for work performed because of the holiday scheduling provision has nothing to do with Article 8 but rather is based on the terms of Article 11 and the March 4, 1976 Settlement Agreement. Paragraph 3d of this Settlement Agreement states:

> "d. A full time regular employee required to work on a holiday which falls on his regularly scheduled non-work day shall be paid at the normal overtime rate of one and one-half (1 1/2) times his basic hourly straight time rate for work performed on such day. . ."*2

*FOOTNOTE *1 If he is asked to work on Saturday, his designated holiday, he receives straight time for such work pursuant to Article 11, Section 4A.*

*FOOTNOTE *2 This clause plainly does not refer to Saturday in the hypothetical example above. For Saturday, being the employee's designated holiday, is by definition a scheduled workday. Rather, it must refer to the official holiday on Monday which was a "scheduled non-work day" for this employee. In any event, this clause does not concern his pay for work performed on Sunday pursuant to the holiday schedule. For Sunday was neither a calendar holiday nor his designated holiday.*

Article 8 is a critical part of this dispute as well. Prior to the 1986 National Agreement, it provided overtime pay for work performed "after eight (8) hours on duty in any one service day or forty (40) hours in any one service week" (Section 4B). It provided further for overtime pay for work outside the regularly scheduled work week, i.e., for work on the employee's non-scheduled days (Section 4B). It referred to a single overtime rate, time and one-half (Section 4A).

The 1984 national negotiations led to significant changes in Article 8. The most important one, for purposes of this case, was the establishment of "penalty overtime pay" of "two (2) times the base hourly straight time rate" (Section 4C). The manner in which this penalty premium was to be applied is set forth in Sections 4 and 5 of the 1984 National Agreement:

> *"Section 4...D.* Effective January 19, 1985, penalty overtime pay will be paid to full-time regular employees for any overtime work in contravention of the restrictions in Section 5.F.
>
> *"Section 5...F.* Effective January 19, 1985, excluding December, no full-time regular employee will be required to work overtime on more than four (4) of the employee's five (5) scheduled days in a service week or work over ten (10) hours on a regularly scheduled day, over eight (8) hours on a non-scheduled day, or over six (6) days in a service week."

In short, employees who work beyond these Section 5F restrictions are entitled to penalty overtime pay.

In the 1984 national negotiations, the Unions proposed several changes in Article 11. One was to "correct Article 11 to reflect the Martin Luther King, Jr. holiday". Another was to "increase...the premium paid for work on a holiday or designated holiday." The former proposal was submitted to the Kerr interest arbitration panel which held that the King birthday should be an additional holiday beginning in 1986. The latter proposal was evidently an attempt to raise any existing "premium" for holiday work. It was dropped by the Unions during negotiations and was never placed before the Kerr panel.

The Postal Service advised the Unions of its interpretation of Article 11 in mid-April 1985. It asserted that volunteering for holiday period work would be considered by Management as indicating a willingness to work up to twelve hours per day. It asserted further that a holiday schedule would continue to be based on the "pecking order" created by Article 11, Section 6B and local implementation but that Management was not obligated to follow the "pecking order" if, by doing so, it incurred penalty overtime pay. Both Unions objected to this interpretation. NALC grieved, alleging that "pecking orders, however established, must be followed by the Postal Service." Its position was that the "pecking order" could not be disregarded because of penalty overtime pay considerations. APWU grieved, taking the same position as NALC on the "pecking order" question. It urged that an employee's right to holiday period work pursuant to Article 11, Section 6B and local implementation could not be affected by any Article 8 changes in overtime compensation. It added too that employees scheduled for holiday work "are available to work the number of hours [eight] they would normally be available for if it were not a holiday schedule."

The original arbitration hearing was held in Washington, D.C. on December 19, 1985. The parties submitted only the question of whether the Unions' complaint was arbitrable under the terms of the 1984 National Agreement. I ruled on May 5, 1986, that "the grievances in this case are arbitrable." A hearing was held on the merits of the dispute on October 8, 1986. Post-hearing briefs were received by the arbitrator on December 6, 1986.

DISCUSSION AND FINDINGS

Article 11, Section 6B is the key provision in this case. It deals with the holiday schedule for the holiday period, namely, the day on which the official holiday falls and the preceding day(s) on which many employees have their designated holiday. Its purpose was to insure, insofar as possible, that regulars would enjoy the holiday (or designated holiday) and be off work that day. It accomplished this purpose by creating a "pecking order." Thus, 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 who does not wish to work. The parties gave the regular non-volunteer a right, vis-a-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 important, 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. Failure to honor these priorities (i.e., scheduling a regular non-volunteer while other qualified non-protected people are available) would plainly be a violation of Article 11, Section 6B.

The Postal Service nevertheless insists that the "pecking order" is not always mandatory under the 1984 National Agreement. It stresses that part of Article 11, Section 6B which says the priorities set forth in the "pecking order" are to be followed "even if the payment of overtime is required." It believes these words mean that the parties anticipated the "pecking order" would cost Management no more than the "overtime" rate in effect (i.e., time and one-half) at the time Section 6B was first written into the National Agreement. It urges that the parties negotiated a new "penalty overtime" rate (i.e., double time) in the 1984 National Agreement, that this was not the "overtime" rate contemplated by Article 11, Section 6, and that Management may therefore ignore the "pecking order" when necessary to avoid the payment of anything beyond such "overtime" rate. Its position is that the parties agreed the Section 6B scheduling procedure could result in "..the payment of overtime" but not "...the payment of penalty overtime."

This argument fails for several reasons. The object of the phrase in question ("even if the payment of overtime is required") obviously was to make clear that Management could not escape the mandatory scheduling procedure in Article 11, Section 6B on the ground that strict application of this procedure would call for "overtime" pay. The "pecking order" had to be followed even though it caused employees to be paid time and one-half. The "pecking order" had to be followed without regard to labor cost considerations.*3 Realistically viewed, this phrase simply serves to emphasize the *unconditional* nature of the Section 6B scheduling ***obligation***. The Postal Service has never had an option in this matter. It had to honor the "pecking order" whenever it made up a holiday schedule. It presumably did so between 1973, when Section 6B came into being, and 1984. Now Management contends that this phrase, absent any change in the language of Section 6B, somehow places a new condition on what had always been an unconditional obligation. This claim is unconvincing, not only because it would alter the long-standing interpretation of Section 6B but also because it would expand the meaning of this phrase far beyond what the parties could possibly have intended.

*FOOTNOTE *3 The Postal Service can, of course, choose from among the part-time flexibles (or from among the regular volunteers, etc.) in order to limit its labor cost. That kind of choice would not conflict with the "pecking order."*

To repeat, the phrase in question precludes any deviation from the "pecking order" because of "overtime." It is true that when Article 11, Section 6B was initially written, there was just one kind of "overtime" pay, namely, time and one-half. The parties established another kind of "overtime" pay, namely, double time, in the 1984 National Agreement and described it as "penalty overtime." Neither of these circumstances command a different conclusion in this case. For "penalty overtime" is still a form of "overtime" and double time is simply a new type of "overtime" rate. Moreover, these new arrangements have been included in the "overtime work" provisions of Article 8, Section 4. The parties' intent to make "overtime" (i.e., labor cost) considerations irrelevant in preparing a holiday schedule under Article 11, Section 6B strongly suggests that Management may not deviate from the "pecking order" because of "penalty overtime."

Neither party seems to have anticipated in the 1984 negotiations that the creation of "penalty overtime" in Article 8, Section 4 might have an impact on holiday scheduling under Article 11, Section 6B. There is no evidence that the negotiators discussed this interrelationship. The Postal Service maintains the Unions never advised Management at the time that the "pecking order" would have to be applied without regard to "penalty overtime" as well as "overtime." Had it been so advised, it says it would have insisted on re-negotiating Article 11, Section 6B. But the Unions can make the very same type of argument. They could properly assert the Postal Service never advised them at the time that deviation from the "pecking order" was prohibited with respect to "overtime" but not "penalty overtime." Had they been so advised, they presumably would also have insisted on re-negotiating Article 11, Section 6B.

The difficulty here is the parties' silence on this issue in the 1984 negotiations. That silence, however, does not work to the Unions' disadvantage. For the holiday scheduling in Article 11, Section 6B, the "pecking order", has always been an unconditional obligation. Nothing in the Postal Service's argument convinces me that a sound basis exists for modifying that unconditional obligation.

The Postal Service resists these findings on other grounds as well. *First*, it states that pay for work performed pursuant to a holiday schedule is based not on Article 8 but rather on Article 11 and the March 6, 1976 Settlement Agreement. It seems to be asserting that there is no interrelationship between Articles 8 and 11. *Second*, it states that the Unions are seeking through this arbitration what they failed to achieve in the 1984 negotiations. It refers to the Unions' withdrawal in those negotiations of a proposal for "increasing the premium paid for work on a holiday or designated holiday" under Article 11.

The first claim has no merit whatever. It is true that pay for work on a holiday (or designated holiday) is governed by Article 11, Section 4. But the holiday schedule typically encompasses a two- or three-day period and calls for employees to work on a day(s) outside their regular schedule, a day(s) other than their holiday (or designated holiday). Payment for these days is not covered by Article 11. Payment for these days is covered by *Article 8* and to a limited extent by the Settlement Agreement.*4

*FOOTNOTE *4 See footnote 2 which explains that Paragraph 3d of the Settlement Agreement has a limited application to a holiday schedule. Note too that the purpose of Paragraph 3d, according to a lengthy April 1974 memorandum issued by Postal Service headquarters, was to show that an employee who "works on a calendar holiday" which is in fact "his sixth work day...is entitled only to the normal overtime rate for service performed that day..." (Emphasis added).*

The Postal Service has recognized the applicability of the overtime pay provisions of Article 8 in these circumstances. An August 1973 telegraphic message was sent to facilities throughout the country by the then Senior Assistant Postmaster General for Employee & Labor Relations. The message dealt with misunderstandings as to the proper interpretation of Article 11, Section 6B. It described the priorities or "pecking order" for a holiday schedule and noted the fourth and fifth priorities in these words:

> "4. All other full time and part time regular volunteers. In the case of such full time volunteers, if they are scheduled to work and it is what would otherwise be their non-scheduled work day, they will be guaranteed 8 hours at *the overtime rate in accordance with Article VIII, Sections 1 and 4.*
>
> "5. Full time and part time regulars who have not volunteered and who will. be working on what would otherwise be their non-scheduled work day. In the case of such full time employees, they will be guaranteed 8 hours at *the overtime rate in accordance with Article VIII, Sections 1 and 4.*" (Emphasis added)

Equally important, the Postal Service issued a January 1985 special postal bulletin (21495) which dealt with pay issues arising from the new "penalty overtime" provision. The bulletin addressed the situation where an "employee worked all seven days of the week which included a holiday." The calendar holiday fell on a Monday; the employee's regularly scheduled off days were Saturday and Sunday; the holiday schedule called for him to work these off days. The bulletin stated that "penalty overtime is paid for the 2nd non-scheduled workday, for hours worked on a 7th day (Sunday)" (Emphasis added). That was obviously a reference to Article 8, Section 4.

The Postal Service expressly acknowledged the applicability of "penalty overtime" to holiday scheduling in an April 1985 letter to the Unions. It stated its "position" in these words:

> "For holiday scheduling purposes work hour limitations for the holiday period; i.e., the holiday and designated holidays, would be as follows:
>
> * * *
>
> -*Penalty pay* would be due for work in excess of 10 hours per day.
>
> -*Penalty pay* would be due for overtime work on more than 4 of the employees 5 scheduled days.
>
> -*Penalty pay* would be paid for work over 8 hours on a nonscheduled day.
>
> -*Penalty pay* would be paid for work over 6 days in a service week." (Emphasis added)

These statements show that employees on a holiday schedule can, where appropriate, qualify for "penalty overtime" under Article 8, Sections 4 and 5. Indeed, the present dispute is before the arbitrator because the Postal Service has admittedly deviated from the "pecking order" of Article 11, Section 6B to avoid the payment of "penalty overtime." That action plainly implies that were Management required to follow the "pecking order" in such situations, it would have to pay "penalty overtime."

All of this illustrates, beyond question, that Article 8 does apply to certain portions of the Article 11, Section 6B holiday schedule. Articles 8 and 11 are interrelated.

The second claim is also not persuasive. In the 1984 negotiations, the Unions noted that "most employees are required to work on holidays" and proposed amending Article 11 so as to "increase...the premium paid for work on a holiday designated holiday." This proposal was later withdrawn. The parties disagree on the significance, if any, to be attributed to this withdrawal.

The Unions' proposal had a narrow target. It was aimed at work performed by employees on their holiday (or designated holiday). It sought something more than the straight time pay authorized by Article 11, Section 4 for such work.*5 The present dispute, however, does not concern work on the employee's holiday (or designated holiday). The Unions do

not challenge the pay formulation in Article 11, Section 4. Rather, their concern is with the employee required to work on a non-scheduled day*6 pursuant to the holiday scheduling procedure of Article 11, Section 6B. Their concern is with Management's obligation to follow the "pecking order" of Section 6B without regard to the "overtime" consequences. Such concerns were obviously not part of the Unions' negotiating proposal. Therefore, it cannot be said that the Unions' position in this case is an attempt to secure through arbitration what it failed to achieve through negotiations.

*FOOTNOTE *5 Time and one-half pay is authorized for work on the Christmas holiday.*

*FOOTNOTE *6 This non-scheduled day would, by definition, be a day other than his holiday (or designated holiday).*

The final issue in this case concerns the Postal Service's view that any regular employee who volunteers for holiday period work may be treated as having volunteered for up to twelve hours on whatever day(s) he is asked to work. The Unions do not agree. They believe that such a regular volunteer is limited to just eight hours and that should Management need more than this eight hours' work, it must use the overtime desired list (ODL).

Article 11 does not address this issue. It deals with the scheduling of holiday period work but it says nothing of the number of hours for which a regular volunteer may be scheduled. However, Article 8, Section 5 offers some significant clues. It describes the procedures to be followed in scheduling "overtime work" for employees. Its general provisions must give way to the specific provisions for holiday scheduling in Article 11, Section 6. Hence, a regular volunteer may be scheduled for an eight-hour shift in the holiday period even though these hours constitute "overtime work" for him and even though he is not on the ODL. But because Article 11 does not speak of the length of a holiday period assignment and because anything beyond the initial eight hours must amount to "overtime work", it is appropriate to look at Article 8, Section 5.

Assume, for instance, that a regular full-time volunteer is working eight hours on a non-scheduled day pursuant to the holiday schedule. That would be "overtime work." But Article 8, Section 5F says "no full-time regular will be required to work...over eight...hours on a non-scheduled day..." Assume further that this regular volunteer is also working eight hours on his holiday (or designated holiday), one of his regularly scheduled days. He receives straight time for such holiday work in addition to his holiday pay. Only if he is asked to work beyond eight hours would overtime pay be applicable. But Article 8, Section 5G says "full-time employees not on the [ODL]...may be required to work overtime only if all available employees on the [ODL]...have worked up to twelve...hours in a day or sixty...hours in a service week..." *7 In short, the regular volunteer cannot work beyond the eight hours without supervision first exhausting the ODL. These Article 8 provisions, when read together with Article 11, strongly suggest that regular volunteers are contractually expected to work eight hours, nothing more. And it appears that regular volunteers were ordinarily scheduled for holiday period work in eight-hour blocks prior to the 1984 National Agreement.

*FOOTNOTE *7 If the regular volunteer is also on the ODL, a different situation might well be presented.*

I find, accordingly, that the regular volunteer is volunteering for eight hours' work as urged by the Unions. That evidently was the accepted construction of Article 11, Section 6 prior to the 1984 National Agreement. There is no sound reason why the new "penalty overtime" provisions of Article 8 should prompt a different construction.

AWARD

The grievances are granted. Management may not ignore the "pecking order" in holiday period scheduling under Article 11, Section 6 in order to avoid penalty overtime pay under Article 8. Management may not treat regular volunteers for holiday period work as having volunteered for up to twelve hours on whatever day(s) they are asked to work. The remedy for this violation, the question of who is entitled to back pay for Management's failure to honor rights under Articles 8 and 11, is remanded to the parties for their consideration. Should they be unable to resolve this matter, the back pay issue may be returned to the appropriate arbitration forum for a final decision.

CBR 92-04 SPECIAL ISSUE
AIRS NO.: 6437

ARTICLE 8 ARBITRATION AWARD
USPS NO.: H1C-4K-C-27344/45
ARBITRATOR: ZUMAS, N.
DATE OF AWARD: NOVEMBER 21, 1985

TEXT OF AWARD

BACKGROUND

This is a Step 4 appeal to the National Level arbitration pursuant to the provisions of Article 15 of the National Agreement between United States Postal Service (hereinafter "Service") and American Postal Workers Union, AFL-CIO (hereinafter "Union"). Hearing was held in Washington, D.C. on February 7, 1985, at which time testimony was taken, exhibits offered and made part of the record, and argument was heard. The post-hearing brief of the Service was received on March 28, 1985. The post-hearing brief of the Union was received on April 8, 1985.

STATEMENT OF THE CASE

This is a Class Action grievance initiated in Des Moines, Iowa on behalf of Full-Time Regular employees, on the Overtime Desired List (ODL) who were bypassed in favor of casual employees utilized in an overtime status. The Union,on behalf of Grievants, alleges that this was in violation of the National Agreement.

The parties failed to resolve the matter during the various steps of the grievance procedure. Because the issue involved an interpretation of the National Agreement, the Union appealed the dispute to the National Level, pursuant to the provisions of Article 15, Section 4(D) of the National Agreement.

ISSUE

The parties have stipulated that the question to be resolved is whether the Service violated the National Agreement when it utilized casual employees on overtime on the days in question instead of scheduling Full-Time Regular employees who are on the Overtime Desired List (ODL).

STATEMENT OF FACTS

The essential facts are not in dispute: Because of the receipt of "contest" mail from two major publishing houses in Des Moines, Iowa, mail volume in the Des Moines Post Office was unusually heavy during the week of January 14, 1984. As a consequence of this heavy mail volume, local management utilized many employees on overtime during this week. Grievants were Full-Time Regular MPLSM Operators, Level 6, who are not scheduled in for overtime on January 17 and 18, 1984 (their non-schedule days). They were, however, on the ODL, and presumably were available to work overtime. Grievants were not called. Instead, local management utilized casual employees who worked approximately 11 hours on each of the days in question.

The Union, on behalf of Grievants, asserts that they were denied the opportunity to work, and that they be compensated in an amount equivalent to overtime earnings received by the casual employees, including a night differential.

APPLICABLE CONTRACT PROVISIONS

Article 7-Section 1-B-1

"The supplemental work force shall be comprised of casual employees. Casual employees are those who may be utilized as a limited term supplemental work force, but may not be employed in lieu of full or part-time employees."

Article 8-Section 5

When needed, overtime work for regular 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:

(A) Two weeks prior to the start of each calendar quarter, full-time regular employees desiring to work overtime during that quarter shall place their names on an "Overtime Desired" list.

* * *

(D) If the voluntary 'Overtime Desired' list does not provide sufficient qualified people, qualified full-time regular employees not on the list may be required to work overtime on a rotation basis with the first opportunity assigned to the junior employee.

POSITION OF THE UNION

The Union argues that local management's utilization of casual employees for overtime duty on the dates in question instead of calling Grievants was prohibited by that portion of Article 7, Section 1-B-1 stating:

"Casual employees... may not be employed in lieu of full or part-time employees."

The Union contends that this section mandates that if an assignment (such as overtime) is available, full and part-time employees must receive priority over casual employees.

The Union also contends that the parties, by agreeing to Article 8, Section 5, provided an overtime work benefit to full-time regular employees, giving a first preference to those full-time employees who are on the ODL, and secondly to those full-time employees who are not. Since casual employees are not covered by the National Agreement, they are not entitled to any of the benefits, including overtime, as provided in Article 8, Section 5.

In further support of its position, and as justification for remedy requested, the Union refers to a January 13, 1975 settlement in Case No. AB-N-2476 between James Gildea, then Assistant Postmaster General and Francis S. Filbey, then President of the Union, which stated, in part:

"When, for any reason, an employee on the 'Overtime Desired' list, who has the necessary skills and who is available, is improperly passed over and that other employee not on the list is selected overtime work, the employee who was passed over shall he paid for an equal number of hours at the overtime rate for the opportunity missed."

In anticipation of the Service's reliance on Arbitrator Mittenthal's awards*1 relating to the respective rights of full-time employees and part-time flexible employees, the Union asserts that those Awards are distinguishable in that part-time flexible employees are covered under the National Agreement, part of the regular work force, and qualified for

most contractual benefits -- as opposed to casual employees who are entitled to no benefits under the National Agreement.

*FOOTNOTE *1 Awards in Case Nos. M8-W-0027 and M8-E-0032*

POSITION OF THE SERVICE

The Service takes the position that the Union has failed to meet its burden of showing any contractual violation; and that there is nothing in the National Agreement that prohibits the Service from utilizing casual employees for overtime work instead of full-time employees on the ODL.

The Service first argues that Article 8, Section 5 in no way requires it to use full-time regular employees before using casual for overtime work. The Service contends that Article 8, Section 5 only creates a priority order for overtime as ***between*** full-time regulars who are on the ODL as opposed to those who are not; ***not*** between full-time regular employees and other classes of employees. In support of its position, the Service cites the two awards by Arbitrator Mittenthal referred to above, and asserts that there is no distinction between part-time regular employees and casual employees insofar as the application of Article 8, Section 5 is concerned.

The Service next contends that the Union's reliance upon Article 7 does not support its position.*2 The Service argues that the term "employed" means ***hired***, not ***assigned*** or ***utilized***. The Service asserts that this section, when looked at in its entirety and along with other provisions, makes it clear that had the parties intended "employed" to mean assigned, the term "utilized" and not "employed" would have been used. Moreover, the Service contends, since 1971 the term "employed" has referred to the number of casual employees that may be hired and the duration of their employment.

*FOOTNOTE *2 "...casual employees may not be employed in lieu of full or part-time employees."*

The Service further contends that the Union's argument concerning the status of a casual employee precludes the granting of a contractual benefit (overtime) is misplaced. The Service argues that the Union has never considered overtime as a "benefit" in prior negotiations; but rather has attempted to limit overtime assignments, again citing Arbitrator Mittenthal's finding that the purpose of Section 5 of Article 8 was to restrict mandatory overtime for full-time regulars (by establishing the ODL). The Service points to studies showing that approximately 7.1% of all casual employees' hours were overtime hours; and that this is proof that the Agreement does not prohibit casual employees from performing overtime work. In this regard, the Service points to Part 231.22 of the F-21 Handbook allowing casual employees to work overtime.

FINDINGS AND CONCLUSION

After review of the record, this Arbitrator finds that the grievance must be denied.

There has been no showing by the Union that the utilization of casuals on January 17 and 18, 1984, when the mail volume was unusually heavy due to the annual arrival of "contest" mail, rather than scheduling full-time regular MPLSM operators to work overtime on their non-schedule days violated any provision of the National Agreement.

Casual employees are non-career employees who, as part of the Supplemental Work Force, perform duties assigned to bargaining unit positions on a limited term basis. They are not restricted to straight time worked, and may perform overtime. And as provided in Article 7, Section 1, these casual employees "may be utilized as a limited term supplemental work force, but may not be employed in lieu of full or part-time employees."

There is no restriction as to how such casual employees may be "utilized" (assigned), except that the Service is required to "make every effort to insure [sic] that qualified and available part-time flexible employees are utilized at the straight-time rate prior to assigning such work to casuals." It is also clear, as the Service contends, that the provision that casual employees "may not be employed in lieu of full or part-time employees" relates to the number of casual employees that may be hired and to the limited duration of their employment. The term "employed" means ***hired*** and not, as the Union contends, the manner in which they are assigned ("utilized") to perform work. The correctness of this interpretation becomes even more obvious When the parties referred to "utilized" and "employed", in different contexts, in the same sentence.

The Union's reliance on the contention that these Grievants "passed over" in violation of Article 8, Section 5 is equally misplaced.

Arbitrator Mittenthal, dealing with the question of whether Article 8, Section 5 required that overtime must be offered to full-time regular employees before it can be offered to part-time flexible employees, stated:

> "[W]hen needed, overtime work for regular full-time employees shall be scheduled in a certain manner. This Section [Article 8, Section 5] deals with just one category of employee, ***full-time regulars***. It describes how overtime will be distributed when full-time regulars are chosen to perform such overtime. There is an order of preference, but that order pertains only to overtime distribution among ***full-time regulars***. Nothing in Article 8, Section 5 states expressly or by implication that overtime must be offered to full-time regulars before it can be offered to part-time flexibles. No such order of preference can be found in this contract language. Nowhere does Article 8 suggests that full-time regulars were to be given a monopoly on overtime.

The weakness in the Union's argument seems clear. It reads Article 8, Section 5 as if it said *'When needed, overtime work shall be scheduled among qualified regular full-time employees.'* The Union transposes the underscored words in such way as to make it appear that Article 8, Section 5 represents an exclusive grant of overtime to full-time regulars. But that plainly is not what the contract says. Had the parties intended to establish an order of preference between full-time regulars and part-time flexibles, it would have been a simple matter to say so. They were, however, silent on that subject. That silence reenforces my view that their intention was merely to describe how overtime would be distributed when management chose to assign such overtime to full-time regulars."*3

In this context, as it relates to the overtime provisions or Article 8, Section 5, there is no distinction between part-time flexibles and casual employees.

*FOOTNOTE *3 Cases M8-W-0027 and M8-E-0032*

With respect to the Union's argument in this dispute that overtime is a benefit only the National Agreement to which casual employees are not entitled, reference again is made to the Mittenthal award on the point. He stated:

> "[g]iven this history, it is obvious that the real purpose of this contract clause was to restrict mandatory overtime for full-time regulars. Article 8, Section 5 had nothing to do with any order of preference between full-time regulars and part-time flexibles. There is not a shred of evidence that this subject was ever raised during the 1973 negotiations which lead to the current contract language. The Union's attempt here to enlarge full-time regulars opportunity for overtime is the exact opposite of the 1973 negotiators' intent to reduce their exposure to overtime."

In summary, the evidence of record fails to show that the Service was contractually obligated to schedule full-time regular employees on the ODL rather than utilize casual employees on the dates in question and under the circumstances presented.

AWARD

Grievance denied.

CBR 92-04 SPECIAL ISSUE
AIRS NO.: 00005(27) & 02226(32)

ARTICLE 8 ARBITRATION AWARD
USPS NO.: M8-W-0027 & M8-E-0032
ARBITRATOR: MITTENTHAL, R.
DATE OF AWARD: NOVEMBER 26, 1980

TEXT OF AWARD

Subject: Overtime - Order of Distribution

Statement of the Issue: Whether the Postal Service's action in giving part-time flexible employees overtime work prior to full-time regular employees on an "overtime desired list" was a violation of the National Agreement or a Local Memorandum of Understanding?

Contract Provisions Involved: Article VIII, Section 5 and Article XXX of the July 21, 1978 National Agreement and Section 14-F of the November 14, 1978 Scranton Memorandum of Understanding.

Statement of the Award: The grievances are denied.

BACKGROUND

These grievances protest the Postal Service's action in assigning certain overtime work to part-time flexible employees rather than full-time regular employees who had placed their names on the "overtime desired list." The Union believes this action was a violation of Article VIII, Section 5 of the National Agreement and, in the Scranton case, also a violation of Section 14-F of the Local Memorandum of Understanding. It asks that the full-time regulars improperly denied the overtime in question be made whole for their loss of earnings. The Postal Service insists there has been no contract violation.

There are several classes of employees in the Postal Service. Full-time regulars ordinarily work a five-day, 40-hour week. Part-time people are considered regulars or flexibles. They too may work a 40-hour week. But Management is free to work them less than five days, less than 40 hours. The part-time regular apparently has a set schedule while the part-time flexible, as the term suggests, is subject to operational needs and cannot rely on any schedule.

The *Salt Lake City* case involves D. Wendt, a full-time regular Mail Handler. He had placed his name on the "overtime desired list." His tour of duty on July 29, 1979, ended at 11:30 p.m. The Acting Tour Superintendent realized he had a considerable amount of work which had not been completed. He decided to have a number of employees work overtime. Supervision approached Wendt at 11:25 p.m., the only full-time regular then available at the post office, and offered him overtime work. Wendt refused. Supervision used six part-time flexibles to perform the necessary overtime.

Their tours did not end until 12 midnight and they each worked until 1:00 a.m. In other words, each of them received one hour of overtime.

The Union grieved (M8-W-0027) on Wendt's behalf, complaining that Management had bypassed a full-time regular on the "overtime desired list" and given overtime to part-time flexibles. It claimed a violation of Article VIII, Section 5 which reads in part:

> "*Overtime Assignments*...When needed, overtime work for regular 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:
>
> "A. Two weeks prior to the start of each calendar quarter, full-time regular employees desiring to work overtime during that quarter shall place their names on an 'Overtime Desired' list.
>
> "B. Lists will be established by craft, section or tour...
>
> "C. 1. Except in the letter carrier craft, when during the quarter the need for overtime arises, employees with the necessary skills having listed their names will be selected in order of their seniority on a rotating basis. Those absent, on leave or on light duty shall be passed over..."

The *Scranton* case involves C. Cesare, a full-time regular Mail Handler. He had placed his name on the "overtime desired list." Management posted a schedule on July 25, 1979, for the week of Saturday, July 28 through Friday, August 3. Several Mail Handlers, including Cesare, were on vacation that week. Their names did not appear on the schedule. In order to take their place, Management used three part-time flexibles. One was scheduled for five days; two were scheduled for six days, including Thursday and Friday, August 2 and 3. Their sixth day represented an overtime assignment.

Cesare' s regular work week was Saturday through Wednesday. His lay-off days were Thursday and Friday. He requested Management to be allowed to work overtime on Thursday or Friday, August 2 or 3, following his vacation. His position was that he had a right to overtime ahead of part-time flexibles. Management denied his request.

The Union grieved (M8-E-0032) on Cesare's behalf, complaining that Management had bypassed a full-time regular on the "overtime desired list" and given overtime to part-time flexibles. It claimed a violation of Article VIII, Section 5. It also claimed a violation of Section 14-F of the Local Memorandum of Understanding which stated in part:

> "Employees absent on sick leave, workmen's compensation or on light-duty assignments prior to the calling of overtime shall be passed over. Those craft employees on the overtime desired list and are subsequently scheduled off on vacation shall be contacted in the proper order of selection only for overtime needed their lay-off days. . ."

DISCUSSION AND FINDINGS

The issue, simply stated, is whether Article VIII, Section 5 creates an order of preference in the assignment of overtime.

The Union insists there is an order of preference. It believes Article VIII, Section 5 describes how overtime, "when needed", is to be distributed among employees. Hence, in its opinion, full-time regulars who have placed their names on the "overtime desired list" have first preference to overtime. Its position seems to be that the Postal Service must exhaust this "overtime desired list" before it can give overtime to part-time flexibles. It emphasizes that the National Agreement, while distinguishing full- time regulars from part-time flexibles, only speaks of overtime assignments for full-time regulars. It cites other contract provisions as well to support this argument.

The Postal Service, on the other hand, insists there is no order of preference. It claims Article VIII, Section 5 merely describes how overtime is to be distributed when Management chooses to assign such overtime to full-time regulars. It urges that this view is supported by the language of the National Agreement, by bargaining history, and by past practice. It alleges that the other unions who are parties to the National Agreement, namely, NALC and APWU, recognize the correctness of Management's interpretation. It states that efficient and effective operation of its facilities require that Management have the flexibility to determine which category of employees will be assigned to available overtime. Its conclusion, accordingly, is that the choice of part-time flexibles for the overtime in question did not violate the rights of any full-time regulars. It asserts that there are in any event special circumstances in the Salt Lake City and Scranton cases which would defeat the grievants claims.

I - Contract Language

Article VIII, Section 5 states, "When needed, overtime work for regular full-time employees shall be scheduled ." in a certain manner. This section deals with just one category of employee, full-time regulars. It describes how overtime will be distributed when full-time regulars are chosen to perform such overtime. There is an order of preference but that order pertains only to overtime distribution *among* full-time regulars. Nothing in Article VIII, Section 5 states expressly or by implication, that overtime must be offered to full-time regulars before it can be offered to part-time flexibles. No such order of preference can be found in this contract language. Nowhere does Article VIII suggest that full-time regulars were to be given a monopoly on over- time.

The weakness in the Union' s argument seems clear. It reads Article VIII, Section 5 as if it said, "When needed, overtime work. . .shall be scheduled among qualified regular full-time

employees..." The Union transposes the underscored words In such a way as to make it appear that Article VIII, Section 5 represents an exclusive grant of overtime to full-time regulars. But that plainly is not what the contract says. Had the parties intended to establish an order of preference as between full-time regulars and part-time flexibles, it would have been a simple matter to say so. They were, however, silent on this subject. That silence reinforces my view that their intention was merely to describe how overtime would be distributed when Management chose to assign such overtime to full-time regulars.*1

*FOOTNOTE *1 Nothing in the Charters-Johnson Memorandum of Understanding calls for a different conclusion. That Memorandum dealt only with the proper administration of the "overtime distribution list" and the appropriate remedy for passing over employees on such list.*

II - Bargaining History

My findings are borne out by the history of this particular contract clause. Article VIII, Section 5 of the 1971 National Agreement provided:

> "Overtime work shall be required on the basis of need - when it is needed, where it is needed, how it is needed and the skills required and shall be scheduled on an equitable basis among qualified employees doing similar work in the work location where the employees regularly work."

Thus, Management initially had broad authority to require overtime of any category of employee.

The unions in the 1973 negotiations, including the Mail Handlers, sought to curb Management's authority. They wished to make all overtime voluntary; they wished to give employees the option of accepting or refusing any overtime assignment. The Postal Service rejected that idea but made a counter-proposal which included limitations on mandatory overtime. It was concerned about Management's ability to have sufficient people available to handle its ever-fluctuating workloads. Hence, its suggested limitation on mandatory overtime applied only to full-time regulars. It apparently informed the unions' negotiators that "we needed ...flexibility...to operate in an effective and efficient manner [a]nd therefore we would not put any restriction on overtime for part-time employees..." These notions, after further discussion, were acceptable to the unions. The result was a new Article VIII, Section 5 in the 1973 National Agreement, the same language before us in the present case.

Given this history, it is obvious that the real purpose of this contract clause was to restrict mandatory overtime for full-time regulars. Article VIII, Section 5 had nothing to do with any order of preference between full-time regulars and part-time flexibles. There is not a shred of evidence that this subject was ever raised during the 1973 negotiations which led to the current contract language. The Union's attempt here to enlarge full-time regulars' opportunity for overtime is the exact opposite of the 1973 negotiators' intent to reduce their exposure to overtime.

III - Practice

This interpretation of Article VIII, Section 5 seems to be confirmed by past practice. It is true that no hard evidence was introduced at the arbitration hearing concerning specific cases of part-time flexibles being given overtime ahead of full-time regulars. But it is apparent from overtime statistics that this is a commonplace occurrence. Management's testimony indicated that approximately 7.9 percent of all full-time regular hours involve overtime while approximately 8.9 percent of all part-time flexible hours involve overtime.*2 This indicates that Management has been assigning overtime to one category or the other on the basis of its needs at a particular moment, on the basis of efficiency and economy. Had the Union's order of preference been in effect in the past, part-time flexibles would have received practically no overtime at all. That has not been the case.

*FOOTNOTE *2 These figures were for a substantial period in 1980. But it appears from the testimony they are fairly representative of Postal Service experience in recent years.*

One of the other unions, NALC, has recognized the validity of the Postal Service's interpretation. Its President stated in a March 1980 letter to the NALC Branch Officers that Article VIII, Section 5 "applies only to full-time employees who are 'needed' to work overtime" and "does not require management to use a full-time employee desiring to work overtime in preference to a part-time flexible." He added in such letter that "management has the right to determine whether to give overtime work to a part-time flexible or a full- time employee."*3

*FOOTNOTE *3 The Mail Handlers are of course not bound by the NALC statement. But it is nevertheless worth noting that one of the union signatories to the National Agreement reads Article VIII, Section 5 in the same way as the Postal Service.*

IV

For these reasons, it is clear that the Salt Lake City grievance is without merit. The grievant, Wendt, could not use his status as a full-time regular to claim overtime ahead of a part-time flexible. There was no violation of Article VIII, Section 5.

The same reasoning would apply to the Scranton grievance. The full-time regular there, Cesare, could not claim overtime ahead of a part-time flexible on the basis of Article VIII, Section 5. But his claim rests on another contract provision as well. He points to Section 14-F of the Local Memorandum of Understanding which says "craft employees on the overtime desired list...subsequently scheduled off on vacation shall be contacted in the proper order of selection only for overtime needed on their lay-off days."

Cesare's vacation covered his regular work week, Saturday, July 28 through Wednesday, August 1. His lay-off days were Thursday and Friday, August 2 and 3. Even assuming the Local Memorandum gave him a right to overtime available on Thursday or Friday ahead of a part-time flexible, that would not resolve the dispute in his favor. For the Local Memorandum, according to Article XXX, shall remain in effect only if it is "not inconsistent or in conflict with the 1978 National Agreement. . ." The preference granted in the Local Memorandum to full-time regulars conflicts with the statement in Article VIII, Section 5C-1 that "those absent...on leave...shall be passed over" in the distribution of overtime. Cesare was on vacation (i.e., "on leave") the week in question. Moreover, Scranton Management has consistently viewed the leave period in these circumstances to include not just the five vacation days but the succeeding off days as well.*4 In either event, the National Agreement seems to call for Cesare to be "passed over." It follows that any right granted to Cesare by the Local Memorandum is denied him by the National Agreement. His claim cannot be sustained on the basis of the Local Memorandum.

*FOOTNOTE *4 It has thus sought to insure employees a minimum seven-day vacation period for each five days of annual leave.*

There has been no contract violation in either of the cases before me.

AWARD

The grievances are denied.

CBR 92-04 SPECIAL ISSUE
AIRS No.: 15323

ARTICLE 8 ARBITRATION AWARD
USPS NO.: H4C-NA-C 30
ARBITRATOR MITTENTHAL, R.
DATE OF AWARD: January 29, 1990

TEXT OF AWARD

BACKGROUND

This is the final case arising from the parties' many disagreements about the meaning of the new overtime provisions in the 1984 National Agreement. Those provisions are found in Article 8, Sections 4 and 5 and the Memorandum written to clarify the parties' intentions. The most relevant language, for purposes of this case, is contained in the following excerpt from the Memorandum:

> Recognizing that excessive use of overtime is inconsistent with the best interests of postal employees and the Postal Service, it is the intent of the parties in adopting changes to Article 8 to limit overtime, to avoid excessive mandatory overtime, and 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.** The parties have agreed to certain additional restrictions on overtime work, **while agreeing to continue the use of overtime desired lists to protect the interests of those employees who do not want to work overtime...** The parties agree this memorandum does not give rise to any contractual commitment beyond the provisions of Article 8, but is intended to set forth the underlying principles which brought the parties to agreement.
>
> The new provisions of Article 8 contain different restrictions than the old language. **However, the new language is not intended to change existing Practices relating to the use of employees not on the overtime desired list when there are insufficient employees on the list available to meet the overtime needs. For example,** if there are five available employees on the overtime desired list and five not on it, and if ten workhours are needed to get the mail out within the next hour, all ten employees may be required to work overtime. But if there are 2 hours within which to get the mail out, then only the five on the overtime desired list may be required to work. (Emphasis added)

In early 1985, extensive discussions took place among Postal Service, APWU, and NALC representatives concerning the new provisions. One of the matters discussed was the simultaneous scheduling of overtime work for employees on the overtime desired list (ODL) and employees not on this list. The Postal Service expressed its position on this issue in an April 5, 1985 letter to the Union Presidents. That letter stated in part:

> The following reflects the position of the Postal Service:
>
> * * *
>
> 4. As the parties discussed, the second paragraph of the Article 8 Memorandum and existing language in Article 8 anticipates the existence of circumstances when the time critical nature of postal operations will require the simultaneous scheduling of ODL employees and non-ODL employees. Similarly, when operational considerations do not so dictate, management should not utilize this simultaneous scheduling; but rather should fully utilize employees from the ODL.
>
> * * *
>
> 6. The Postal Service believes the nature of activities in Bulk Mail Centers frequently lends itself to the necessity for simultaneously scheduling ODL and non-ODL employees as referenced in item 4 above. However, it is our understanding that such scheduling is not occurring

on a universal basis as alleged by the union; but rather depends on local factual circumstances.

The APWU President filed a grievance in August 1985 and sought arbitration. The grievance recited the Postal Service position quoted above and then alleged:

> Notwithstanding the assurances provided by paragraph 4 of Mr. Fritsch's April 5 letter..., the contention of the Postal Service that "the nature of activities in Bulk Mail Centers frequently lends itself to the necessity for simultaneously scheduling ODL and non-ODL employees", is in error and establishes a position of the Employer which violates Article 8 of the Agreement. Moreover, the Employer has engaged in a practice of frequently scheduling ODL and non-ODL employees to work overtime simultaneously in facilities other than BMCs. Under Article 8 and the parties' memorandum ..., the parties have agreed that the simultaneous scheduling of ODL employees and non-ODL employees will not be an automatic occurrence in any type of facility but will occur only "when there are in-sufficient employees on the list available to meet the overtime needs" necessitated by the time critical nature of postal operations.
>
> The Postal Service is therefore in contravention of the parties' understanding and in violation of Article 8.

Apparently the parties agreed to dispense with any Step 4 meeting on this grievance.

After August 1985, I heard and decided a number of cases involving fundamental overtime problems under Article 8 and the Memorandum. One such award, Case Nos. H4C-NA-C 19 and H4N-NA-C 21 (1st issue), held:

> ...ODL employees do not have the option to accept or refuse overtime beyond the [Article 8, Section] 5F limitations [namely, work over eight hours on a non-scheduled day, work over six days in a service week, and overtime work on more than four of five scheduled days in a service week]. They can be required to perform such overtime. The non-ODL employees may not be required to work overtime until the ODL employees have exhausted their overtime obligation under [Article 8, Section] 5G.

With respect to the Memorandum, I held, consistent with its terms, that it "does not give rise to any contractual commitment beyond the provisions of Article 8."

The present grievance did not reach arbitration until September 13, 1989. The Postal Service asserted at the hearing that the grievance is not arbitrable because it does not raise "interpretive issues" under the 1984 Agreement. It contended that the propriety of simultaneously scheduling overtime for both ODL and non-ODL employees turned on whether or not "there are insufficient employees on the [ODL] list available to meet the overtime needs." It urged that this was purely a fact question, not an interpretive question, and that the proper forum for such disputes was regional arbitration rather than national arbitration.

The APWU disagreed. First, it argued that the simultaneous scheduling of ODL and non-ODL employees was a violation of Article 8. It relied upon the rulings quoted above in Case Nos. H4C-NA-C 19 and H4N-NA-C 21 (1st issue). It conceded that this was a change of position (that is, contrary to what the APWU President had stated on the face of the grievance) but it insisted that such a change of position was justified by the arbitration rulings which post-dated the grievance and by the fact that the Postal Service itself had done precisely the same thing in the earlier case. Second, assuming the arbitrator finds that Article 8 permits simultaneous scheduling, it argued that the parties had "an understanding at the National level as to the...standards for simultaneous scheduling..." and that those agreed-upon "standards" should be identified in national arbitration *1 and then used regionally in resolving this type of scheduling issue. For either of these reasons, the APWU believed the grievance is arbitrable.

*FOOTNOTE *1 At the hearing, the APWU expressed this argument in much vaguer language. It spoke of the need for identifying the contractual "standards" to be used in determining when simultaneous scheduling is proper.*

The Postal Service responded that this first APWU argument should not be considered by the arbitrator because it involves a complete reversal of position. It emphasizes that APWU had not made this argument until the very day of the hearing.

DISCUSSION AND FINDINGS

Part of the difficulty in this case is attributable to the failure of the grievance itself to state with precision what the alleged contract violation is. The difficulty is also due to the fact that there was no Step 4 meeting on the grievance and hence no Step 4 answer. The parties did not have the usual opportunity to explore one another's positions in detail. The difficulty is further attributable to the long period, some four years, between the filing of the grievance and the arbitration hearing. Given these circumstances, it is hardly surprising that the issues are not as clear as they usually are in national level arbitration.

In my view, there are two basic questions to be decided. One is whether the APWU's initial claim - namely, that the simultaneous scheduling of overtime for ODL and non-ODL employees is a violation of Article 8 - is properly before the arbitrator. If it is, the parties agree that such a claim would pose an "interpretive issue" under the 1984 National Agreement. The other is whether the APWU's second claim namely, that there is "an understanding at the National level as to the...standards for simultaneous scheduling..." - raises an "interpretive issue" under the 1984 National Agreement.

Propriety of First Claim

Article 15, Section 3(d) provides:

> It is agreed that in the event of a dispute between the Union and the Employer as to the interpretation of this Agreement, such dispute may be initiated as a grievance at the Step 4 level by the President of the Union. Such a grievance...must specify in detail the facts giving rise to the dispute, the precise interpretive issue to be decided and the contention of the Union...

The instant grievance sought to comply with these rules. It stated:

> ...Under Article 8 and the parties' memorandum ..., the parties have agreed that the simultaneous scheduling of ODL employees and non-ODL employees will not be an automatic occurrence in any type of facility but will occur only "when there are insufficient employees on the list available to meet the overtime needs" necessitated by the time critical nature of postal operations...

In short, the grievance conceded that simultaneous scheduling is permitted under Article 8 in certain situations. Its "interpretive issue" was not whether Management had a right to simultaneously schedule but rather what were the circumstances under which that right could be legitimately exercised.

At the arbitration hearing, APWU counsel argued that simultaneous scheduling is not permitted under Article 8 in any situation. This was a radical change of position, a one hundred and eighty degree turn. The grievance admitted the existence of a Management right which counsel now denies. For four years, both parties had apparently assumed the existence of that right. The APWU cannot be allowed to change the essential thrust of the grievance at the arbitration hearing. Its action is tantamount to the filing of an entirely new grievance at the hearing. Case No. NC-E-11359 is distinguishable from the instant case in a number of ways but the principle stated there by National Arbitrator Aaron seems pertinent here as well:

> It is now well settled that parties to an arbitration under a National Agreement between the Postal Service and a signatory Union are barred from introducing...arguments not presented at preceding steps of the grievance procedure, and that this principle must be strictly observed. The reason for the rule is obvious: neither party should have to deal with...argument presented for the first time in an arbitration hearing, which it has not previously considered and for which it has had no time to prepare rebuttal evidence and argument.

The APWU claim that simultaneous scheduling is a violation of Article 8 is not properly before me. To rule otherwise would serve to undermine the effectiveness of the Article 15, Section 3(d) procedure. *2

*FOOTNOTE *2 No doubt there have been other late changes of position, perhaps even at the arbitration hearing. But such changes either were not as pronounced as the one before me in this case or did not become a fundamental issue in the resolution of a given dispute.*

Arbitrability of Second Claim

National level arbitration is, according to Article 15, Section 4(d)(1), limited to "cases involving interpretive issues under this [National] Agreement or supplements thereto of general application..." The question is whether the present grievance regarding simultaneous scheduling poses such an "interpretive issue."

Some general observations about the Memorandum are necessary to place the dispute in sharper focus. A substantial part of the Memorandum's purpose is stated in terms of what the parties did not intend. They **did not intend** the Memorandum's words to "...give rise to any contractual commitment beyond the provisions of Article 8..." They did not intend the new language in Article 8 to "...change existing practices" with respect to simultaneous scheduling of ODL and non-ODL employees where insufficient ODL people are available. They thus plainly embraced these pre-July 1984 "practices" and acknowledged that they meant to continue to be bound by such "practices."

What those "practices" are I do not know. The Memorandum cites just one "example" of a situation in which "practices" would justify simultaneous scheduling. That "example", viewed in light of the Memorandum as a whole, suggests the considerations which are likely to influence this type of scheduling decision. They include "bona fide operational requirements", "interests of employees", and so on. If this case were simply a dispute over the nature of such "practices" or the application of a "practice" to a particular scheduling situation, I would most likely find that there was no "interpretive issue" under the National Agreement. These would be essentially fact questions. They therefore would be a proper subject for regional arbitration.

But the APWU claim here is quite different. It alleges in effect that whatever the "existing practices" may have been, there was an agreement at the national level on "...standards for simultaneous scheduling" and that such agreement, once recognized, would have a large impact on how simultaneous scheduling questions are resolved in regional arbitration.

The Postal Service believed at the arbitration hearing, perhaps for good reason, that the APWU was asking the arbitrator to establish "standards" based only on arguments to be made by the parties at some later hearing. It responded, correctly I think, that the "standards" had already been announced in the Memorandum and that what remained was to apply these "standards" to specific fact situations in regional arbitration[.]sic However, it appears that the "standards" the APWU had in mind are quite different. It relies on "standards" allegedly agreed to which go beyond what is found in the Memorandum (or which serve to explain

the nature of the "standards" in the Memorandum). The Postal Service, I assume, would deny the existence of any such agreed-to "standards."

The question, simply put, is whether or not the parties agreed at the national level to the kind of "standards" claimed by the APWU. That, it seems to me, is an "interpretive issue" under the National Agreement. Its resolution will presumably turn on an interpretation of the Memorandum, more precisely, the parties' intentions with respect to the execution of that Memorandum. The APWU requests that the Memorandum "standards" or "existing practices" be modified or expanded on the basis of the alleged agreement. The Postal Service flatly disagrees. That is the stuff national level arbitrations are made of.

AWARD

The APWU claim that the simultaneous scheduling of overtime for ODL and non-ODL employees is a violation of Article 8 is not properly before the arbitrator. That claim is dismissed.

The APWU claim that there was an agreement at the national level as to the "...standards for simultaneous scheduling" involves an "interpretive issue" under the National Agreement and is therefore arbitrable at the national level.

CBR 92-04 SPECIAL ISSUE
AIRS NO.: 17199

ARTICLE 8 ARBITRATION AWARD
USPS NO.: H4C-NA-C 30
ARBITRATOR: MITTENTHAL, R.
DATE OF AWARD: January 14, 1991

TEXT OF AWARD

BACKGROUND

The Article 8 Memorandum in the 1984 Agreement referred to the simultaneous scheduling of overtime work for employees on the overtime desired list (ODL) and employees not on this list. The APWU insists that the parties agreed in negotiating the Memorandum to limit simultaneous scheduling to situations where "such scheduling is necessary to meet the dispatch schedules, service standards, and other time critical requirements identified in the facility operating plan." The Postal Service insists there was no such agreement, no such limitation placed on simultaneous scheduling. It believes that the Memorandum intended only to confirm that Management was free to continue "existing practices" with respect to simultaneous scheduling as of December 1984.

In order to understand this case, some history of the 1984 negotiations is necessary. The Postal Service and the larger Unions, APWU and NALC, reached an impasse in their negotiations in mid-1984. They took their dispute to interest arbitration pursuant to federal law. However, they sought to resolve all of the so-called non-economic issues before the arbitration began. Overtime proved to be a particularly troublesome problem. But during early December, the parties thought they had reached an agreement establishing new restrictions on the assignment of overtime and a new category of penalty pay for certain overtime work.

The parties instructed their respective attorneys to meet and prepare a draft of these overtime understandings. The attorneys did so, their product being the new overtime rules found in Article 8, Section 5F and G. The Postal Service and NALC were prepared to accept the draft although Management apparently had some reservations. APWU, however, found the draft unacceptable and sought further language changes. The Postal Service was unwilling to make such changes but was persuaded later to return to the bargaining table to discuss these matters with APWU. Indeed, the Postal Service was itself concerned about an ambiguity in Article 8 that might encourage APWU to protest Management's simultaneous scheduling of ODL and non-ODL employees for overtime work. Management believed that it had always had the right to schedule such employees simultaneously and that this right had not been surrendered through the new language in Article 8. APWU, as indicated earlier, had other concerns about the new language.

The Postal Service and APWU resolved their differences through a series of meetings between December 10 and 17. *1 They executed an Article 8 Memorandum to express the understandings reached at these meetings. The Memorandum sought to explain the "underlying principles" behind the new Article 8 language but was not intended to change such language. It reads in part:

*FOOTNOTE *1 NALC did not participate in these meetings*

> Recognizing that excessive use of overtime is inconsistent with the best interests of postal employees and the Postal Service, it is the intent of the parties in adopting changes to Article 8 to limit overtime, to avoid excessive mandatory overtime, and 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. The parties have agreed to certain additional restrictions on overtime work, while agreeing to continue the use of overtime desired lists to protect the interests of those employees who do not want to work overtime, and the interests of those who seek to work limited overtime. **The parties agreed this memorandum does not give rise to any contractual commitment beyond the provisions of Article 8, but is intended to set forth the underlying principles which brought the parties to agreement.**

> The new provisions of Article 8 contain different restrictions than the old language. **However, the new language is not intended to change existing practices relating to use of employees not on the overtime desired list when there are insufficient employees on the list available to meet the overtime needs. For example,** if there are five available employees on the overtime desired list and five not on it, and if ten workhours are needed to get the mail out within the next hour, all ten employees may be required to work overtime. But if there are 2 hours within which to get the mail out, then only the five on the overtime desired list may be required to work... (Emphasis added)

APWU asserts that during the discussions which led to the Memorandum, the parties cited various examples of when simultaneous scheduling would be justified and when it would not. It claims that Management's examples all involved situations in which the scheduling of only ODL employees for overtime would have meant a failure"... to meet the dispatch schedules, service standards, and other time critical requirements identified in the facility operating plan." It concedes, as it apparently did in late 1984 as well, that Management is free in these circumstances to simultaneously schedule both ODL and non-ODL employees for overtime. But it argues that absent these time critical requirements related to an operating plan, simultaneous scheduling would be a violation of the Agreement. It maintains that this view is supported not just by what the Memorandum negotiators said to one another but also by the language of the Memorandum, the "existing practices" with respect to non-ODL people, and the need for some objective standard for determining the propriety of simultaneous scheduling.

The Postal Service's view of this controversy is quite different. It contends that the Memorandum did nothing more than "preserve...the status quo" with respect to simultaneous scheduling. It believes that Management's right to schedule both ODL and non-ODL employees at the same time, however that right may be defined, was unaffected by the Memorandum. It concedes that it must have "legitimate reasons to simultaneously schedule..." and that time critical requirements in the facility operating plan may typically be the "legitimate reason..." for such scheduling. It seems to concede also that the examples discussed in the Memorandum negotiations emphasized time critical requirements. But it asserts that Management "never agreed to limit its use of simultaneous scheduling only to [such] situations..." Its position is that any "valid operational reasons", whether time critical or not, could properly justify the use of simultaneous scheduling and that disputes over such scheduling involve questions of fact to be resolved in regional arbitration.

DISCUSSION AND FINDINGS

The parties acknowledge that simultaneous scheduling must be supported by "legitimate" or "valid" reasons. Their quarrel is whether the Memorandum negotiations, specifically, the examples discussed in those December 1984 negotiations, resulted in an agreement that simultaneous scheduling was warranted only where "...necessary to meet the dispatch schedules, service standards, and other time critical requirements identified in the facility operating plan." APWU alleges there was such an agreement. The Postal Service says there was not.

APWU's case does not rest upon an express understanding reached during the Memorandum negotiations. It does not claim its representatives then specifically proposed that simultaneous scheduling be limited to time critical requirements found in an operating plan or that the Postal Service representatives specifically consented to this limitation. Rather, its argument rests on the examples discussed by the negotiators. It stresses that all the Postal Service examples of what Management considered to be proper simultaneous scheduling involved situations in which time critical requirements could not otherwise have been met. It insists that its representatives relied on these examples and had good reason to believe that the examples described what was, for both parties, the basis upon which Management would thereafter use simultaneous scheduling. It urges that this shared understanding should be grounds for granting this grievance.

There are several difficulties with APWU's argument. During the course of any negotiation, the parties discuss proposed contract language. One side or the other may cite examples to show what is (or is not) intended by such language. Those examples may prove useful in resolving an ambiguity which later surfaces in administering this contract language. But the significance of the examples may itself pose a problem. Consider the possibilities. On the one hand, examples may merely have been offered as illustrations of some principle which itself transcends the illustrations. That would be the Postal Service view in the present case. On the other hand, examples may be offered as a means of identifying the precise scope of a principle in which event the examples could well be regarded as all-inclusive. That would be the APWU view in this case. Neither view is, on its face, unreasonable.

However, in both of the above situations, the examples would serve to clarify some perceived ambiguity in contract language. Here, there is no such ambiguity. Nowhere in the Memorandum did the parties establish a new standard for determining when simultaneous scheduling was justified and when it was not. The parties simply stated that "the new language [in Article 8] is not intended to change existing practices relating to the use of employees not on the overtime desired list when there are insufficient employees on the list available to meet the overtime needs." These words do not create a new criterion for simultaneous scheduling. They do nothing more than embrace "existing practices." Thus, the parties agreed that whatever "...practices" were in existence on this subject before December 1984 would continue in effect after December 1984.

The Memorandum accepted the status quo in this area, whatever that might mean. It asserted, in clear and unmistakable terms, that "the new language [in Article 8] is not

intended to change..." the customary ways of handling simultaneous scheduling. Nor can the Memorandum support any new contract obligation. Its limited scope could not have been made any plainer, "...this [M]emorandum does not give rise to any contractual commitment beyond the provisions of Article 8..." If that is true of the Memorandum, it must also be true of the negotiations which led to the Memorandum. In face of these statements of purpose, it cannot be said that the Memorandum negotiators intended the examples they cited to constitute a new obligation with respect to simultaneous scheduling. Or, to express the point more directly, the examples of time critical situations which the parties believed would justify simultaneous scheduling cannot reasonably be regarded as the only situations which could possibly justify such scheduling. What can or cannot be justified, according to the Memorandum, depends on "existing practices." Given the parties' sophistication in bargaining, they could hardly have meant the term "existing practices" to be limited to the negotiators' examples.

These observations should not come as a surprise to the APWU. One of its Memorandum negotiators testified as follows about the significance of the examples offered by the Postal Service:

> Q. ...Do you recall any other circumstance that the employer articulated when they needed to simultaneously schedule, aside from operational windows or time-critical dispatches?
>
> A. I don't believe there was any other example used, and I don't think that it was intended to foreclose the possibility that there might [be]... [O]f those of us participating...only Mr. Gervais would be what I regard as an expert on Article 8.. [A]t least three out of the four of us weren't experts...and **couldn't say with a certainty that there couldn't be any other circumstance that** would be similar enough to what we were contemplating [the Postal Service examples] that it **would also fit within the employer's right...[We] were not trying to spell out every circumstance,** but it had to be a time-critical dispatch or something just like it... (Tr. pp. 44-45, Oct. 11 hearing, Emphasis added)

Clearly, the examples were not meant to be all-inclusive. There was no agreement that the examples would be the sole basis for simultaneous scheduling.*2

*FOOTNOTE *2 This point is illustrated also by the APWU post-hearing brief. The brief states that several m emorandum phrases among them, "bona fide operational requirements", "existing practices", and the "need to get out the mail" - serve to "describe or at least allude to standards or criteria for simultaneous scheduling." These Memorandum phrases are broad enough to encompass circumstances other than time critical requirements, assuming of course that such circumstances had as a matter of "...practice" prompted simultaneous scheduling in the past.*

For all of these reasons, APWU's claim cannot be accepted.

AWARD

The grievance is denied.

If you have questions about overtime issues or are in need of copies of arbitration awards cited in this CBR, please contact the Industrial Relations Department at 1300 L. Street, NW, Washington, D.C. 20005 or by telephone at (202) 842-4273

APPENDIX

Contains Settlements And Other Documents Pertaining To Article 8

21397, 3-31-83, Page 6 POSTAL BULLETIN

SENIOR BIDDER—SCHEME TRAINING ALTERNATIVES

Effective April 16, the following changes are made to Interim Publication 118 (second edition), *Fair Labor Standards Act Policy and Instructions (study, travel and training)*, the M-5 Handbook, *Schemes: Construction, Assignment, Training, and Proficiency*, and Handbook M-54, *Letter Sorting Machines*. These changes will be included in future revisions.

Sections 412.1, 432.3, 432.7 and 434.1 contain changes to the M-5 Handbook and the appropriate sections of Publication 118 (second edition) which reflect these sections.

412 Bids

412.1 Except as provided in Part 412.2 *the senior bidder* for a preferred duty assignment which requires scheme knowledge as a prerequisite to permanent filling of the assignment (see Article 37 of the USPS-NALC/APWU National Agreement) *will be provided the following alternatives for acquiring the requisite scheme knowledge:*

a.) *Assuming the senior bidder has a sufficient annual leave balance, such employee will be permitted to take annual leave for scheme training and testing. The training and testing time will be recorded on Form 2432. Where the senior bidder passes the appropriate examination and accepts the position, the annual leave will be converted to hours worked and the employee's annual leave balance recredited a like number of hours.*

b.) *The senior bidder may elect to enter into scheme training and testing outside such employee's regularly scheduled hours. The employee will not be paid for such training and testing. The training and testing time will be recorded on Form 2432. Where the senior bidder passes the appropriate examination and accepts the position, the employee will be compensated at the appropriate overtime rate.*

c.) *In the event that the senior bidder selects the alternative set forth in Section 412.1(a) above, and during the training period exhausts his or her annual leave balance, such employee would be permitted, only in those circumstances, to complete the training pursuant to Section 412.1(b).*

If the senior bidder desires the use of manual scheme training materials, they will be made available for use only on postal premises. Only

the senior bidder shall be afforded the use of training materials and study time scheduled will be provided at the rate of one hour for every sixteen items in the scheme. An employee who fails to qualify on a voluntary bid will remain in the present duty assignment. Immediately after the end of the deferment period, the senior bidder then qualified shall be permanently assigned.

432 Training Guidelines

• • • • •

432.3 Length and Scheduling of Training Sessions Scheme training will be scheduled for each of the trainee's scheduled workdays in sessions of one hour each. At local option, however, 1½ hour sessions may be used provided 1½ times as much material is assigned to be learned during each session. Training should be scheduled to avoid the latter part of the trainee's tour of duty where there is a greater chance for fatigue. Should there be a requirement for two training sessions for an employee in a single day, two sessions not exceeding one hour each may be scheduled with an adequate break between the two sessions to afford effective learning. Extensive continuous memorization is not an effective form of learning.

• • • • •

432.7 Monitoring Performance

Trainee performance in scheme study will be monitored through use of weekly review tests. The test will be administered using review tests, in accordance with P-402T, *Scheme Training—Instructors Guide*. The time required for the review tests *will be in addition to the hours allocated for scheme study. In the case of assigned schemes, such testing time will be on-the-clock. In the case of bid schemes, the testing time will be as specified in Section 412.1.*

• • • • •

434 Scheme Qualification

434.1 General

Employees assigned schemes will be provided one try on the first workday following completion of the allotted training time to pass a qualification test by correctly sorting 95% or more of the cards in a 100 card test deck in eight minutes or less. Employees bidding for scheme assignments will be provided one try to pass a qualification test at the end of the deferment period. Such an employee may request and be permitted to attempt to qualify no more than two times prior to the end of the deferment period. Should the employee fail to qualify on the two early attempts, the final opportunity at the end of the deferment period will be allowed. The examination will be designed and conducted in accordance with Handbook P-402T. The time used to take the scheme qualification test by trainees assigned schemes will be in addition to any paid study time provided for learning the scheme and will be compensable. *For senior bidders, the test time will be as specified in Section 412.1.*

Section 513.1 contains a change to the M-54 Handbook and the appropriate section of Publication 118 (second edition) which reflects that section.

513 Training Pay

513.1 The senior bidder or an MPLSM duty assignment is granted on-the-clock machine and memory item training. (See exception in 537.) Scheme training for a senior bidder is to be provided in accordance with Section 412.1 [of the M-5 Handbook] unless Section 412.2 is applicable.

• • • • •

Each office is responsible for insuring that the appropriate action is taken to inform employees of the alternatives, and maintaining the necessary records to credit annual leave or reimburse employees at the appropriate overtime rate for training and testing time after the senior bidder passes the appropriate examination and accepts the position.

Details concerning the timekeeping requirements will be issued in the immediate future. *Mail Processing Dept. 3-31-83.*

EMPLOYEE AND LABOR RELATIONS GROUP
Washington, DC 20260

January 13, 1975

Mr. Francis S. Filbey
General President
American Postal Workers Union,
AFL-CIO
817 - 14th Street, N. W.
Washington, DC 20005

Re: Arbitration Case No.
AB-N-2476

Dear Mr. Filbey:

This letter sets forth our understanding of the agreement reached on January 8, 1975, settling Arbitration Case No. AB-N-2476. The underlying grievance involves the proper interpretation of Article VIII, Section 5, of the 1973 National Agreement when employees represented by the American Postal Workers Union, AFL-CIO, having their names on the "Overtime Desired" list, are improperly passed over by management in the selection for overtime work assignments. Agreement was reached to settle that grievance on the following basis:

1. When, for any reason, an employee on the "Overtime Desired" list, who has the necessary skills and who is available, is improperly passed over and another employee on the list is selected for overtime work out of rotation, the following shall apply:

   (a) An employee who was passed over shall, within ninety (90) days of the date the error is discovered, be given a similar make-up overtime opportunity for which he has the necessary skills;

(b) Should no similar make-up overtime opportunity present itself within ninety (90) days subsequent to the discovery of the missed opportunity, the employee who was passed over shall be compensated at the overtime rate for a period equal to the opportunity missed.

2. When, for any reason, an employee on the "Overtime Desired" list, who has the necessary skills and who is available, is improperly passed over and another employee not on the list is selected for overtime work, the employee who was passed over shall be paid for an equal number of hours at the overtime rate for the opportunity missed.

3. When a question arises as to the proper administration of the "Overtime Desired" list at the local level, an APWU steward may have access to appropriate overtime records.

4. The foregoing principles are without prejudice to either party's position as to the proper interpretation of Article VIII, Section 5. They shall be applied to all timely filed and currently active grievances and to future grievances filed pursuant to the 1973 National Agreement unless they are superseded by a future agreement between the Postal Service and the APWU, or by an arbitrator's award that the parties agree is dispositive of the issue.

If this document and its provisions set forth our agreement, please keep one copy for your files, sign the duplicate original and return it to me to acknowledge the settlement.

Sincerely,

James C. Gildea
Assistant Postmaster General
Labor Relations Department

Francis S. Filbey
General President
American Postal Workers Union, AFL-CIO

UNITED STATES POSTAL SERVICE
475 L'Enfant Plaza, SW
Washington, DC 20260
August 7, 1985

Mr. Thomas A. Neill
Industrial Relations Director
American Postal Workers
Union, AFL-CIO
817 14th Street, N.W.
Washington, D.C. 20005-3399

Dear Mr. Neill:

On July 8 we met in prearbitration discussion of H1C-1E-C 41245 and H1C-1E-C 42949, Boston, Massachusetts, GMF. The question in these grievances is whether the grievants should be permitted to place their names on the overtime desired list after the beginning of a quarter when they are successful bidders on a different tour.

It was mutually agreed to full settlement of these cases as follows:

1. Unless otherwise addressed in a Local Memorandum of Understanding, an employee may opt to bring his/her name forward from one overtime desired list to another when he/she is successful bidder on a different tour. The employee will be placed on the list in accordance with their seniority.

2. Unless otherwise addressed in a Local Memorandum of Understanding, an employee who was not on any overtime desired list at the beginning of a quarter may not place his/her name on the overtime desired list by virtue of being a successful bidder to another tour until the beginning of the next quarter.

3. Backpay is not awarded.

Please sign and return the enclosed copy of this letter acknowledging your agreement to settle these cases, withdrawing them from the national pending arbitration listing.

Sincerely,

Frank M. Dyer
Labor Relations Specialist
Arbitration Division
Labor Relations Department

Thomas A. Neill
Industrial Relations Director
American Postal Workers Union, AFL-CIO

Aug 13 1985
(Date)

UNITED STATES POSTAL SERVICE
Labor Relations Department
475 L'Enfant Plaza, SW
Washington, DC 20260-4100

FEB 11 1988

Mr. Owen Barnett
Assistant Director
Maintenance Craft Division
American Postal Workers
Union, AFL-CIO
1300 L Street, N.W.
Washington, DC 20005-4107

Re: S. Knapps
South Suburban, IL 60499
B4C-4L-C 34379

Dear Mr. Barnett:

On October 6, 1987, we met to discuss the above-captioned grievance at the fourth step of our contractual grievance procedure.

The issue in this grievance is whether employees on the overtime desired list can remove their names from the list during the quarter.

After reviewing this matter, we mutually agreed that no national interpretive issue is fairly presented in this case. The parties at step 4 agree that when an employee requests that his/her name be removed from the overtime desired list, the request will be granted. However, management does not have to immediately honor the request if the employee is needed for overtime work on the day the request was made or scheduled for overtime in the immediate future. Further, once an employee is removed from the overtime desired list, he/she will only be permitted to place their name back on the list in accordance with Article 8, Section 5.A., of the National Agreement.

Accordingly, we agreed to remand this case to the parties at Step 3 for further processing.

Please sign and return the enclosed copy of this letter as your acknowledgment of agreement to remand this case.

Time limits were extended by mutual consent.

Sincerely,

Gary Johnston
Grievance & Arbitration
Division

Owen Barnett
Assistant Director
Maintenance Craft Division
American Postal Workers
Union, AFL-CIO

UNITED STATES POSTAL SERVICE
475 L'Enfant Plaza, SW
Washington, DC 20260

April 16, 1985

Mr. Moe Biller
President
American Postal Workers
Union, AFL-CIO
817 14th Street, N.W.
Washington, D.C. 20005-3399

Mr. Vincent W. Sombrotto
President
National Association of
Letter Carriers, AFL-CIO
100 Indiana Avenue, N.W.
Washington, D.C. 20001-2197

Gentlemen:

As confirmation of your concurrence that the following represents agreed upon positions on certain of the overtime issues the parties have discussed, please sign and return a copy of this letter.

A. The 12 hours per day and 60 hours in a service week are to be considered upper limits beyond which full-time employees are not to be worked.

B. The parties agree that local offices may discuss multiple overtime desired lists during the current local implementation process with a view toward local resolution of the issue.

C. The parties agree that employees on "sectional" overtime desired lists as identified through Article 30 may not be used in other "sections" to avoid the payment of penalty pay.

D. For the purpose of the application of the overtime provisions, scheme study hours used by an employee pursuant to a voluntary bid are to be counted towards the daily and weekly work hour limitations. For example,

if an overtime desired list employee who would otherwise be available for 12 hours work on a particular day is brought in for 1 hour scheme study before tour, that employee would be considered to be available for 11 additional work hours that particular day. If the employee ultimately qualifies and is placed in the assignment, compensation for that hour would be as if the employee had worked that hour. If this "work hour" is in excess of the restrictions in Article 8, Section 5F, the compensation would be at the penalty rate.

If the employee fails to qualify, he or she is not entitled to any additional compensation or overtime opportunity for any overtime missed due to the employee being engaged in scheme study.

E. Grievances which involve interpretation of the new provisions of Article 8 will be held at the step where they presently reside in the grievance procedure. Newly filed grievances will be processed through Step 2 and held there.

Positions agreed to by the parties should be followed in disposing of existing grievances. Those interpretive issues remaining in dispute will be expeditiously placed before an arbitrator. Grievances involving those issues will ultimately be disposed of consistent with the arbitration award.

Sincerely,

Thomas J. Leitsch
Assistant Postmaster General
Labor Relations Department

Moe Biller
American Postal Workers
Union, AFL-CIO

Vincent W. Sombrotto
National Association of
Letter Carriers, AFL-CIO