USPS No. 846584-F

NATIONAL ARBITRATION PANEL

C# 09897

In the Matter of the Arbitration

between

UNITED STATES POSTAL SERVICE

and

AMERICAN POSTAL WORKERS UNION

GRIEVANT: APWU President

CASE NO. H4C-NA-C 30

BEFORE: Richard Mittenthal, Arbitrator

APPEARANCES:

For the Postal Service: Lynn D. Poole
Senior Attorney
Office of Labor Law

For the APWU: Arthur M. Luby
Attorney (O'Donnell
Schwartz & Anderson)

Place of Hearing: Washington, D.C.

Date of Hearing: September 13, 1989

Dates of Post-Hearing Briefs: January 8, 1990

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.

Date of Award: January 29, 1990.

Richard Mittenthal
Arbitrator

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:
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> * * * *
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> 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.
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> * * * *
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> 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.

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.

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[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.

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]

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

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[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.

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.

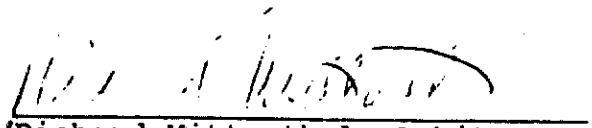
The Postal Service believed at the arbitration hearing, perhaps for good reason, that the APWU was asking the arbitrator to establish "standards" based only on arguments to be made by the parties at some later hearing. It responded, correctly I think, that the "standards" had already been announced in the Memorandum and that what remained was to apply these "standards" to specific fact situations in regional arbitration 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.



Richard Mittenthal, Arbitrator