C-27129

REGULAR ARBITRATION PANEL

IN THE MATTER OF ARBITRATION	)	GRIEVANT: Class Action
	)	
between	)	CASE NOS.
	)	USPS: B01N-4B-C
UNITED STATES POSTAL SERVICE	)	06082735
	)	
and	)	NALC: DRT NO.
	)	14-048824
NATIONAL ASSOCIATION OF LETTER CARRIERS, AFL-CIO	)	GRIEVANCE NO. 20-04-06

Before: Robert T. Simmelkjaer, Esq.
ARBITRATOR

APPEARANCES

FOR THE USPS

Charles J. Corso, Labor Relations Specialist

FOR THE NALC

Paul Daniels, President, Branch 20

Place of Hearing: Waterford, CT
Date of Hearing: April 12, 2007

AWARD

1) The Service violated Article 8.5, Overtime Assignments, from February 21, 2006 through February 25, 2006 and on March 9, 2006.

2) As a remedy, the Service shall cease and desist from implementing its 5:00 p.m. Window of Operation in the Pawcatuck, CT Post Office.

3) All Carriers improperly forced to work overtime on the days in question shall be granted administrative leave equal to the number of hours forced to work overtime at their discretion.

4) Carrier Kuflik shall be paid 3.73 hours at the penalty rate, Carrier Olivia 4.85 hours at the penalty rate, and Carrier Fake 1.00 hour at the penalty rate.

5) The Service shall apply the remedy set forth in the instant award to the 88 USPS/NALC Branch 20 cases the Step B Dispute Resolution Team has held in abeyance in accordance with Section 15.3.E of the National Agreement pending the resolution of the instant grievance.

6) The Arbitrator shall retain jurisdiction to address any issues which may arise with respect to the implementation of this award.

June 16, 2007

Robert T. Simmelkjaer

BACKGROUND

Pursuant to the procedure for arbitration contained in the Collective Bargaining Agreement between the United States Postal Service (hereinafter "the Service") and the National Association of Letter Carriers, AFL-CIO (hereinafter "the Union"), the undersigned was selected to hear and determine the following

ISSUE: Did the Service violate the mandatory overtime provisions of Article 8.5, Overtime Assignments, from February 21, 2006 through February 25, 2006 and on March 9, 2006?
And, if so, what shall be the remedy?

At the hearing, the parties were given ample opportunity to present their respective positions, including testimonial and documentary evidence. The record consists of two (2) Joint Exhibits, twelve (12) Union Exhibits, and nine (9) Service Union Exhibits.

STIPULATIONS

1. The Parties stipulate that on a number of dates in February and March 2006 as listed in the grievance management forced carriers not on the Overtime Desired List (ODL) to work overtime when a carrier on the ODL or PTF could have done the overtime work but would have worked past the 5 pm Window of Operation.

2. The Parties stipulate that the sole reason management has argued to justify forcing the non-ODL carriers to work on those dates was that the David Donnelly 5:00 pm Window of Operations was legitimate and that they forced the non-ODL carriers to work to comply with that Window.

3. The Parties stipulate that management never made any other argument at anytime for forcing the non-ODL carriers to work

overtime. Management did not argue that there was an emergency or non-recurring situation as defined in Article 3.F.

4. **The Parties stipulate that on November 12, 2006 Arbitrator Barbara Deinhardt, Esq. issued a decision on that Norwich window of operation grievance B01N-4B-C 06079858, local #05-08-06 that sustained the union's position, rescinded the 5:00 pm Dave Donnelly window of operations and paid overtime and administrative leave to the carriers harmed by the window.**

RELEVANT CONTRACT PROVISION

ARTICLE 8

HOURS OF WORK

Section 5. Overtime Assignments

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

A. Employees desiring to work overtime shall place their names on either the "Overtime Desired" list or the "Work Assignment" list during the two weeks prior to the start of the calendar quarter, and their names shall remain on the list until such time as they remove their names from the list. Employees may switch from one list to the other during the two weeks prior to the start of the calendar quarter, and the change will be effective beginning that new calendar quarter.

B. "Overtime Desired" lists will be established by craft, section or tour in accordance with Article 30, Local Implementation...

HISTORY OF PROCEEDINGS

The record indicates that the instant case, Pawcatuck Class Action #20-04-06 was originally scheduled before Arbitrator Cenci on July 19, 2006. However, the advocates deferred presentation of the instant case until another case #05-08-06 before Arbitrator Deinhardt, also addressing the issue of the Donnelly Window of Operation, could be heard.

On September 13, 2006, Arbitrator Deinhardt issued an initial decision of the threshold issue of arbitrability. According to the Union, "[s]he ruled that the Mittenthal National Award H4C-NA-C 30 does not grant the Postal Service the right to establish a 'Window of Operation' if in doing so it included the likelihood that it would result in the overtime scheduling of non-ODL carriers and limit the overtime of ODL carrier in a manner arguably inconsistent with the negotiated intention of the parties to 'protect the interests of employees who do not wish to work overtime.'"

On November 12, 2006, Arbitrator Deinhardt issued a second decision on the merits of the Norwich Case, ruling that the Donnelly "Window of Operation" violated the National Agreement, ordered it rescinded, and that the carriers harmed be paid overtime and administrative leave.

CONTENTIONS OF THE PARTIES

UNION POSITION

The Union, which has the burden of proof in a contract interpretation grievance, maintains that the decision of Arbitrator Barbara Deinhardt in USPS Case No. B01N-4B-C 06079858/NALC Case No. 05-08-06 (2006) is dispositive of the instant case. In that case, Deinhardt found as follows:

> **On the merits, therefore, I find that the Postal Service has the right to determine the hours of operation necessary to effect the timely delivery of mail. That right under Article 3 does not, however, give it the unfettered right to abrogate the terms of Article 8. Here the Union presented evidence that following the establishment of the 5:00 window of operations, on a regular basis, employees not on the ODL are being required to work overtime before employees on the ODL have maximized their overtime. Thus the burden shifted to the Postal Service to prove that the 5:00 window was supported by valid, legitimate operational necessity that justified the simultaneous scheduling. The Postal Service was not able to prove this with evidence and arguments offered during the grievance procedure. Therefore the grievance is sustained.**
>
> **As a remedy, I order that the 5:00 window of operations be rescinded. If management finds that it is unable to deliver mail in a timely manner or is unable to meet nationally mandated time limits, it is not precluded from taking whatever steps are necessary to effect such timely delivery or to meet such mandates, so long as it does so consistent with the requirements of the National Agreement. Carriers not on the ODL who were required to work overtime hours as a result of the 5:00 WOO shall be granted that same number of administrative leave hours. Carriers on the ODL who were denied those overtime hours that were assigned to non-ODL carriers as a result of the 5:00 WOO are entitled to be paid that number of hours, at the overtime rate.**

According to the Union, the Service is barred under the doctrines of collateral estoppel and/or res judicata from relitigating the issue presented

in the instant case, namely whether the Service violated the provisions of Article 8.5 Overtime Assignments by forcing non-ODL carriers to work on a number of dates in February and March 26 in order to meet a "Window of Operation" established by David J. Donnelly, Acting Manager Operations Programs Support, effective February 3, 2006.

With respect to the application of collateral estoppel, the Union argues that the doctrine bars relitigation of a particular issue or determinative fact. Since Arbitrator Deinhardt has purportedly ruled that the Donnelly Window of Operation was not justified by an emergency or non-recurring situation, the determinative fact of whether the Service could have simultaneously scheduled non-ODL and ODL carriers already has been adjudicated.

The instant case is the representative case for 88 other Branch 20 Article 8.5 overtime grievances. The Deinhardt award pertains to 58 cases ostensibly settled by her decision. The decision in the instant case will pertain to the remaining 88 cases.

Moreover, since Arbitrator Deinhardt in Case 05-08-06 "had the exact same issue, the exact same fact circumstances and the exact same arguments from management that they have made in this Case #20-04-06 in front of her and has ruled that the Dave Donnelly Window of Operation was illegal and ordered it rescinded," the Union urges this arbitrator to apply the doctrines of res judicata/collateral estoppel and preclude further litigation on the subject.

The Union further contends that in the Norwich case the sole argument advanced by management to defend their simultaneous scheduling of non-ODL and ODL carriers for overtime was the legitimacy of the Donnelly Window of Operation – a defense subsequently rejected by Deinhardt's Award. In the absence of an emergency or non-recurring situation as defined by Article 3F, the Union reiterates the argument it made in the Deinhardt case, to wit: "Management did not have the right to simultaneously schedule non-ODL and ODL Carriers for overtime."

The Union called no witnesses.

SERVICE POSITION

The Service takes exception to the Union's claim that the preclusive doctrines of res judicata and collateral estoppel should be applied in the instant case. Whereas the Service acknowledges that Arbitrator Deinhardt in the Norwich Case rescinded the Donnelly Window of Operations and ordered a compensatory remedy, it notes that Arbitrator Deinhardt "chastised" management for not providing sufficient evidence to support their contentions. The Service alludes to Arbitrator Deinhardt's opinion where she states:

> Thus the burden shifted to the Postal Service to prove that the 5:00 window was supported by valid, legitimate operational necessity that justified the simultaneous scheduling. The Postal Service was not able to prove this with the evidence and arguments offered during the grievance procedure. Therefore the grievance is sustained.

Given the paucity of evidence provided by the Service in the Norwich case, which resulted in the Arbitrator's decision upholding the Union's grievance, the Service in the instant case argues that Norwich should neither be considered a representative case applicable to the instant case but rather the Stamford, CT Case No. B01N-4B-C 06083627 (2006) decided by Arbitrator Wooters should constitute the appropriate precedent.

The Service maintains that in the Stamford Case, similar to the instant case, the Union grieved Donnelly's 5:00 p.m. Window of Operation, forced non-ODL carriers to work overtime, and sought the remedy as requested in Norwich, namely, "that management be instructed to cease and desist the application of the 5:00 p.m. WOO..., all letter carriers improperly forced to work overtime should receive an additional 50% pay for all hours forced to work and an amount equal to the number of hours forced should be paid to letter carriers on the ODL to be chosen by the Union at the appropriate overtime rate."

However, unlike the decision of Arbitrator Deinhardt in a case where management's file was undocumented, Arbitrator Wooters, in considering the Donnelly 5:00 Window of Operation, found it to be "clearly related to nationally set service goals...and in the absence of evidence to the contrary, I must consider it bona fide" (S. Ex. #3 @ 19). Arbitrator Wooters further found that "Service goals were identified consistently of delivery time, delivery by a certain time of day – and operating policies determined

based on management's judgment of how best to effectuate the goals."

Arbitrator Wooters' opinion included the following:

> **As applied in Stamford, the district policy resulted, at least temporarily, in an increase in the number of times non-volunteers were required to work. Does this increased frequency of simultaneous scheduling mean that, in Stamford[2], the window of operations does not constitute a justification for using non-ODL carriers before maximizing the use of ODL employees?**
>
> **I do believe that there is a limit to the discretion of management under Article 3. Management actions may not be in direct conflict with some express provision of the agreement. Management could not, for example, decide that, for all situations where extra employee hours are needed, ODL and non-ODL employees would be used interchangeably. There is no such direct conflict here. Management does use all "available" ODL employees within the window before forcing non-volunteers to work. What has happened in this and other cases is that the exercise of management discretion over operational methods and staffing has led directly to diminished "availability" of carriers for overtime and, thus, increased need to use non-volunteers..**
>
> **Absent any specific limit in Article 8.5G or the MOU, I would hold that management may not establish a schedule which relies on such use of non-volunteers in cases where their use would not be permitted without maximizing use of ODL employees. Management may not, in good faith, agree to provisions such as Article 8.5 G and then exercise its discretion in such a way as to make them meaningless. Overtime, including restricting mandatory overtime by non-volunteers, has been a major issue in collective bargaining between the parties. Any exercise of contractual rights by the**

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[2] I agree, in part, with the arguments of management on the scope of the instant arbitration. I agree that this case cannot determine the validity of the district policy, but is instead limited to the application of that policy in Stamford. Should I find a violation, I would hold only that the window of operations does not provide a justification for simultaneous scheduling and that management violates Article 8.5 G when it does so prior to maximizing ODL carriers. ODL carriers would be considered "available" until the old window, 6:00 PM, which would get them back prior to the last dispatch. I do not agree with management that this arbitration is limited to Camp Avenue. It has been clear throughout the process that it was intended to apply to all carrier operations in Stamford. Prior to arbitration, there has been no argument that the grievance had to be limited to the facility of the steward filing the initial grievance.

> **Service which has the effect of substantially reducing the value of a bargained-for limitation in this area should be viewed with skepticism.**
>
> **Similarly, I would also find it difficult to accept a union argument which essentially negated either specific rights bargained for by management or undermined managements right to make core business decisions. Thus, I do not accept the view that any exercise of management rights which has any adverse effect on overtime violates the contract.**

In finding that the language of Article 8.5D or G does not establish "a clear limit, beyond which even an otherwise legitimate exercise of management rights may not intrude," Arbitrator Wooters concluded that under the circumstances presented in Stamford simultaneous scheduling by management where applied to legitimate operational objectives would be permissible, even if not coincident with emergencies or non-recurring situations. In Wooter's opinion, management, in unilaterally establishing a WOO, could schedule non-OTDL carriers for overtime, even when OTDL carriers had not be maxed out at 12 hours, so long as the simultaneous scheduling was made in good faith pursuant to a bona fide business decision to improve customer service.

On the one hand, Wooters would find a violation of Article 8.5 G "regardless of the policies underlying the window of operations if significant numbers of non-ODL carriers were simultaneously scheduled on most Service days," absent a management justification for such scheduling. However, on the other hand, since "the scope and frequency" of such scheduling in Stamford did not reach a level indicative of "bad

faith" or design by management to rely on non-ODL carriers without maximizing the user of ODL carriers, and thus constitute a violation of Article 8.5 G, no contractual violation was found.

For remedy purposes, the Service has cited the decision of Arbitrator Eileen A. Cenci in Case No. B01N-4B-C 06072667 (February 2007) (Wethersfield, CT) – a decision which post-dated Arbitrator Deinhardt's Norwich decision in November 2006. In the Wethersfield Case, Arbitrator Cenci "declined the Union's request to order the Connecticut District to rescind the 5 pm WOO in light of Arbitrator Deinhardt's ward" because "this remedy was not requested by the Union at the lower levels of the grievance procedure or at the arbitration hearing..."

Inasmuch as the Union in the instant case did not request the rescission of the WOO as part of its remedy but rather "the proper remedy is that management cease and desist from future similar violations, that Carrier Kuflik be paid 3.73 hours at the penalty rate, Carrier Olivia receive 4.85 hours at the penalty rate, that Carrier Fake receive 1.00 hour at the penalty rate for the hours they should have worked [and] all carriers improperly forced to work overtime on the days in question should [receive] administrative leave equal to the number of hours forced [to work] to be used at their discretion," the Service argues that the instant remedy, should the Union prevail, not exceed the foregoing remedy requested (S. Ex. #6).

With respect to the instant case, the Service acknowledges that in Paucatuck, CT, management implemented a WOO which required carriers not on the ODL to work overtime before carriers on the ODL were maxed out at 12 hours. The Service notes that for the timeframe cited in the grievance, the Pawcatuck Post Office had two (2) carriers on the ODL and management, pursuant to the WOO, had required the carriers to return to the post office no later than 5:00 p.m.

The Service next alluded to the time records of Carriers Kuflik and Fake – records in the case file about which the parties agreed not to argue. The Service summarized the time records as follows:

> Mr. Fake was on annual leave on all days cited in the issue statement except March 9, 2006. Time records submitted by the union and contained in the grievance file show Mr. Kuflik worked begin tour overtime on all days cited in the issue statement. In addition, time records show Mr. Kuflik worked penalty overtime on all days cited in the issue statement except February 23, 2006 and March 9, 2006. On these days the records show Mr. Kuflik worked ten (10) hours and 9-1/2 hours respectively. The only day at issue for Mr. Fake is March 9, 2006. On this day time records show Mr. Fake worked begin tour overtime and also worked penalty end tour overtime.

The Service maintains that under Article 3A, it has the right "[t]o direct the employees in the performance of their official duties;" under Article 3C "[t]o maintain the efficiency of the operation entrusted to it;" and under Article 3D "[t]o determine the method, means, and the personnel by which such operations are to be conducted."

According to the Service, once the 5 pm WOO was implemented in Pawcatuck, CT working the ODL Carrier Kuflik twelve (12) hours would have brought him back past the 5 pm WOO and thus rendered him unavailable in terms of Article 8.5 G. The Service considers the example set forth in the MOU between the parties regarding overtime germane to the instant case as follows:

> "For example, if are there five available employees on the overtime desired 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 2 hours within to get the mail out, then only the five on the overtime desired list may be required to work."

The Service called no witnesses.

DISCUSSION

The Union has sought to apply the doctrines of res judicata and/or collateral estoppel to preclude further litigation of the issue promulgated in the instant grievance. That is, the Union has argued that since the issue presented in the instant Pawcatuck, CT grievance, namely, "Did the Service violate the mandatory overtime provisions of Article 8.5, Overtime Assignments?", has been decided already in Arbitrator Deinhardt's Norwich, CT decision (NALC 05-08-06) the Service should be precluded from further litigation by res judicata or under collateral estoppel precluded from raising the issue in the instant case. Given the fact Arbitrator Deinhardt found a contract violation, ordered the Donnelly 5:00 p.m.

Window of Operation rescinded, and compensated the carriers affected, the Union argues that res judicata or collateral estoppel should be applied in the Pawcatuck Case not only to preclude any further litigation on the matter, but also applied to the remaining 88 Branch 20 class action cases for which Pawcatuck is the representative case.

Res judicata is a term which incorporates both claim preclusion and issue preclusion or collateral estoppel. "Claim preclusion requires a final decision on a claim and precludes reassertion of that claim in a subsequent arbitration proceeding." In this Arbitrator's opinion, claim preclusion would also be applicable herein to prevent a party from rearbitrating in a later proceeding a matter that was part of the same claim in an earlier dispute. In the event the Service had sought to relitigate its business justification claim to support the validity of its WOO in the instant Pawcatuck case following Arbitrator Deinhardt's decision in Norwich excluding this claim and rescinding the WOO claim preclusion could be applied. As Whitley McCoy wrote, "Where the prior decision involves the interpretation of the identical contract provision between the same company and union, every principle of common sense, policy, and labor relations demands that it [a prior arbitration decision] stand until the parties annul it by a newly worded contract provision." Under the doctrine of claim preclusion, the Service is precluded from reasserting in this later Pawcatuck case the defense of business justification – a matter which it should have raised in the earlier arbitration.

Under the doctrine of issue preclusion/collateral estoppel the Service, in the instant case, is precluded from relitigating issues "actually arbitrated and decided in the first case."

Issue preclusion is applicable in arbitration when a party attempts to relitigate an issue decided in a prior arbitration award. As National Arbitrator Snow wrote, the requirements of issue preclusion are that "the issue (1) was actually litigated; (2) was necessary to the decision; and (3) the party against whom the doctrine is being asserted was a party or in privity with a party to the former action."

In the Arbitrator's opinion, the issues are identical in both the Norwich and Pawcatuck cases, (i.e. whether the Service violated Article 8.5); the parties are identical (i.e. Branch 20 of the NALC); and there is sufficient evidence that the issues set forth in the grievance were actually litigated. Therefore, collateral estoppel/issue preclusion seems applicable in this matter.

As noted, collateral estoppel/issue preclusion focuses on issues that were actually litigated and decided in the earlier case. Since the issues were undoubtedly identical (the alleged violation of Article 8.5), the same parties were involved (USPS/Connecticut District and Branch 20 /NALC), and Arbitrator Deinhardt actually issued a decision on the merits, this Arbitrator is inclined to apply the doctrine of collateral estoppel to preclude further litigation on a matter already decided and to ensure consistent results.

Although the Service has correctly noted that its case on the merits was limited because Arbitrator Deinahrdt excluded any evidence not included in the grievance file, this Arbitrator, given the parties' stipulation "that the sole reason management has argued to justify forcing the non-ODL carriers to work on those dates was that the David Donnelly 5:00 p.m. Window of Operations was legitimate..." is faced with a similar restriction. As Arbitrator Deinhardt found:

> **Thus the burden shifted to the Postal Service to prove that the 5:00 window was supported by valid, legitimate operational necessity that justified the simultaneous scheduling. The Postal Service was not able to prove this with the evidence and arguments offered during the grievance procedure. Therefore the grievance is sustained.**

Inasmuch as the Service has presented no more evidence on the merits in the instant case than it did in Norwich, this Arbitrator is not only inclined to concur with the conclusions reached by Arbitrator Deinhardt in her decision applicable to 58 similarly situated class action cases, but also persuaded to collaterally estop the Service from relitigating the issue of the Donnelly Window of Operation in a different cause of action/grievance.

The Arbitrator also credits the Union's claim that the instant case #20-04-06 was deferred for approximately nine months in order for the parties to utilize the Norwich decision #20-03-06 as a precedent for deciding 146 cases, including Pawcatuck #20-04-06, wherein the issue of the Donnelly Window of Operation was pivotal. On this record, this Arbitrator discerns no basis for deviating from the Deinhardt decision in

Norwich, applicable to 58 cases, and extending that decision, with one exception, to the instant Pawcatuck case and the remaining 88 cases.

As an alternative to applying Arbitrator Deinhardt's decision in the Norwich Case to all Branch 20 Class Action grievances via collateral estoppel, the Service has urged the Arbitrator to consider Arbitrator Wooters' decision in Stamford, CT involving NALC Branch 60 and upholding Donnelly's Window of Operation. According to the Service, notwithstanding the distinction between the Branch 60, Stamford case and the 146 Branch 20 class action cases encompassed by the representative Norwich and instant Pawcatuck cases, the Stamford, CT case is deemed more representative of its substantive position and therefore should be given significant weight. Since the Norwich Case was defective in terms of the Service's documentation during the grievance process as compared to its fuller presentation in Stamford, the Service considers Arbitrator Wooters' decision to be more appropriate for application to the Pawcatuck case.

In considering the Service's position, the Arbitrator first notes that the case file in the instant Pawcatuck case, given the parties' stipulation, is limited to the sole management argument that the WOO was legitimate supplemented only by the time records of the carriers on the OTDL. Moreover, the parties, having designated both Norwich and the instant Pawcatuck case as representative of the 146 Branch 20 class action

grievances, distinguished the Stamford/Branch 60 case decided in October 2006 from the Norwich case decided in November 2006.

Second, the Arbitrator, absent case law to the contrary, finds that the elements necessary to establish collateral estoppel are present in the instant case in that the parties are identical USPS/Connecticut District and NALC Branch 20, as well as the issue framed and matter arbitrated. With the B Team, having opted to frame the class action issue in terms of a NALC Branch 20 and the USPS/Connecticut District dispute, the Arbitrator maintains that these entities can constitute the level for application of collateral estoppel without venturing beyond the Branch 20 to ascertain the wider impact of the Donnelly WOO in the Connecticut District.

Third, assuming arguendo that Arbitrator Wooters' decision in Stamford involving Branch 60 and pre-dating Norwich has relevance to the 146 class actions being held in abeyance, this Arbitrator is not in accord with Arbitrator Wooters' findings insofar as the Donnelly Window of Operation is concerned.

Whereas this Arbitrator concurs with Arbitrator Wooters that Article 8.5 G does not permit significant numbers of non-ODL carriers to be simultaneously scheduled for overtime when ODL carriers have not been maxed out and that management "may not establish a schedule which relies on such use of non-volunteers in cases where their use would not be permitted without maximizing use of ODL employees," this Arbitrator differs from Arbitrator Wooters in finding that a "good faith" exception can

be found in the implementation of the Donnelly WOO in Pawcatuck that permits simultaneous scheduling for a legitimate business purpose even where that scheduling does not comport with the Article 3 limitation that such actions can only be taken in emergencies or under circumstances not expected to be recurring.

From the limited evidence adduced in the instant Pawcatuck case, the Arbitrator is persuaded that none of the days where management ordered simultaneous scheduling of non-ODL and ODL carriers to meet a 5:00 p.m. WOO were there emergencies or unforeseen circumstances such as personnel shortages that warranted forcing overtime on the non-ODL carriers. Moreover, there is evidence that additional overtime work was available for OTDL carriers Kuflik to perform from February 21 to February 25, 2006 and on March 9, and for Carrier Fake on March 9, 2006. Inasmuch as the OTDL carriers had not been "maxed out" at 12 hours in a day or 60 hours in a service week, the Service, pursuant to Article 8.5 G, was prohibited from forcing non-OTDL carriers Anchors and Costa to work overtime.

In the Arbitrator's opinion, but for management's decision to implement a 5:00 p.m. WOO, which had the effect of designating those carriers who returned after 5 p.m. as unavailable, and thereby permit management under Article 8.5D "to move off the list and require non-OTDL carriers to work overtime..." management's compliance with Article 8.5G was feasible even it entailed staffing adjustments or a later WOO.

In this regard the arbitrator concurs with those arbitrators who have found that while management under Article 3 may set performance goals such as a Window of Operation and promulgate operational procedures to achieve those goals and objectives it may not do so at the expense of abrogating its obligations under the overtime provisions of the contract.

Arbitrator Wooters, in applying a balancing test between management's discretion under Article 5 to determine the most efficient operational methods to effectuate reasonable delivery goals conducive to ensuring customer satisfaction against the strictures of Article 8.5 G prohibiting simultaneous scheduling unless the OTDL carriers had been fully utilized, found a "good faith" exception allowing management to impose simultaneous scheduling for an unspecified period pursuant to a "bona fide business decision." Unlike Arbitrator Wooters, this Arbitrator is disinclined to expand the scope of management's right to simultaneously schedule non-ODL and ODL carriers beyond the established justifications of an emergency or an unforeseen non-recurring circumstance.

Although the Arbitrator acknowledges management's right to establish a Window of Operation and will concur with Arbitrator Cenci in Case No. B01N-$4B-C 06072667 (2007) in excluding the rescission of the WOO as part of the remedy, he is not persuaded that a WOO, as here, which by design invariably and predictably required the continuous scheduling of non-ODL and ODL carriers can be contractually sanctioned. The right of employees not to work overtime is incorporated in the

language of Article 8.5 G and absent evidence that an intervening contingency required the extensive and continuous scheduling of non-ODL carriers as evidenced in Pawcatuck, the Service's implementation of a WOO which necessitated the simultaneous scheduling, particularly where the ODL carriers had not been fully utilized, constitutes a violation of Article 8.5 G. While the Service's right to establish a WOO pursuant to its business objectives and operational prerogatives under Article 3 cannot be negated, such decisionmaking cannot in its design and operation nullify the protections afforded employees under Article 8.5 G who have opted not to work overtime. Whereas an occasional circumstance may require simultaneous scheduling to fulfill the Service's delivery objectives, such occasions should be the exception as opposed to the fact pattern documented in the instant case.

Based on the foregoing analysis, the grievance is sustained and the remedy, with the exception of the rescission of the WOO, is as set forth in the Deinhardt Award and requested by the Union.