

**REGULAR ARBITRATION PANEL**

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IN THE MATTER OF ARBITRATION  
BETWEEN  
UNITED STATES POSTAL SERVICE  
AND  
AMERICAN POSTAL WORKERS  
UNION, AFL-CIO

Grievant – Class Action  
Post Office – Fargo, ND  
USPS Case # E11C-4E-C-12172644  
APWU Case # 88KK3012

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BEFORE: Jon Numair, Arbitrator

APPEARANCES:

For the U.S. Postal Service: Nancy J. Brewer, Manager, Labor Relations

For the American Postal Workers Union: John D. Durham, Vice President, Fargo Areal Local

Place of Hearing: Fargo, ND

Date of Hearing: November 30, 2012

Date of Award: December 28, 2012

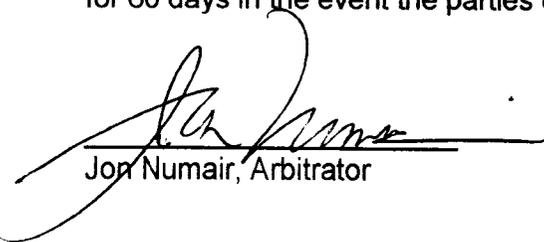
Relevant Contract Provisions: Articles 8

Contract Year: 2010-2015

Type of Grievance: Contract

**Award Summary:**

For reasons discussed herein, the grievance is sustained in part. The Employer violated the Local Make-Up Overtime Policy when they assigned clerks Vosburg and Zaeske to work ORDS mail while on make-up overtime on February 28, 2012. The assignment of Vosburg to work ORDS mail on March 2 also violated this Policy. The assignment of Zaeske on March 2 did not violate the Policy. The case is remanded to the parties for determination of the appropriate remedy in accordance with Section 3 of the Local Policy. The Arbitrator will retain jurisdiction for 60 days in the event the parties cannot reach agreement.

  
Jon Numair, Arbitrator

## ISSUE

The parties could not agree on an issue statement although their submissions were somewhat similar. They agreed at the hearing to let the Arbitrator frame the issue.

The Union submitted the issue as:

*Did management violate the local Make-Up Overtime Policy on February 28 and March 2, 2012 when it worked Tour 1 Clerks Kevin Vosburg and Steve Zaeske on make-up overtime? If so, what is the appropriate remedy? <sup>1</sup>*

The Employer submitted the issue as:

*Did Management violate Section 4 of the Make-up Overtime Policy utilized in the Fargo P&DC on February 28, 2012?*

*“Did Management violate Section 4 and Section 1 of the Make-up Overtime Policy utilized in the Fargo P&DC on March 2, 2012? <sup>2</sup>*

The Arbitrator frames the issue as follows:

Did the Employer violate the Collective Bargaining Agreement and/or the Local Make-up Overtime Policy when they assigned clerks Vosburg and Zaeske to work make-up overtime on February 28 and March 2, 2012? If so, what is the appropriate remedy?

## BACKGROUND

The Employer and the Union have a long standing agreement at the national level to provide make-up overtime opportunities to employees improperly bypassed for an overtime opportunity if that employee is on the overtime desired list (OTDL) and the employee who was given the assignment that resulted in the bypass is also on the OTDL. The agreement does not spell out how that make-up should be provided, only that, if not provided within 90 days, the employee will be paid for the lost opportunity.

The parties at the local level resolved multiple grievances on the method of providing those make-up opportunities by executing a “Make-up Overtime Policy” (Local Policy) <sup>3</sup> on October 22, 1998. This agreement was amended on May 31, 2007 and remains in force.

The grievance, filed on March 15, 2012, contested the Employer’s assignment of make-up overtime to two employees, Vosburg and Zaeske, on February 28 and March 2, 2012. The

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<sup>1</sup> Union’s Opening Statement

<sup>2</sup> Employer’s Opening Statement

<sup>3</sup> Joint Exhibit #8

Union alleges that the Employer violated the Local Policy in multiple ways when they assigned the contested overtime. The grievance properly moved through the grievance-arbitration process and was appealed to arbitration on July 16, 2012.<sup>4</sup> There were no threshold issues, nor any challenge to the arbitrability of the grievance.

## **RELEVANT CONTRACTUAL PROVISIONS**

### **ARTICLE 8 HOURS OF WORK**

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#### **Section 5. 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 in accordance with Article 30, Local Implementation.*

*C. 1. a. 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.*

*b. Those absent or on leave shall be passed over.*

. . . .

### **MAKE-UP OVERTIME POLICY**

#### **Section 1. Use of Make-Up Overtime**

*A. Make-up overtime may not be utilized in lieu of OTDL (Overtime Desired List). Management may not circumvent the OTDL by utilizing make-up overtime in place of normal overtime requirements.*

*B. Make-up overtime must not disrupt the normal rotation of the OTDL. An employee who has worked make-up overtime may not be bypassed on the OTDL as a result of the employee working make-up overtime.*

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<sup>4</sup> Joint Exhibit #2 – Moving Papers

*C. Unless mutually agreed by both parties, make-up overtime shall be similar to the opportunity missed. For example, if an employee is skipped on 8 OT list (day off overtime), then the make-up should be day off overtime, not split into 4 chunks of 2 OT. Also, a person skipped on 2 OT late list at four different times may not be offered a combined 8 OT day off make-up opportunity.*

*D. Make-up overtime will be considered invalid if any other employee is working similar non make-up overtime in any portion of that same time frame. However, an employee may work overtime during the use of make-up of (if?) that employee is working in an area requiring special skills or training that the make-up overtime employee does not possess. A person may work 2 OT (early or late) make-up over-time while normal day off overtime is being utilized. A person may work 8 OT (day off) make-up if no more than 2 hours of that BOT shift has normal overtime employees working during that same timeframe.*

## **Section 2. Scheduling**

*A. An employee's make-up overtime will not be counted, for scheduling purposes, as overtime hours worked for that week. For example, an employee should not be bypassed to avoid penalty overtime on his fifth day of overtime if one of those days were make-up. If management decides to bypass the employee in this situation, the employee will be reinstated with their original make-up overtime and date. Additionally, if an employee is on 8 OT make-up, he may not be skipped if normal overtime is utilized on the same day. The 12/60 hour limits outlined in the ELM still apply.*

*B. Only five employees may be on make-up overtime from the 2 OT list at any one time. Only two employees may be working day off (8 OT) make-up overtime at any one time.*

*C. Make-up overtime must be offered in advance, when possible, for the following:*

- 1. One hour notice for after tour (p.m.) make-up overtime.*
- 2. One hour notice for before tour (a.m.) make-up overtime.*
- 3. One day notice for day-off (8 OT) make-up overtime.*

*If an employee can not be contacted for make-up overtime, the opportunity will not be considered offered. The employee must be contacted personally and decline the offer in order for the make-up opportunity to be considered complete.*

*D. If an employee has annual leave or change of schedule approved in advance that is in conjunction with the offered opportunity, the employee may chose to pass and the make-up opportunity will not be considered resolved. An employee on sick leave may not be offered make-up overtime.*

## **Section 3. Remedy for Violations**

*1. Any violation of the make-up overtime guidelines will result in reinstatement of the employee's make-up overtime with the original date of error. A case by case review will also be done by both parties to determine if displacement of additional employees on the OTDL occurred. This will be determined by a joint review of the OTDL to check rotation and qualifications.*

*2. If the make-up overtime opportunity is not offered within 90 days, the aggrieved employee will be compensated at the overtime rate for a period equal to the opportunity missed.*

#### **Section 4. Make-up Overtime Work**

1. While all work can be utilized during make-up overtime, the work performed must not be work that would have been performed by use of the OTDL. Therefore, the parties have agreed to the following list of specific job duties as "non-OTDL duties". These duties have been identified as jobs that are typically not utilized for overtime, and may be modified at a later date by mutual consent. The duties listed are suggested items only, as management is not required to utilize them. However, if an employee performs over 50% of their make-up overtime in the listed duties below (75% on an 8 hour makeup), the union will not be allowed to challenge the validity of that particular make-up overtime.

#### **Suggested work for make-up:**

- safety training-OJT, reviewing manuals, watching videos
- career enhancement-watching FOCUS videos, reading "Postal Life", study DMM for job specific applications, .. etc
- manual chores-sweeping the floors, replacing broken label holders on FSM tubs and letter trays, stocking areas with empty tubs and trays, straightening up area full of clutter, cleaning the refrigerator and microwaves in the break areas ... etc.
- review "CUSTOMER PERFECT" goals
- organize labels for FSM and automation areas- make additional copies of labels for outgoing APC's
- reweigh equipment to verify correct weight
- restock mailing supplies in lobby
- UBBM -waste mail<sup>5</sup>

### **FACTS AND CONTENTIONS**

#### **THE POSITION OF THE UNION**

The Union's arguments, contained in their opening statement, included the following:

*There are four instances of make-up overtime in dispute. On February 28 and March 2, 2012 Tour 1 Clerk Kevin Vosburg and Steve Zaeske were given two hours of make-up overtime on each of the two dates.*

*The union claims that all four of these make-up overtime opportunities are invalid and in violation of our local make-up overtime guidelines.*

*One of the four make-up opportunities was a clear violation. Zaeske's make-up on March 2nd was overlapped with similar non make-up overtime. Section 1.D of the agreement directly addresses this situation.*

**Section 1.D.: "Make-up overtime will be considered invalid if any other employee is working similar non make-up overtime in any portion of that same timeframe."**

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<sup>5</sup> Joint Exhibit #8

*The other three make-up opportunities in this case were not overlapped by similar non make-up overtime employees. In these cases the union points to Section 1.A and Section 4 of the guidelines:*

**Section 1.A.: “Make-up overtime may not be used in lieu of the OTDL. Management may not circumvent the OTDL by utilizing make-up overtime in place of normal overtime requirements.”**

**Section 4: “While all work can be utilized during make-up overtime, the work performed must not be work that would have been performed by the use of the OTDL.”**

*In the remaining make-up overtime opportunities in this case, the union alleges that the work performed was done in lieu of the regular OTDL (Overtime Desired List). Instead of using the OTDL, management simply used make-up overtime instead.*

*The work performed by the clerks was done in “ORDS”, Operation Code 128, located at the Annex facility in north Fargo. During the entire week this occurred, Tour 2 Clerk Bruce Baarstad was on leave. Baarstad is only one of two clerks assigned to the Annex on Tour 2, and is the only clerk primarily assigned to work in “ORDS”. Because of Baarstad’s absence, mail in the ORDS section started building up. Management used overtime for ORDS immediately before and after the make-up overtime. The make-up opportunities occurred on a Tuesday and a Friday. Fridays are typically the busiest days at the Annex and most heavily used for regular overtime.*

*The expiration dates on the make-up overtime were also dangerously close, so management improperly used make-up to avoid cash payments. Payment is required if not offered within 90 days. The deadlines for the four make-ups were March 2-8, 2011. If they were not done that week, payment was going to be mandatory.<sup>6</sup>*

To support those arguments, the Union presented testimony from a number of witnesses, including former Fargo Local President John D. Durham, who negotiated the original Make-up Overtime Policy in 1998. Durham provided background on the Policy by way of producing the files of five grievances that gave rise to the settlement.<sup>7</sup> Those five grievances were resolved at the regional level in a pre-arbitration settlement on September 2, 1998. That settlement directed the local parties as follows:

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<sup>6</sup> Opening Statement of the Union

<sup>7</sup> Union Exhibit #2, pp. 1-57

*“...Mgmt and the union are to meet and agree on a way to schedule the makeup overtime opportunities mentioned in these 5 grievances within 90 days of the signing of this agreement. A procedure or method needs to be made between the parties so present and future makeup overtime opportunities are done properly and efficiently...”<sup>8</sup>*

Durham also provided his correspondence to then Manager of In-Plant Support Greg Johnson (currently the Postmaster of Fargo) related to the negotiation of the Policy and notes from meetings that took place leading up to the finalization of the Local Policy on October 22, 1998.<sup>9</sup>

Other Union witnesses testified as to the events of February 28 and March 2. Kyle Kuntz, the shop steward who filed the grievance, testified to his involvement in the case. Kuntz testified that it was unusual for employees to be called for less than 2 hours overtime as is what happened on February 28 for clerk Mark Krause. He offered his opinion that the reason for Krause only being assigned 1.5 hours instead of 2 hours overtime was that the Employer was trying to avoid an “overlap” of regular overtime and make-up overtime. He also testified that the color coding of mail in current use designates “blue” mail for dispatch on Friday so delivery can be accomplished on Saturday or Monday. That there are no special skills to working ORDS mail (which is the work in dispute for February 28<sup>th</sup> and one instance of the March 2<sup>nd</sup> overtime), and that clerk Baarstad, who normally works ORDS was absent the week prior and the week of the disputed assignments. Under cross-examination, Kuntz testified to his understanding that section 4.1 of the Policy prohibits the assignment of an employee on make-up overtime to work that “needs to get done”.

Clerk Mark Krause testified that he was always “booked” for two hours overtime when called to work early. He questioned the supervisor who called him for 1.5 hours overtime on February 28, asking if the report time of 10:30 (one and a half hours early overtime) was correct. He came to think of it as “suspicious” because he later heard that clerk Zaeske was on make-up overtime until 10:30. He also testified that he worked a lot of Fridays in ORDS and to his understanding, “blue” coded mail needed to be completed on Fridays. These were “standing orders” still in place at the time of the hearing. Under cross he acknowledged that “blue” mail isn’t always completed on Fridays, but the employees do the best they can.

Clerk Karen Rheault, the Expediter at the Annex where ORDS mail is worked, testified that only she and clerk Baarstad worked the Annex on tour 2. Part of her duties as Expediter

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<sup>8</sup> Union Exhibit #2, page 57

<sup>9</sup> Union Exhibit #2, pp. 58-68

was to request extra help when needed. She remembered that Baarstad was gone for two weeks from 2-22-2012 until 3-2-2012. On March 2, when she learned that clerks Vosburg and Zaeske were working make-up overtime, she called the Union due to her belief that the work was outside the scope of "make-up". That the practice at the Annex was not to use make-up overtime for "committed" mail, that is, mail designated for dispatch that day. There was high inventory of "blue" mail that "had to be dispatched" that night. She also testified that "all" overtime is assigned in two hour increments. Under cross, she stated that, given the amount of "blue" mail on March 2, she would normally ask for three extra people's help.

Finally, the Union contended that management was misapplying the term "similar" in the context of this Policy. They cited section 1.C, which defines "similar" as the same type of overtime, e.g. day off overtime, before shift overtime, or after shift overtime, not overtime spent performing similar work.

As to remedy, the Union requests,

*At the end of this hearing the union will ask you sustain this grievance in its entirety. Because the 90-day limit has long expired, the two affected employees should be paid for the improper make-up overtime opportunities. And in accordance with Section 3 of the Make-Up Overtime Policy, the local parties should also review this case to determine if displacement of additional employees occurred.*<sup>10</sup>

In support of its arguments, the Union cited the following decisions: J90C-4J-C-92056096, 92225 (Edwin H. Benn, Royal Oak, MI, October 6, 1997) and D90-C-1D-C-95028050 / C94253930 (Michael Wolf, Charleston, WV, November 24, 1997).

## THE POSITION OF THE EMPLOYER

The Employer argued four points in their opening:

1. The Union was trying to expand the Policy
2. The Employer was trying to work within a "right-sized" compliment of employees
3. The Employer was not trying to overturn the Policy
4. Section 4 controls other provisions of the Policy.

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<sup>10</sup> Opening Statement of the Union

In addition, their written opening remarks included the following:

*What is in dispute is whether Management could use clerks Zaeske and Vosburg for make-up overtime in the ORDS operation. The union alleges that because Management has also used regular overtime in the past and subsequent to the make-up opportunities in dispute, that Management cannot ever use ORDS for make-up overtime purposes. The union goes so far as to state that Management cannot use "productive" work for make-up purposes. This interpretation is clearly ludicrous as the purpose of a make-up opportunity is to correct the improper scheduling of productive overtime work, and a make-up is to make the employee whole for the overtime that was missed. Even the language in the Policy that the Union cites indicates that "all work can be utilized during make-up" but it must not be work that would not have been performed by use of the OTDL. On February 28 and March 2 it was not operationally necessary that all of the ORDS be cleared by the following day necessitating that all overtime must be dedicated to this operation. The Union has provided nothing to document that there was a critical need for the work to be done such as to mandate the scheduling of regular overtime. Article 3 provides Management the right to determine when overtime is needed and when it is scheduled and on February 28 and March 2 there was not a critical need sufficient to call regular OT in on all tours to clear ORDS.*

....

*Management contends that the provisions of Section 4 regarding challenging the validity of the opportunity are controlling in this situation.*

....

*...the Union bears the burden to prove that Management did indeed violate Sections 1.D and 4 of the Fargo Make-up Overtime Policy as it regards to what work may be utilized for make-up overtime. After all the evidence and testimony are considered, the Service believes that you will find that Management acted in accordance with Article 3 and the terms of the make-up Policy in appropriately scheduling and utilizing make-up overtime in the Fargo Installation. The Service respectfully requests that you deny the grievance in its entirety.*

The Employer presented four witnesses in support of their arguments. First, Operation Support Specialist Tim Foltz speculated that page 2 of Union Exhibit #4 (which required "blue" mail to be dispatched by Friday) was a holdover from when Fargo had five days to deliver ORDS mail, they now had only three. He testified that Friday was always a high volume day for ORDS and that there is "no way we can clear all of the Friday drops (blue mail) by Saturday

morning.” He also stated that it isn’t an issue if “blue” mail is still on hand on Sunday for dispatch Monday morning. That it would be “nice to have the mail out on Saturday, but in reality, as long as it is delivered by Monday, it’s OK.” Such decisions, as well as decisions to utilize overtime were normally made by the Plant Manager.

Supervisor Andrea Eberhardt testified that working ORDS on make-up overtime was not a problem. She stated it was standard mail, that was not committed and that an employee on make-up would not be taking overtime from anyone else. She agreed with Foltz that “blue” mail meant Monday delivery.

Supervisor Erin Tucker testified that she called Clerk Krause for 1.5 hours of overtime on 2-28 because she knew tour 1 employees were in a make-up status until 10:30. She did not want to have an overlap situation, prohibited by the Local Policy. She stated that it was management’s call on how much overtime to call and when. She also highlighted that Tour 3 clerks Krause, Cruz, and Beling all worked two hours early overtime on Friday, March 2, beginning at 10am, and that they all worked at the Annex on ORDS.

Lastly, Postmaster Greg Johnson testified. He first spoke to his involvement in the promulgation of the Local Policy. He noted that Section 4 of the first draft proposed by the Union began, “While most work can be utilized during make-up overtime...” He countered that “all work” was the better phrase and that “all” is the term used in the final document. He did not agree that “productive work” was excluded from consideration as make-up. He stated that even if work was accomplished the previous week on regular overtime, that same work could be accomplished by make-up overtime based on volume changes, deadlines (committed v. non-committed mail), and other factors he did not name.

Johnson characterized a proposal the Employer made during the 2011 Local Implementation Negotiations regarding make-up overtime as an attempt to “get rid of the current Policy and get something new – less restrictive.” He stated the Employer’s view was the Policy didn’t work anymore. It amounted to wait 90 days and pay.

He too, speculated that the dispatch placards brought into evidence by the Union were old. He described the matrix as something they “try” to follow

He agreed with Supervisor Tucker that management can schedule overtime in a way that avoids overlap since if there is overlap, the make-up is invalid.

In support of their presentation, the Employer cited the following decisions: E98-C-1E-C-01044970 (Karla R. Burton, Las Vegas, NV, May 5, 2003) and I94C-1I-C-97021338 (George Edward Larney, Des Moines, IA GMF, December 7, 1999).

## ANALYSIS AND OPINION

First of all, the Arbitrator must point out that the arguments and decision in this matter are unique to the Fargo facility. The National Agreement is only marginally in play. The case will be decided under terms the local parties have agreed to in the Local Policy. The issue is not whether the Local Policy is too restrictive; whether it has merit, or is reasonable. Those are questions long ago put to rest by the parties when they mutually agreed to its terms. It is not the Arbitrator's job to decide the wisdom of the parties' decisions. The issue is whether the Employer violated that mutually agreed upon Policy by their actions.

The facts of this matter are largely uncontested. Sometime in late 2011 or early 2012, the Employer settled grievances with the Union that resulted in clerks Vosburg and Zaeske being given make-up overtime assignments of four hours each.

There is no disagreement over the terms and application of the National Agreement. Both sides agree with the application of the settlement included in Union Exhibit #1, cited above, and reiterated in the Joint Contract Interpretation Manual.<sup>11</sup> Both sides agree the employees were entitled to make-up overtime. The disagreement occurs when considering whether these assignments were proper make-up assignments, in accordance with the Local Policy, specifically sections 1.A., 1.D and 4.

### **Section 1. Use of Make-Up Overtime**

*A. Make-up overtime may not be utilized in lieu of OTDL (Overtime Desired List). Management may not circumvent the OTDL by utilizing make-up overtime in place of normal overtime requirements.*

. . . .

*D. Make-up overtime will be considered invalid if any other employee is working similar non make-up overtime in any portion of that same time frame. However, an employee may work overtime during the use of make-up of (if?) that employee is working in an area requiring special skills or training that the make-up overtime employee does not possess. A person may work 2 OT (early or late) make-up over-time while normal day off overtime is being utilized. A person may work 8 OT (day off) make-up if no more than 2 hours of that BOT shift has normal overtime employees working during that same timeframe.*

. . . .

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<sup>11</sup> Joint Exhibit #2

#### **Section 4. Make-up Overtime Work**

1. While all work can be utilized during make-up overtime, the work performed must not be work that would have been performed by use of the OTDL. Therefore, the parties have agreed to the following list of specific job duties as "non-OTDL duties". These duties have been identified as jobs that are typically not utilized for overtime, and may be modified at a later date by mutual consent. The duties listed are suggested items only, as management is not required to utilize them. However, if an employee performs over 50% of their make-up overtime in the listed duties below (75% on an 8 hour makeup), the union will not be allowed to challenge the validity of that particular make-up overtime.

#### **Suggested work for make-up:**

-safety training-OJT, reviewing manuals, watching videos  
-career enhancement-watching FOCUS videos, reading "Postal Life", study DMM for job specific applications, ... etc  
-manual chores-sweeping the floors, replacing broken label holders on FSM tubs and letter trays, stocking areas with empty tubs and trays, straightening up area full of clutter, cleaning the refrigerator and microwaves in the break areas ... etc.  
-review "CUSTOMER PERFECT" goals  
-organize labels for FSM and automation areas- make additional copies of labels for outgoing APC's  
-reweigh equipment to verify correct weight  
-restock mailing supplies in lobby  
-UBBM -waste mail <sup>12</sup>

Vosburg and Zaeske worked their make-up assignments as follows:

February 28, 2012	Vosburg	2 hours overtime	Annex - ORDS
February 28, 2012	Zaeske	2 hours overtime	Annex - ORDS and Box PP
March 2, 2012	Vosburg	2 hours overtime	Annex - ORDS
March 2, 2012	Zaeske	2 hours overtime	Trollwood Station - 1.07 hours UBBM <sup>13</sup>

Although this is one grievance, there are two distinct make-up situations the Union contests. The Union argues,

1. The assignment of Vosburg and Zaeske to work ORDS on February 28, and Vosburg on March 2 violated sections 1.A and 4 of the Local Policy in that the make-up overtime was assigned to the detriment of employees on the OTDL – that the assignments were made

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<sup>12</sup> Joint Exhibit #8

<sup>13</sup> Joint Exhibit #4, pp. 1-4 clock rings for Vosburg and Zaeske

“in lieu of OTDL” and “in place of normal overtime requirements” or that the work performed was “work that would have been performed by the use of the OTDL”.

2. The Assignment of Zaeske on March 2 was an “overlap” situation, in that other employees on the OTDL were working “similar” non-make-up overtime at that same time which violated section 1.D of the Local Policy.

The Employer’s rebuttal boils down to:

1. That on February 28 and March 2, it was not “operationally necessary” to clear all the ORDS mail. That the Employer has the right under Article 3 to determine when to call overtime and that there was no “critical need” to schedule regular overtime.
2. Regardless of where or what type of overtime Zaeske worked on March 2, the fact that he worked more than 50% of his make-up opportunity in one of the operations listed in the “suggested work for make-up” listing under Section 4 of the Local Policy undercuts any other argument the Union might otherwise have regarding the assignment.

The citations provided by the Union are easily distinguishable from this case for the following reasons, and are not helpful in deciding this case. In D90C-1D-C-95028050, Arbitrator Wolf decided that “*Management should schedule make-up overtime in such a way that it does not deprive ODL employees of their rights to overtime opportunities.*” We have no disagreement here on that question, as the local parties have already made such an agreement. In J90C-4J-C-92056096, Arbitrator Benn rejected make-up as a remedy given the amount of time that had passed since the infraction. Since the local parties have addressed the issue of remedy in their Policy, this, too, is not of value.

Likewise, the citations submitted by the Employer are not on point, which is understandable given the high degree of reliance on the Fargo Local Policy in this case. In I94C-1I-C-97021338, Arbitrator Larney states the obligation to provide make-up overtime “*is not subject to the same constraints, limitations, or restrictions that govern the distribution and assignment of regular overtime.*” In Fargo, the parties have created their own set of constraints, limitations and restrictions that govern the assignment of make-up overtime by way of the Local Policy. Similarly, Arbitrator Burton, in E98-C-1E-C-01044970, quotes Larney in deciding that providing a make-up overtime assignment is a “*higher priority*” than selecting the next employee on the OTDL. In Fargo, the parties have established their own priority list.

We are on our own in this case based on the Local Policy the parties have constructed. Since the two individuals who co-authored the original policy in 1998 are at odds over the intent

of the language in dispute, we will have to dig deeper to determine the meaning of the language.

#### The ORDS Work – February 28 and March 2

The Union's theory that the make-up overtime was assigned when regular overtime was needed starts with the absence of clerk Baarstad. From February 22, 2012 through March 2, 2012, clerk Baarstad, who normally works ORDS, was absent. He is one of only two clerks regularly assigned to the Annex on tour 2. They also point to testimony of Expediter Rheault regarding the need for extra help. Extra help by way of regular overtime is assigned every Thursday and Friday and she had a specific recollection that she was surprised to see make-up overtime being worked on March 2 when there was so much mail to be dispatched. She also stated the normal way work is distinguished as available for make-up or not, is the color code. Mail designated for dispatch on a given workday is "committed" and is not usually assigned as make-up. Mail designated for dispatch on some future day is not committed and therefore available for assignment as a make-up opportunity. She referred to Union Exhibit #4 for her testimony.

Union Exhibit #4 is a 3 page document with related, but separate pages. Page 1 is a Service Talk sheet, dated 2-1-2010. Page 2 is a matrix showing color codes used for ORDS mail and the proper disposition of that mail. Page 3 is a different matrix showing the appropriate color code for mail based on the day and time of its arrival at the facility.

Although Employer witnesses Foltz and Johnson testified that page 1 of UE#4 was outdated, they both stopped short of that statement regarding page 2 of the exhibit, speculating the color coding on page 2 was "probably" not current (Foltz) and "looks like old placards" (Johnson). Although the first page of UE#4 might be outdated all the Union witnesses testified page 2 (the color codes and dispatch day matrix) was currently hanging at the Annex and utilized daily for mail dispatch. The matrix calls for "blue" coded mail to be "dispatched to the stations or downflow plant Friday Night for Saturday or Monday Delivery". Union witness Kuntz testified it was important to get the mail out on Saturday morning because it took two days to get mail to Williston or Minot, areas served by Fargo. He acknowledged though that this was not always the case.

Almost universally, the Employer makes the determination how, when and where to call or assign overtime. This is in keeping with the Management Rights Clause in Article 3 of the parties' Collective Bargaining Agreement. Section D of Article 3 grants Management the right

*"To determine the methods, means, and personnel by which such operations are to be conducted"*

However, the prefacing paragraph of Article 3 makes all the listed Management Rights subject to other provisions of the Agreement.

*The Employer shall have the exclusive right, subject to the provisions of this Agreement and consistent with applicable laws and regulations:*

(Emphasis added)

In Article 15, the Grievance-Arbitration Procedure, the parties at the National Level have agreed that step 2 grievance settlements are not precedent setting, but may be if the parties mutually agree.

*Article 15.2. Step 2.(e) Any settlement or withdrawal of a grievance in Step 2 shall be in writing or shall be noted on the standard grievance form, but shall not be a precedent for any purpose, unless the parties specifically so agree or develop an agreement to dispose of future similar or related problems.*

In this case, by settling the grievances in 1998 and agreeing to the 2007 modification, the Employer has agreed to a rather strict method of providing make-up overtime going forward. In so doing, they have made some of Management's Right to schedule overtime subject to the Local Policy. For instance, when they agreed not to use make-up overtime in lieu of regular overtime, some test has to determine if it was likely that non-make-up overtime would have been used. It would render multiple provisions of the Local Policy meaningless to conclude otherwise. There would be no method of determining whether make-up assignments were "utilized in lieu of the OTDL", or if the OTDL was being circumvented "by utilizing make-up overtime in place of normal overtime requirements," or if the work performed was "work that would have been performed by use of the OTDL." Unless non-make-up overtime assignments had some predictability, as the Union argues is the case here, these sections of the Policy would be unenforceable. Again, the Arbitrator is not supporting the wisdom of the Policy; he is simply trying to point to a means of determining if there was compliance.

The parties have grown accustomed to these restraints. Expediter Rheault was concerned enough when she saw make-up overtime being worked under circumstances she thought called for "regular" overtime that she called her Union rep. She also testified, as previously noted, as to the demarcation between committed mail and non-committed mail. Shop Steward Kuntz filed the grievance because it was not common to have make-up overtime assigned in an operation that was shorthanded and which commonly needed "regular" overtime. He testified to his understanding that assigning make-up overtime in an instance where work "needed to get done" was prohibited by the Local Policy. Supervisor Eberhardt testified that if

one employee was on “regular” overtime, a similar make-up assignment to a different employee would not be valid. She stated an assignment is valid if the employee on make-up is “not taking overtime from anyone else”. Supervisor Tucker testified that the reason clerk Krause was only brought in for 1.5 hours early overtime on the 28<sup>th</sup> was to avoid an overlap, and agreed with the suggestion that Krause would have been given a 2 hours assignment had the make-up assignment not been made. Postmaster Johnson testified that, in accordance with the Policy, all work could be considered for make-up, including so-called “productive work.” He went on to say that work accomplished the week before by regular overtime could be considered for make-up depending upon “volume changes” and “deadlines”, explaining that designations of committed or non-committed were important in that decision. He said there were a lot of factors used to help make that determination. Under cross, when asked if the Policy prohibits work normally assigned as regular overtime from being assigned as make-up overtime, he replied there were a “lot of factors surrounding” such a decision.

To the Arbitrator, these collective responses indicate an acknowledgement that the Union’s suggested interpretation of the language has been the practice between the parties. Each of these witnesses made distinctions between appropriate and inappropriate make-up assignments, along the lines argued by the Union, inferring that such assignments were conditionally valid. Although under most circumstances, the Employer has the exclusive right to assign overtime, when assigning make-up assignments in Fargo, ND, those decisions are subject to a determination of whether “regular” overtime would have been used if make-up overtime were not assigned, based on the language of sections 1.A. and 4 of the Local Policy. We will need to examine each assignment to test it against this finding.

The Friday, March 2 assignment of Vosburg to work two hours make-up overtime at the end of his tour 1 shift, at the Annex, working ORDS was made in the following context: Fridays are typically heavy ORDS volume days and clerk Krause works ORDS on regular overtime almost every Friday to help clear the mail.<sup>14</sup> Clerk Baarstad, the regular tour 2 ORDS clerk was absent, as he had been all week.<sup>15</sup> Three clerks from tour 3 (Krause, Cruz and Beling) were called in for two hours early overtime, beginning at 10am to work ORDS.<sup>16</sup> There were 49 pallets and three hampers of “blue” ORDS on hand to be worked at the beginning of tour 2 and 41 pallets left to be worked at the end of the shift.<sup>17</sup> The parties stipulated at the hearing that,

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<sup>14</sup> Testimony of Krause and Rheault

<sup>15</sup> Testimony of Rheault and Joint Exhibit #4

<sup>16</sup> Joint Exhibit #4 pp.5-8

<sup>17</sup> Union Exhibit #7, page 2

“On March 2, 2012, the make-up opportunity in ORDS was for working mail identified by ‘blue’ color code”. “Blue” ORDS is scheduled to be dispatched on Saturday mornings.<sup>18</sup>

Given this scenario it is difficult to conclude that this was an assignment in compliance with the Local Policy. This make-up assignment was clearly “in lieu of OTDL” and was work that “would have been performed by use of the OTDL”. It occurred in a situation where overtime was regularly used, and likely more necessary due to the absence of Baarstad. The mail was designated for dispatch the following morning. It was committed. The Employer violated the Local Policy by assigning make-up overtime in this manner.

Regarding the facts for Tuesday, February 28 – Baarstad was absent on this day as well. There were six pallets and four hampers of “Violet” mail scheduled to be dispatched on Wednesday morning. Krause was only called in for 1.5 hours of early overtime, when his experience and that of the other Union witnesses was that two hours is the common practice. The Union argues that was done to avoid the “overlap” situation prohibited by the Local Policy. The Employer argues it is their right to schedule as they see fit. Supervisor Tucker testified that avoiding overlap was indeed the situation. She couldn’t bring Krause in for two hours overtime since four one clerks were still in a make-up overtime status until 10:30. Under cross, she agreed that if not for the make-up, Krause would probably have been called in for two hours overtime that day.

Unlike the first scenario, this does not appear to be a situation where the make-up overtime was used to avoid the scheduling of regular overtime. There wasn’t an excess amount of mail, regardless of the fact that regular overtime had been used to work some of it. We do not need to parse the scenario, however, since it is clear that Krause had his regular overtime assignment reduced by 30 minutes to avoid an overlap situation. This is a violation of the “not in lieu of” clause of section 1.A. But for Vosburg and Zaeske’s make-up assignment on February 28, Krause would have worked 2 hours overtime – judging by history and the candid comments of Supervisor Tucker.

In the Employer’s attempt to not violate the Policy’s prohibition against overlap, they violated the Policy by using make-up overtime in lieu of the OTDL. Vosburg and Zaeske were assigned make-up overtime in lieu of Krause on regular overtime.

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<sup>18</sup> Union Exhibit #4, page 2

## March 2 - Trollwood

Clerk Zaeske worked two hours overtime at Trollwood on the 2<sup>nd</sup>. He apparently moved to the station sometime during his normal shift and continued there on an overtime basis. He worked two hours overtime, 1.06 of it on UBBM, which is one of the excepted duties under section 4 of the Local Policy. The Union claims this is the most flagrant violation since there was clear overlap with “similar” regular overtime. Their definition of “similar” being the same type of overtime – as described locally, 2OT or 8OT.

The Service argues that since UBBM is excepted work under section 4, the Union waives all right to challenge the assignment – that performing a section 4 duty, in effect, trumps the other provisions of the Policy. They also inferred the overtime wasn’t “similar” since the employees working regular overtime were performing very different duties.

I credit the Union’s definition of “similar.” Section 1.C. provides a clear definition. Similar does not refer to the type of work being performed or where it is performed; it is a characterization of the type of overtime being worked, day-off overtime or early/late overtime. In this case, there was a clear overlap, for 30 minutes. Zaeske’s two hour make-up assignment at Trollwood was “similar” to the three tour 3 employees’ two hour early regular overtime assignment at the Annex. According to both Union and Employer witnesses, overlap is not permitted under section 1.D. However, the Employer invokes the Section 4 trump card, arguing 4 supersedes 1.D.

Consequently, the only question that remains, is, does the waiver clause under section 4 apply to any challenge the Union might be entitled to under the Local Policy? The Employer says yes, the Union, no.

It is easy to understand the differing views. We have two sections of the Policy that appear to be in conflict. The Union argues Section 1 prohibits the scenario here, in that one employee on regular overtime and one employee on make-up overtime were working at the same time, performing “similar” overtime. The Employer argues Section 4 gives them the right to make any make-up assignment, regardless of the prohibitions in sections 1, 2, or 4, if the bulk of the make-up assignment is to one of the duties listed in Section 4.

In order to resolve the puzzle, we must look at the entire Policy and not isolate on these two phrases. Section 1 is entitled “Use of Make-Up Overtime” and has four sub-sections on proper utilization of such assignments. Section 2 is entitled “Scheduling”. It has four sub-sections giving guidance on scheduling matters. Section 4 is entitled “Make-up Overtime Work”. It talks about the type of work – duties, which may be assigned. The Policy is laid out logically

in addressing these different elements of proper make-up assignments. They have an inter-relationship.

Concurrent with trying to see how the different pieces of the Policy fit together, we must also try to find an interpretation that does not render the Policy, or a section of it, meaningless. Rendering parts of the Policy meaningless might reasonably be the outcome for certain times of the year, if sections 1 and 2 operated in a vacuum. It might be impossible during the Christmas season or during heavy vacation periods to find a window of time when regular overtime was not being used, or could have // should have been used. It would render the Policy unworkable. The result would be exactly the concern that Postmaster Johnson expressed, that make-up assignments could not be made, and the "wait 90 days and pay" scenario would play out. We cannot determine an outcome here that does not allow the Policy to serve the purpose for which it was created, which was, in the words of the step 3 remand from 1998,

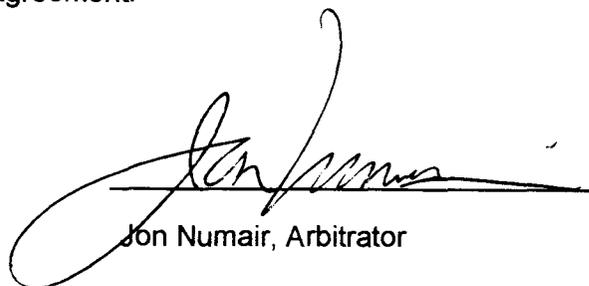
*A procedure or method needs to be made between the parties so present and future makeup overtime opportunities are done properly and efficiently so grievances will not be necessary.*

Although the Union argues that the Section 4 duties were only meant to be a waiver on the phrase from that section, "*the work performed must not be work that would have been performed by use of the OTDL*", if that were the case, the waiver would be superfluous. Section 1 prohibits make-up assignments that infringe on overtime assignments that would normally be accomplished by the OTDL. Why would the parties take the time to develop a list of duties that are considered "non-OTDL duties" if they were not meant as a safe haven for any make-up overtime assignment? If the list only applied to Section 4, the Union could still challenge the assignment by way of the Section 1 rule, claiming Section 1 stands alone, which they have done here. To agree with that position would render Section 4 meaningless. As discussed earlier, I cannot come to a conclusion with that result.

Therefore, the purpose of the suggested duties sub-section in section 4 must be to identify work that, due to the nature of the duties as non-priority (non-OTDL), can be worked regardless of any other provision of the Local Policy. The waiver provision disallows any challenge if the employee on the make-up assignment performs the listed duties for 50% or more of their assignment. Even though Clerk Zaeske's make-up overtime assignment was similar to other non-make-up overtime for a portion of the same time frame, the Employer did not violate the Policy since Zaeske worked more than 50% of his overtime processing UBBM.

## CONCLUSION

For reasons discussed herein, the grievance is sustained in part. The Employer violated the Local Make-Up Overtime Policy when they assigned clerks Vosburg and Zaeske to work ORDS mail while on make-up overtime on February 28, 2012. The assignment of Vosburg to work ORDS mail on March 2 also violated this Policy. The assignment of Zaeske on March 2 did not violate the Policy. The case is remanded to the parties for determination of the appropriate remedy in accordance with Section 3 of the Local Policy. The Arbitrator will retain jurisdiction for 60 days in the event the parties cannot reach agreement.



Jon Numair, Arbitrator

December 28, 2012