REGULAR REGIONAL ARBITRATION PANEL

In the Matter of the Arbitration	)	
	)	**IMPASSE ITEM**
between	)	
	)	**Post Office:** Fargo, North Dakota
United States Postal Service	)	
	)	**Case Nos:**
and	)	I98C-4I-I 99192708
	)	I98C-4I-I 99193537
American Postal Workers Union	)	

Before: **John C. FLETCHER, Arbitrator**

Appearances:

For the Postal Service:	Robert Ivey, Labor Relations Specialist USPS Dakotas District Sioux Falls, South Dakota 57117-7560
For the Union:	John Akey, National Business Agent APWU Clerk Division Bloomington, Minnesota 55425
Place of Hearing:	Fargo, North Dakota
Date of Hearing:	August 5, 1999
Date of Award:	September 3, 1999
Relevant Contract Provisions:	Article 30
Contract Year:	1998 - 2000
Type of Grievance:	Impasse

Award Summary

The overtime pecking order provided in the Fargo LMOU is not inconsistent and in conflict with the National Agreement. The Service has not established with credible evidence that the overtime pecking order that uses OTDL employees before part-time and supplemental employees creates an unreasonable burden on Management. The existing LMOU, that includes an overtime pecking order will be retained, as provided in Article 30 of the National Agreement.

Fletcher

John C. FLETCHER, Arbitrator

OPINION AND AWARD

I98C-4I 99192708 - Union Appeal
I98C-4I 99193537 - Management Appeal
Overtime Pecking Order

Background:

In 1992, in response to the pending introduction of Transitional Employees ("TE's") into the Fargo, North Dakota workforce, Management and APWU, on April 7th, (even though the local negotiating window was closed) entered into a Memorandum of Understanding, supplementing their existing LMOU[1] in several areas to accommodate a variety of anticipated problems. One item of that MOU is at the center of this Impasse dispute:

> Overtime
>
> Addendum for scheduling of overtime when overtime is necessary, the following pecking order will be utilized.
>
> 1. Full-time regular employees from the overtime desired list, by seniority.
> 2. Full-time regular employee volunteers not on the overtime desired list, by seniority.
> 3. Part-time flexible and part-time regular volunteers by seniority.
> 4. Transitional employees, volunteers by seniority.
> 5. Transitional employees, non-volunteers by juniority.
> 6. Part-time flexible and part-time regular employees who do not volunteer, by juniority.

[1] In the introduction of exhibits, some discussion occurred on whether or not the April 7, 1992, MOU was actually part of the LMOU. There can be no argument that the parties intended the MOU to be an addendum to their LMOU. Under the heading "Overtime" the word "addendum" is used. "Addendum" must be an addendum to something, and no one has suggested that it is an addendum to anything but the LMOU. The section on holiday scheduling clarifies that the document is an addendum to the LMOU. There the parties wrote "addendum to Local Memorandum of Understanding."

7. Full-time regular employees who do not volunteer, by juniority on a rotating basis.

On February 8, 1993, the parties met and revised the overtime pecking order that they had established ten months earlier. The revised pecking order provided:

Overtime

Addendum for scheduling of overtime when overtime is necessary, the following pecking order will be utilized.

1. Full-time regular employees from the overtime desired list, by seniority.
2. Full-time regular employee, not on the overtime desired list, **who are not on the clock, may volunteer** by seniority.
3. Part-time flexible and part-time regular volunteers by seniority.
4. Transitional employees, volunteers by seniority.
5. Transitional employees, non-volunteers by juniority.
6. Part-time flexible and part-time regular employees who do not volunteer, by juniority.
7. Full-time regular employees who do not volunteer, by juniority on a rotating basis.

Under the provisions of Article 30, of the 1994 - 1998 National Agreement, the parties on the local level were provided a negotiating window (commencing February 15, 1996) in which to revise their LMOU's. Two days before that date, Management and APWU in the Fargo facility signed-off on a one-sentence extension stating:

> It is mutually agreed that the present Local Agreement is to be extended in full force and effect through November 20, 1998.[2]

Subsequent to that date, Management usually made overtime assignments as provided in the pecking order established on April 7, 1992 and modified on February 8, 1993. When the pecking order was not followed, APWU filed claims. During the local negotiating window established in the 1998 - 2000 Agreement, Management took the position that the overtime pecking order was inconsistent and in conflict with the National Agreement, and also that its continuation would represent an unreasonable burden on the Postal Service. Locally the parties met four times to negotiate on this issue. A number of proposals were exchanged, but agreement was not reached. The ensuing disputes were timely certified to arbitration.

THE POSITIONS OF THE PARTIES

The Position of the Postal Service:

The Postal Service insists that there exist three reasons why the pecking order for overtime should not be retained in the new LMOU for the Fargo facility:

1. It is inconsistent and in conflict with the National Agreement
2. It is not one of the 22 Items contained in Article 30 on which Local Negotiations are required
3. A pecking Order that uses OTDL employees before part-time and supplemental employees creates an unreasonable burden on Management.

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[2] The April 7, 1992, MOU as revised on February 8, 1993, was attached to the LMOU, immediately ahead of the sign off document.

The Postal Service says that the original intent of the MOU establishing an overtime pecking order was to put together some guidelines to insure that no TE's would be working overtime to the detriment of the Full-time work force. The Overtime pecking order has now become a device whereby the Union insists that Management schedule FTR's on the OTDL at penalty overtime as well as FTR's who are not on the OTDL for overtime work, before they can schedule PTF's for any overtime. This is in conflict with the National Agreement, Management asserts.

Article 8 does not provide that PTF's are to be a part of an OTDL, the Service notes. Even though PTF's are not allowed to have their names placed on an OTDL, the Union insists that they be included within the pecking order for calling overtime. That restricts the availability of the very employees that were intended to be available in such circumstances, the Service asserts. Furthermore, Article 8.5.G. of the National Agreement provides that OTDL employees can be by-passed when penalty overtime would be required, the Service notes, but the overtime pecking order forecloses this action.

The Service contends that the overtime pecking order is costly. Thousands of unnecessary funds are wasted on penalty overtime as a result of following the pecking order, that otherwise would be saved if PTF's could be utilized more freely. When compared to overtime usage elsewhere in the Dakotas District, this demonstrates an unreasonable burden, Management states.

In support of its several arguments, the Service relies on the following arbitration decisions:

M8-W-0027	Mittenthal	November 26, 1980
N1C-1J-C 15443	Dennis	April 22, 1985
H1C-4K-C 27344	Zumas	November 21, 1985

The Position of the Union:

The Union argues that a pecking order for overtime that includes PTF's is not in conflict or inconsistent with the National Agreement. Nothing in the National Agreement proscribes the development of a pecking order for overtime, the Union says. Additionally, because an overtime pecking order is not specifically listed among the 22 items in Article 30, it may still be a subject in a LMOU, the Union asserts. The items listed in Article 30 are mandatory items of bargaining, but others may be dealt with if the parties agree, the Union says. Finally, Management has not provided acceptable evidence that the continuation of an overtime pecking order in the LMOU creates an unreasonable burden, the Union asserts. Its evidence on this point is skewed and inconclusive, all that it demonstrates is that overtime was paid, but credible comparisons are not provided indicating what alternative costs would be. Moreover, comparisons with other facilities in the District are imperfect because of the differences in operations and sizes of the facilities.

In support of its several arguments, the Union relies on the following arbitration decisions:

M8-W-0027	Mittenthal	November 26, 1980
N8-W-0406	Mittenthal	September 21, 1981
S0C-3N-I 900063	Bentz	June 23, 1992
S0C-3U-I 900079	Jedel	May 19, 1992
N0C-1J-T 90043	Kelly	June 1, 1992
N0C-1F-I 90018	Shea	July 7, 1992
S0C-3W-I 900030	Jedel	July 10, 1992
C0C-4A-I 99054	Fletcher	July 24, 1992
N0C-1T-I 90055	Jacobs	July 27, 1992
NDC-1K-I 90037	Sirefman	July 30, 1992
S0C-3B-900016	Bentz	January 25, 1993
H0C-NA-C 3	Mittenthal	July 12, 1993
Cincinnati Impasse	Sickles	July 20, 1993
W0C-5R-I 90152	Abernathy	March 3, 1993
W0C-5M-I 90114	Bridgewater	January 28, 1994
I94C-1I-I 96054806	Benn	April 15, 1997
I94C-1I-I 96044002	Fletcher	July 25, 1997
I94C-1I-I 96054921	Benn	July 31, 1997

DISCUSSION

The Postal Service contends that there exist three basic reasons why the overtime pecking order it agreed to for the Fargo facility, first in 1992, revised in 1993, and retained in the 1994 - LMOU, should now be eliminated. None have been found to be persuasive in this record.

Looking first at the Service's contention that an overtime pecking order is not one of the 22 items addressed in Article 30, therefore it need not be continued. The Arbitrator notes that this issue has been answered by Arbitrator Mittenthal in National Award N8N-5L-C 10418. In that case, Arbitrator Mittenthal noted the first question before him to be:

> Whether this Helena [Montana] clause [in the LMOU] is rendered unenforceable by reason of the fact that its subject matter is outside the scope of the 22 items enumerated for local negotiations in Article XXX-B.

After discussing previous National negotiations on the development of Article 30, Arbitrator Mittenthal noted that the concern being addressed by the parties was not the subject matter of the LMOU but instead it was the number of impasse disputes that developed in 1971 that concerned the parties. He acknowledged that Article 30 limited the subjects on which the parties were required to negotiate, but concluded that this was done to limit the number of potential impasses in the future. On this point, Arbitrator Mittenthal made a clear distinction on required items to be bargained over and permitted items that may be bargained over, concluding that under the limited objective of Article 30:

> [It] would take clear contract language to prohibit the local parties from negotiating a clause on a subject outside the 22 listed items. No such language, no such prohibition, can be found in XXX-B. The Postal Service believes this provision describes what the local parties <u>are authorized</u> to negotiate. But it is equally plausible to argue, as NALC does, that this provision describes what the local parties <u>are required</u> to negotiate. This interpretation is , I think, more consistent with the parties' history as well as collective bargaining reality. The rule of construction noted earlier, when applied to this view of XXX-B, bound indicate only that the local parties <u>are not required</u> to negotiate on any subject outside the 22 listed items. Thus, the local parties are free if they wish to expand their negotiating agenda to include subjects nowhere mentioned in XXX-B. That is exactly what happened in Helena when the local parties agreed to a re-labeling clause in the 1975 negotiations. They had the authority to negotiate such a clause.
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> (Underlining in the original. Footnotes omitted.)

Arbitrator Mittenthal's decision in N8-W-0406 (H8N-5L-C 10418) leaves no doubt that while the parties are not required to negotiate on items outside the 22 listed in Article 30, they may do so if they choose to, and if they do so, the clause is valid. The Postal Service has not offered a single citation that would suggest that Mittenthal's decision is not the applicable standard required to be applied.

Accordingly, it will be embraced and applied here – the overtime pecking order of the Fargo LMOU is not invalid, *per se*, because it is outside the scope of the 22 items listed in Article 30 as mandatory subjects of bargaining.

The second contention of the Service, to be dealt with here, is its argument that retention of the overtime pecking order is unreasonable and burdensome. A number of arbitrators have discussed in some detail the burden that is placed on the Postal Service in satisfying test of "unreasonable and burdensome." These decisions need not be visited in any great detail here, because in this matter the Postal Service has not met even the most lenient standard that could be applied to "unreasonable and burdensome." While Management has submitted some evidence on overtime usage, it has not demonstrated how this overtime usage would have been changed if the pecking order was not in place. Without data on this point the Arbitrator, from just study of a chart on overtime usage, is unable to make any informed judgments that the pecking order is indeed burdensome.[3]

The data that was offered does make some comparisons between overtime payments at Fargo and those in other facilities in the District. This is not overly helpful, for a variety of reasons. The compared facilities employee different numbers of employees, their mail volumes are different, and they may also have better scheduling, dispatch times, etc., that would affect overtime in general. Simply because other facilities do not operate under an overtime pecking order and their total overtime expenditures is less than Fargo is not evidence that the

[3] It should be pointed out that even if it where demonstrated that it would be less costly to operate the facility without an overtime pecking order, this does not mean that it

overtime pecking order in the Fargo facility is an unreasonable burden. Something more is required. Something more has not been offered in this record.

The Service's "inconflict and inconsistent" argument is considered next. This argument is puzzling in a number of areas. On several occasions the Service emphasizes that PTF's are not entitled to sign up on an OTDL, therefore they should not be included within an overtime pecking order. It also notes that Management is not obligated to use employees off the OTDL at penalty overtime if other qualified employees are available. It also says that a pecking order for overtime infringes upon Management's right to direct the workforce. To the Arbitrator this combination of contentions evinces a basic misconception as to the fundamental purpose of the OTDL.

In National Award M8-W-0027, Arbitrator Mittenthal reviewed the negotiating development of Article 8, Section 5. In that decision Arbitrator Mittenthal concluded that:

> [The] real purpose of this contract clause was to restrict mandatory overtime for full-time regulars. Article VIII, Section 5 had nothing to do with any order of preference between full-time regulars and part-time flexibles. Article VII, Section 5 had nothing to do with any order of preference between full-time regulars and part-time flexibles.
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> (Underlining in Original.)

Thus, contract provisions limiting OTDL to FTR's provides that category of employees with an entitlement to avoid mandatory overtime when they wish to do so, something that is not available to PTF's, TE's or Casuals. Procedures and

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is automatically to be concluded that the provision is burdensome. Only that without this data an informed decision cannot be made.

priorities for calling overtime between full-time employees and the supplemental workforce, the real issue under consideration here, are Article 3 issues, as noted in a strikingly similar case decided by Arbitrator Benn. In his award in I94C-1I-I 96054921 Arbitrator Benn concluded:

> My Award in I94C-1I-I 96054806 and awards discussed in detail therein take care of the issue on the merits:
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> > ... [T]here is nothing in the National Agreement, particularly Article 8.5, which *specifically* states that PTF's cannot be placed in the pecking order for overtime assignments. Therefore, by agreeing to place PTF's in the pecking order for such assignments, the parties have not agreed at the local level to something that is "in conflict" or "inconsistent" with or are provisions that "vary " the terms of the National Agreement.
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> > ...
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> With respect to the Service's position that "... to give priority assignment to the list precludes management from utilizing the supplemental workforce as well as part-time flexible employees in lieu of the list" ... that argument has also been considered and disposed of in I94C-1I-I 96054806 and the awards cited:
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> > Therefore the Service's position is really an Article 3 argument – *i.e.,* that Management has the managerial prerogative to "direct" and "assign" employees under Article 3.A. and B – and the LMOU language restricts that managerial prerogative.
> >
> > But nothing in Article 3 says Management cannot agree to limit some of its managerial discretion. The only limitation is that found in Article 30 – that whatever limitation there is cannot conflict or be inconsistent with the terms of the National Agreement. A very similar argument to the present argument made by the Service was rejected in *H8N-5L-C 10418* (Mittenthal, 1981) at 8-9"
> >
> > > The contract language (Article 3) grants the Postal Service an "exclusive right" to "direct" the work force and "assign"

> work. ... Neither party has cited any portion of the National Agreement which would limit that discretion in relation to the facts of this case. ...
>
> * * *
>
> The difficulty with this argument is that it assumes Helena Management had no "right" to agree to such a clause. This is not true. One who holds an "exclusive right" has a wide variety of options. Thus, Helena Management had many alternatives with respect to the assignment of the disputed work. ...
>
> In short the "exclusive" right in Article III did not prevent Helena Management from contracting with the Local NALC Branch to limit the assignment of particular work to particular employees. That was simply one of the options available to it. Because this Helena clause was hence within Management's powers, it can hardly be considered "inconsistent or in conflict with" Article III rights. That being so, this local Management was bound by this clause. ...

Therefore, it is not inconsistent or in conflict with the National Agreement to have LMOU language which has PTF's and casuals in a pecking order for overtime assignments.

This Arbitrator in this case reaches the same conclusion. In doing so this Arbitrator is cognizant of the reliance the Postal Service placed on Arbitrator Dennis' conclusions in N1C-IJ-C 15443 - it was mentioned in local negotiations, emphasized in Management's letter submitted the matter to impasse arbitration, and argued extensively in the arbitration hearing. Arbitrator Dennis' award is not persuasive because, *inter alia*, there is no indication that it considered Arbitrator Mittenthal's National Award in H8N-5L-C 10418 that concluded that there is no

conflict with the National Agreement when local Management agrees to limit one of its managerial rights. Furthermore, the plethora of awards submitted by the Union disclose that several deal with situations where the local parties have provided a pecking order for calling overtime. Finally, Arbitrator Dennis was dealing with a grievance, and not an impasse arbitration.

Accordingly, upon consideration of the entire record, the Arbitrator concludes that an award favorable to the Union is required.

A W A R D

The overtime pecking order provided in the Fargo LMOU is not inconsistent and in conflict with the National Agreement. The Service has not established with credible evidence that the overtime pecking order that uses OTDL employees before part-time and supplemental employees creates an unreasonable burden on Management. The existing LMOU, that includes an overtime pecking order will be retained, as provided in Article 30 of the National Agreement.

John C. FLETCHER, Arbitrator

Mount Prospect, Illinois - September 3, 1999