REGULAR ARBITRATION PANEL

In the Matter of the Arbitration	( )	Grievant: Class Action
between	( )	Post Office: Des Moines P&DC
UNITED STATES POSTAL SERVICE	( )	USPS Case No: E98C-1E-C 99259531 APWU Case No:779915441
and	( )	
AMERICAN POSTAL WORKERS UNION, AFL-CIO	( )	

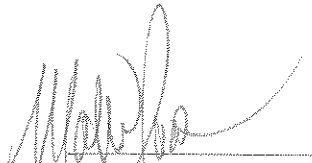
BEFORE: MARK W. SUARDI, ARBITRATOR

APPEARANCES:

For the U.S. Postal Service:	Janet S. Ades, Labor Relations Specialist
For the Union:	Carl Casillas, National Business Agent
Place of Hearing:	Des Moines, Iowa P&DC
Date of Hearing:	September 19, 2003
Date of Award:	October 1, 2003
Relevant Contract Provision:	Article 11
Contract Year:	1998-2000
Type of Grievance:	Contract

Award Summary:

The grievance is sustained per the text of this award. SO ORDERED.



MARK W. SUARDI, ARBITRATOR

ISSUE

Did Management violate the National Agreement in the manner in which it scheduled for the Memorial Day holiday in 1999? If so, what shall the remedy be?

BACKGROUND

This is a Class Action grievance filed on behalf of all Full-Time Regular (FTR) Tour 3 FSM clerks who were forced to work during the 1999 Memorial Day holiday schedule (Jt. 4) at the Des Moines, Iowa P&DC. The grievance also seeks relief for those Part-Time Flexibles (PTF) clerks who could have been maximized up to 12 hours during that weekend, but were not.

Prior to the holiday weekend, Management estimated a need for thirty-six FSM qualified and key qualified employees to work on each day of the weekend, that is, on Saturday, May 29, 1999, Sunday, May 30, 1999 and Monday, May 31, 1999 (Jt. 13). One employee volunteered to work their day off on Sunday. Two employees volunteered to work on Monday (one on their day off, the other on their holiday).

When the holiday work schedule was prepared several employees were listed as being forced to work their day off or their designated holiday (Jt. 4). In advance of the work itself, Tour 3 Union Steward Bostwick approached MDO Corwin to discuss the schedule. Steward Bostwick requested that FSM qualified PTFs from Tour 1 be brought in early or, alternatively, that various Tour 1 and Tour 3 PTFs be used for manual sortation, so that the FTR employees could avoid being forced. The Union contended that scheduling the PTFs could eliminate the need to call in the regular

employees on each of the three days during the Memorial Day weekend.

Management disagreed. Eleven FTRs were forced on Saturday, four on Sunday and five on Monday for a total of 159.86 forced hours (Jt. 5). Several Tour 3 PTFs worked overtime on each of the days of the weekend (PS 2). In its Step 2 Decision, Management stated that it does not schedule PTFs in advance to work more than eight (8) hours on a holiday. The Step 2 Decision also stated that scheduling employees for up to twelve (12) hours would be neither reasonable nor efficient. Management also cited the lack of uniformity in training among PTFs in all areas, the likelihood of leaving other tours short of PTFs, and the inability to predict the volume of mail during a holiday weekend. There was also an issue of whether maximizing the PTFs on overtime would have reduced their availability for staffing after the holiday weekend.

The Union appealed Management's Step 2 Decision to Step 3, where the grievance was again denied. Thereafter, the grievance proceeded to arbitration. An arbitration hearing on the grievance was held at the Des Moines, Iowa P&DC on September 19, 2003. At that time, each side submitted its respective case through sworn testimony and various exhibits. At the conclusion of the hearing each side offered a capable argument, with accompanying authorities.

UNION CONTENTIONS

Article 11.6.B is clear and unambiguous. The regular workforce is to be spared from performing work on a holiday or a day designated as their holiday. To accomplish this, Management is obligated to utilize all casuals and PTFs to the

maximum extent possible, even if the payment of overtime is required.

Throughout the grievance procedure, Management has claimed it was not obligated to schedule PTFs in excess of eight hours. This position is contrary to the weight of arbitrable authority, which recognizes the use of PTFs on overtime to meet Management's service commitment.

PTFs from other sections of Tour 1, including qualified FSM and automation clerks, could have been brought in early. They could have helped on the machines or assisted with manual sortation on the 150,000 to 180,000 pieces referenced at the hearing. Also, Tour 3 PTFs could have worked longer. But Management ignored of all these possibilities, and it never raised operational needs when defending the grievance. Management's vague reference to efficiency in the Step 2 Decision is no substitute for actual proof of operational need.

Even though some PTFs worked overtime during the holiday weekend, the Union's complaint turns on scheduling. On that point, the parties recognize that work of up to twelve (12) hours in a service day may occur. Further, in his discussions with MDO Corwin, Steward Bostwick gave viable examples of how the supplemental workforce could have been utilized. Management set an arbitrary standard when it refused to consider these suggestions.

The grievance should be sustained.

POSTAL SERVICE CONTENTIONS

Management posted its needs for the 1999 Memorial Day weekend well in advance. In keeping with the Local Memorandum of Understanding (LMOU), MDOs and stewards had a chance to discuss these needs. PTFs *were* used on overtime throughout the holiday weekend. Some FTRs *were* spared following discussions. There was no contract violation.

Between 1998 and 1999 an additional FSM machine was added. Bringing in automation clerks to manually sort the mail would have been inefficient. It would have been equally inefficient to bring in Tour 1 PTFs early. The nature of the FSM operation requires a specific number of qualified keyers, two sweeps and a relatively fixed maintenance window, all making the use of unqualified clerks inadvisable. The timing of access to the FSM machines, even by qualified employees, was also a problem. Supervisor Oglesbee credibly described these types of issues.

Scheduling overtime to the maximum extent possible does not equate with guaranteed overtime, much less penalty overtime. Management reserves the right under Article 3 to determine the needs and efficiency of its operations. The goal is to avoid a service failure where mail is not cleared, as has occurred in Des Moines in the past. And contrary to the Union's view, Memorial Day mail volumes are heavy. They impact the entire State of Iowa.

PTFs do not have a regular schedule. They can be scheduled in a flexible manner. Moreover, the LMOU shows separate and distinct scheduling by tour. To the

point, the Tour 1 employees had already worked one day of the holiday at the beginning of the weekend, leaving them unavailable for weekend scheduling on Monday.

The grievance should be denied.

DISCUSSION

The question in this case turns not so much on *what* happened over the 1999 Memorial Day weekend, as *why*. As a threshold matter, the Arbitrator is convinced that the schedule itself was prepared in due course, as other schedules had been prepared and discussed in the past. Supervisor Oglesbee testified quite credibly as to her participation in the process, as did Steward Bostwick. The Arbitrator has no reason to doubt the veracity of this testimony, nor Steward Bostwick's observation that, when he spoke to MDO Corwin, the MDO took the position later articulated in Management's denials at Step 2, Step 3 and in arbitration.

As the Union argues, Management's steadfast position is that it has no obligation to schedule PTFs in excess of eight hours during a holiday weekend. This begs the ultimate question, however. The question is whether Management must *consider* the use of PTFs in excess of eight hours for scheduling purposes. The Arbitrator believes it must. This conclusion derives not only by necessary implication from the language of Article 11.6.B, but also from Item 13, Section C of the parties' LMOU.

Under Item 13C, *volunteers* other than relief and pool employees are not to be scheduled for holiday work on other than their scheduled tour. Markedly absent from this language is the status of *non-volunteers,* that is, casuals and PTFs already slated for work and arguably available for either cross-tour overtime or overtime within their own tour. The point is that neither the National Agreement nor the LMOU express an intention to totally exclude "outside the tour" employees from consideration for holiday manning purposes. And, so far as appears, on at least one other occasion in Des Moines PTFs from Tours 1 and 3 were scheduled outside their tour to assist on Tour 2 (Step 3 Appeal).

The Arbitrator agrees that holiday scheduling is as much an art as a science. It depends in large part on an educated guess. Hindsight and surmise as to how things might have been done better will not sustain a Union grievance. As the cited cases clearly indicate, managers are not imbued with a telepathic power telling them whether to overschedule or underschedule employees. Nor can they readily predict whether mail volume will be up or down on a particular weekend. Each holiday is different and, borrowing from Arbitrator Sherman, "judgment is fallible." Case No. S4C-3D-C 34521 at p. 6.

Historical staffing may be a good starting point for a scheduling analysis, but it is not the ending point. A reasonable staffing decision should also consider operational changes that occur from one year to the next. In the present case, the complement of PTFs at the Des Moines P&DC was greatly enhanced from 1998 to

1999. The proffered seniority roster makes this quite clear (Jt. 10). However, there is no evidence to indicate this factor was taken into account at the critical point in time, i.e. when the schedule was being proposed and discussed. In fact, the more persuasive evidence is that this factor was either ignored or intentionally disregarded (i.e. "PTFs have never been scheduled in advance. . ." [Step 2 Decision]).

It is true that ELM Section 432.32 does not *mandate* the use of the supplemental workforce up to twelve hours. As written, §432.32 acts as a prohibition against excess scheduling, and that alone. Similarly, the proffered Step 4 decisions are not so clear as to overcome Management's scheduling flexibility allowed under Article 3. The phrase "where operational circumstances permit" (Un. 2) permeates the cited awards and will always be a crucial factor when deciding whether particular vacation scheduling was appropriate.

By the same token, where an original schedule reveals the need to force FTRs to work, Management must be prepared to later defend the extent of its consideration of the supplemental workforce. Accord, see Arbitrator Tranen in Case No. D98C-1D-C 01014824/17RDD 2000 at p. 9. In this endeavor, Management's claim of operational need may very well be justified and upheld. In this case, however, the details of Management's operational needs were not disclosed until arbitration. Throughout the lower grievance steps Management stood fast on its claim that it had never advance-scheduled PTFs to work more than eight hours. Management also relied on its claim that scheduling PTFs up to twelve hours was not required. Similar to the cited case

decided by Arbitrator Goldstein, these claims, even if true, are not enough to overcome a Union charge that Article 11.6.B has been violated:

> After the Postal Service schedule(s) all the casuals and PTFs for a holiday, and it discovers that full-time regulars are still needed, then I hold, in each individual case, local Management must consider scheduling the PTFs for overtime in order to spare as many full-time regulars as possible.
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> This "local practice" (not to schedule out of tour or out of section for PTFs and casuals) cannot override the implications of Article 11.6.B in its requirement that overtime should be considered at least when the holiday schedules are being put together. Otherwise, what application can the wording and intent of that specific provision of Article 11 be deemed to mean, I stress Case No. I94C-1I-C 97052028/00/028(a) at p. 26 and 27.

In the Arbitrator's opinion, the Union has a proven a violation of Article 11.6.B.

The Arbitrator enters the remedy phase of the case by first noting the general rule that contractual damages are intended to put the non-breaching party in as good a position as possible assuming the contract had been performed. Applied here, the FTR employees who were forced to work obviously cannot recoup their leisure time. Recognizing this fact, other arbitrators have applied the parties' October 19, 1988 MOU and have compensated the affected FTRs by awarding them an additional fifty percent (50%) for the hours they worked on the days they were forced. The Arbitrator finds this agreed-upon remedy a proper measure of the damage incurred. As indicated above, there were 159.86 hours of forced work during the weekend in

dispute. The affected FTRs will be compensated based on this figure.

The damages incurred by the PTFs who were not maximized is not so easily ascertained. As the name suggests, PTFs work flexible hours "as assigned by the Employer during the course of a service week." Article 7.A.2. There is no guarantee or fixed number of worked hours to which these employees are entitled.

In the cases cited by the Union and decided by Arbitrator Larney (Case No. I94C-1I-C 97033648) and Arbitrator Kessler (Case No. I98C-1I-C 99287721) Management admitted its improper scheduling of FTR employees, thus giving rise to a claim for entitlement to compensation by the PTFs. While Management in both cases argued that the PTFs were not entitled to anything in the way of compensation, both arbitrators looked for guidance to the parties' October 19, 1988 MOU. Each arbitrator found that Paragraph 2 of the MOU permitted a compensatory award based on the PTFs' lost work opportunities.

In this Arbitrator's opinion, the above-cited awards correctly stand for the proposition that even though there is no contractual guarantee on the number of hours PTFs will work, and even though the "pecking order" is adhered to, an admitted (or here, proven) failure to utilize PTFs to the "maximum extent possible" will permit a compensatory remedy, one which may, if appropriate, include the payment of penalty overtime.

When actually fashioning a remedy, arbitrators should be aware that the same factors which cause differences in holiday scheduling from one location to another and

from one year to the next could also have an impact on lost work opportunities. Unlike the PTFs in Arbitrator Larney's case, who "were scheduled to work only eight (8) hours and no more," the PTFs in Des Moines worked a variety of hours over the Memorial Day weekend. Some Tour 1 and Tour 3 PTFs worked overtime on Saturday and Sunday. Others worked an eight (8) hour shift or less. And, as Management points out, timing alone may have pushed the Tour 1 employees outside the holiday window and beyond the scope of a remedy relative to Monday, May 31.

Under these circumstances, the record is in an insufficient state for the Arbitrator to determine who, among the PTF complement, should have been maximized and in what manner. These employees will not be denied a remedy on this account however, since the *fact* of damage has been established. The proper approach is to remand this phase of the case to the parties to permit them to determine the identity of the affected PTFs and to decide on the proper amount of compensation to be awarded between and among those persons, provided however, that the maximum amount of compensation shall not exceed 159.86 hours of straight time or overtime in total.

AWARD

The grievance is sustained. The Postal Service is ordered to pay those full-time regular employees who were forced to work during the 1999 Memorial Day holiday an additional fifty (50%) percent for the hours that they worked during that weekend, not to exceed 159.86 hours. In addition, the case is remanded to the parties to permit

them to identify those PTFs who were not maximized during the holiday weekend and to compensate the affected PTFs, whether at straight time or overtime rates as applicable, up to a total of 159.86 hours. SO ORDERED.

Signed in the County of St. Louis this 1st day of October, 2003.

MARK W. SUARDI, ARBITRATOR