REGULAR ARBITRATION PANEL

IN THE MATTER OF THE ARBITRATION

BETWEEN

EMPLOYER
UNITED STATES POSTAL SERVICE

AND

UNION
AMERICAN POSTAL WORKERS UNION, AFL-CIO

GRIEVANT: CLASS ACTION

POST OFFICE: DES MOINES, IA GMF

CASE NO: I94C-1I-C 97021338

BEFORE: GEORGE EDWARD LARNEY

APPEARANCES:

FOR THE POSTAL SERVICE:	MARCIA GRANT Labor Relations Specialist
FOR THE UNION:	LANCE A. COLES President Des Moines IA Area Local
PLACE OF HEARING:	1165 Second Avenue Des Moines, IA
DATE OF HEARING:	DECEMBER 3, 1999
DATE OF AWARD:	DECEMBER 7, 1999
CONTRACT YEAR:	1994-1998
TYPE OF GRIEVANCE:	Contract

AWARD SUMMARY

Based on the rationale set forth in the preceding Opinion Section, the Arbitrator finds the Postal Service committed no violation of any applicable provision of the National Agreement (Jt. Ex. 1), the LMOU (Jt. Ex. 3) or applicable Settlement Agreements by the manner in which it administered the make-up overtime opportunity in the Outgoing Mails Section on September 17, 1996. Accordingly, the Arbitrator rules to deny the subject grievance in its entirety.

GRIEVANCE DENIED.

GEORGE EDWARD LARNEY
Arbitrator

WITNESSES: (in order of respective appearance)

FOR THE EMPLOYER

JANET PLUMB
Supervisor, Tour 3

LEE CORBIN
Supervisor, Distribution Operations
Flat Sorter Area, Tour 3 &
Former LAMPS Team Member

FOR THE UNION

RON KREBS
Distribution Clerk &
Union Steward and
Former LAMPS Team Member

ISSUE

At the hearing, the Parties stipulated that the following issue is properly before the Arbitrator for resolution on the merits:

> Did the Postal Service violate the 1994-98 National Collective Bargaining Agreement (Jt. Ex. 1), as well as, applicable provisions of the Local Memorandum of Understanding (LMOU-Jt. Ex. 3), Letters of Agreement (Jt. Exs. 4 & 5), and the October 20, 1988 LAMPS Settlement Agreement (Un. Ex. 2), by the manner in which it administered the make-up overtime opportunity in the Outgoing Mails Section on September 17, 1996?
>
> If so, what shall be the proper remedy?

RELEVANT DOCUMENTATION

I. APPLICABLE CONTRACT PROVISIONS (Jt. Ex. 1)

- §§ 3, 8, 15, 19, 30
- Article 8 Memorandum of Understanding

II. APPLICABLE LOCAL MEMORANDUM OF UNDERSTANDING (LMOU) PROVISIONS (Jt. Ex. 3)

- Item 14 - Overtime
- Item 18 - Definition of a Section

III. LETTERS OF AGREEMENT (Jt. Exs. 4 & 5)

- "Filbey Letter" dated January 13, 1975 (Jt. Ex. 4)
- Letter dated April 16, 1985, Paragraph C (Jt. Ex. 5)

IV. LAMPS SETTLEMENT AGREEMENT APPLICABLE TO THE DES MOINES, IA GMF DATED OCTOBER 20, 1988 (Un. Ex. 2)

BACKGROUND

On Tuesday, September 17, 1996, Management determined to call "make-up" overtime to be worked at the end of Tour 3, utilizing five (5) employees from three (3) different Sections, specifically, MPLSM Section, MPFSM Section, and OCR/BCS/DBCS (Automation) Section, to process mail in the Outgoing Mails Section. It was explained in testimony that make-up overtime arises as a result of various circumstances that occur which cause an employee who has volunteered for overtime work by signing his/her name on the Overtime Desired List (OTDL or ODL) to be bypassed for an overtime opportunity when their name was next up, by way of rotation of names on the OTDL list, to work overtime.

The concept of "make-up overtime," that is, giving a bypassed employee an opportunity to recoup the hours of overtime he/she would have been entitled to work had it not been for the fact that his/her name was improperly passed over, for whatever the reason, when they were next up on the list to work the overtime, was addressed by the Parties at the National level nearly twenty-five (25) years ago in a letter setting forth the terms of an agreement that settled Arbitration Case No. AB-N-2476. This letter (Jt. Ex. 4), commonly known by the Parties as the "Filbey Letter" after Francis S. Filbey, the then incumbent General President of the Postal Workers Union, provided a standard remedy for employees on the OTDL that had been passed over to work an overtime opportunity or assignment relative to two (2) different situations, to wit: (a) if the bypass occurred as a result of another employee on the OTDL being selected out of rotation to perform the overtime work, then the Postal Service had a period of ninety (90) days from the date the bypass was discovered to provide the aggrieved employee a "similar make-up overtime opportunity for which [said employee possesses] the necessary skills." If no such opportunity presented itself in the subject ninety (90) day period, the remedy then is to compensate the aggrieved employee at the overtime rate equal to the period of time involved in the overtime opportunity missed as a result of the improper bypass; and (b) if the improper bypass resulted by the missed overtime opportunity being worked by an employee **not** on the OTDL list, the remedy then is to compensate the aggrieved employee at the overtime rate for the number of hours equal to those involved in the missed overtime opportunity. The letter also provided that said remedial action (referenced to as "principles") would apply to all timely filed future grievances filed pursuant to the 1973 National Agreement **unless** superseded by a future agreement between the Parties (USPS & APWU), **or** by an arbitrator's award that the Parties agree is dispositive of the issue.

At the subject December 3, 1999 hearing before this Arbitrator, the Parties concurred that the "principles" embodied in the Filbey Letter are still applicable today and have relevance to the instant grievance. Additionally, it was noted in testimony, that supervisors on each of the three (3) tours are provided with a current list of employees' names who are entitled, as a result of a grievance settlement, to be offered make-up overtime. Such make-up overtime lists also specify, among other information, the number of make-up overtime hours the identified employees are entitled to work, the overtime rate that is applicable, to wit, either the regular overtime rate or, penalty overtime rate and the deadline date by which the ninety (90) day window period expires meaning, the absolute last date the Postal Service has to provide the employee with a make-up overtime opportunity before it is obligated to compensate the employee at the applicable overtime rate for the number of overtime hours he/she was deprived of working as a result of having been improperly bypassed on the OTDL list by another employee on the OTDL list.[1]

The record evidence reflects that ten (10) years after the Filbey Letter came into existence, the Parties entered into another Letter of Agreement, this one dated April 16, 1985 pertaining to a number of overtime related issues (Jt. Ex. 5). Most pertinent to the subject issue of this arbitration was the agreement set forth in Paragraph C of the letter which set forth the following restriction in the administration of OTDL lists:

> The parties agree that employees on "sectional" overtime desired lists as identified through Article 30 [of the National Agreement] may not be used in other "sections" to avoid the payment of penalty pay.

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[1] The Employer submitted into evidence the most current Make-up Overtime List bearing date of November 23, 1999 applicable to Tour 3 (Emp. Ex. 2). This list shows that as a result of eight (8) grievance settlements, 29 employees were entitled to work make-up overtime and, of this total, five (5) employees had been improperly bypassed more than one (1) time and were entitled to work make-up overtime as a result of more than one grievance settlement. The list reflected that the vast majority of employees had until December 20, 1999 to be given an opportunity by the Postal Service to work their make-up overtime while a remaining five (5) employees had three (3) other deadline dates of November 25, 26 and 29, 1999. Notwithstanding the fact this arbitration hearing occurred subsequent to these November deadline dates, there was no information recorded on the copy of this makeup overtime list regarding whether or not the employees actually were offered and worked the overtime due them.

In and around the mid to late 1980s, the Postal Service and the Postal Workers entered into a working relationship known as Labor and Management Partners referenced by the acronym LAMPS. The purpose of LAMPS was to interject a mechanism between Step 1 and Step 2 of the Contractual grievance procedure as a means of arriving at settlement agreements that would resolve numerous separately filed but related grievances simultaneously. Any settlements reached in LAMPS were considered to be Step 2 settlements. At the Des Moines, Iowa GMF, a LAMPS team was formed with then MDO Lee Corbin representing Management and then Craft Director, Ron Krebs, representing the Union. According to Corbin, at the time the LAMPS team was formed, the GMF had between 600 and 900 backlogged grievances, the majority of which involved overtime related issues. Both Corbin and Krebs testified that a settlement was reached in the LAMPS procedure regarding the issue of the distribution of overtime, the resolution of which was to bring about a more fair and equitable distribution of overtime opportunities by establishing a formalized sequential order, commonly referenced as a "pecking order," to follow in offering overtime opportunities to employees, beginning with those who voluntarily put themselves on the OTDL list. In recognition that overtime is to be assigned by section by tour as the very first priority, the LAMPS team established the following "pecking order" to be followed in assigning scheduled overtime:

1. Volunteers (Overtime Desired List) in the section and tour requiring the overtime.

2. Volunteers (Overtime Desired List) on the tour requiring the overtime, other sections, with the skills required.

3. Volunteers (Overtime Desired List), in the same section, on other tours, who are on their regularly scheduled day, up to four (4) hours. If you see you have completed the task sooner than expected, you can release those volunteers at that time. In other words, they are not guaranteed any particular amount of overtime, only as much as their skills are needed up to four (4) hours.

4. Volunteers (Overtime Desired List), in other sections, on other tours, with the skills required, who are on their regularly scheduled day, up to four (4) hours. If you see you have completed the task sooner than expected, you can release those volunteers at that time. In other words, they are not guaranteed any particular amount of overtime, only as much as their skills are needed up to four (4) hours.

5. Non-volunteers in the section and tour requiring the overtime on their non-scheduled day, by inverse seniority with the necessary skills.

NOTE: All overtime is to be administered on a rotating basis.

(Un. Ex. 2)[2]

The Parties concur that since the establishment of the above "pecking order" as of October 20, 1988, the date the settlement agreement was reached, this has been the procedure in assigning overtime at the Des Moines GMF.[3]

In conjunction with the Filbey Letter (Jt. Ex. 4), the April 16, 1985 Letter of Agreement (Jt. Ex. 5) and the October 20, 1988 LAMPS Settlement Agreement (Un. Ex. 2), the Parties at the Des Moines GMF have negotiated a Local Memorandum of Understanding (LMOU) pursuant to the provisions set forth in Article 30 of the National Agreement. The most current LMOU and the one in force along with the 1994-98 National Agreement (Jt. Ex. 1) sets forth provisions related to Item 14, defined in Article 30 as follows:

14. Whether "Overtime Desired" lists in Article 8 shall be by section and/or tour.

In pertinent part, Item 14 of the LMOU provides for the following:

Section A.

Management shall two weeks prior to the start of each calendar quarter establish a list of full-time regular employees desiring to work overtime for that quarter. *** The overtime desired list will be closed at the end of the two week period. *** This voluntary overtime list shall be established by **section, tour,** and **skills required** (Section as defined in item 18). When during this quarter, the need for overtime arises, the supervisor in the section and the tour requiring the overtime shall inform the employees in his/her section who have placed their names on this list that they shall work overtime. Opportunities to work overtime from this

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[2] The Arbitrator notes this settlement agreement was signed by Krebs and Corbin on October 20, 1988 and provided a remedy, in its first application, to a total of eight (8) employees in Pay Location 103.

[3] Corbin testified that the intent underlying this procedure was to utilize the OTDL to the maximum extent possible.

list will be selected by **skills required, by seniority, on a rotating basis.**[4]

Krebs testified that the October 20, 1988 LAMPS Settlement Agreement (Un. Ex. 2) in essence, simplified the process of distributing overtime and that a by-product of this simplification made it easier to identify those aggrieved employees who had, as a result of various reasons, been improperly by-passed for overtime opportunities and were entitled to make-up overtime pursuant to the January 13, 1975 Filbey Letter (Jt. Ex. 4).

As the Parties were unable to reach a mutually satisfactory resolution of the issue in dispute, the matter comes now before this Arbitrator for a final and binding determination.

CONTENTIONS

UNION POSITION

In the case at bar, the Union filed a written grievance contending that the September 17, 1996 make-up overtime was called out of section, that is, that employees in the LSM, FSM, and Automation Sections were assigned to work make-up overtime in the Outgoing Mails Section and that such assignment was made without utilizing any of the Tour 3 employees from the Outgoing Mails Section who were on the OTDL list to work overtime that day. The Union asserts that by assigning make-up overtime in this manner, employees regularly assigned to work in the Outgoing Mail Section who were on the OTDL list were deprived of working the overtime called for at the end of Tour 3 on September 17, 1996 and, therefore, these employees who are covered by the subject class action grievance are, in turn, entitled to work make-up overtime.

In support of its position, the Union asserts that Management is required to call overtime in accord with both Articles 8.5 and 30B (#14 and #18) of the 1994-98 National Agreement (Jt. Ex. 1) and, Items 14 and 18 of the LMOU (Jt. Ex. 3). As such, the Union argues that if there was sufficient mail volume on the night in question to call overtime in the Outgoing Mail Section, such overtime

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[4] The Arbitrator notes the provisions of Item 14 continue, setting forth a less specific "pecking order" for filling overtime opportunities than that spelled out in the October 20, 1988 LAMPS Settlement Agreement (Un. Ex. 2) when the need for filling overtime opportunities is not fully satisfied by first utilizing the employees in the section and tour for which the overtime is called.

belonged to the full-time employees on the OTDL regularly assigned to the Outgoing Mails Section. The Union further argues that if utilizing the full-time regularly assigned employees in the Outgoing Mails Section who are on the OTDL list is not sufficient to cover the amount of overtime work available and needed to be performed, Management can then supplement the shortfall in employee resources by calling out-of-section overtime from Tour 3 employees on the OTDL list. The Union contends that, in the instant case, had Management first utilized, to the maximum extent possible, employees on the OTDL list regularly assigned to work in the Outgoing Mails Section, and determined at this point that additional employees were required to work the overtime opportunities available, then Management could have satisfied this business need by utilizing out-of-section employees entitled to work make-up overtime. Thus, as a general rule of thumb, the Union maintains that if Management utilizes employees on the OTDL list in their regularly assigned section to work called overtime in their section to the maximum extent possible, then there is no restriction on Management to, in addition, call make-up overtime as a supplement to fill the excess overtime opportunities available, as long as, Management complies with the overtime provisions of both the National Agreement (Jt. Ex. 1) and the LMOU (Jt. Ex. 3).

As a remedy, the Union requests that all available employees from the Outgoing Mails Section on the OTDL list be granted four (4) hours make-up overtime consisting of two (2) hours at the regular overtime rate of pay and two (2) hours at the penalty overtime rate of pay, to be worked within ninety (90) days of the occurrence of the improper by-pass or, be compensated for same if not worked within the ninety (90) day window period plus, any other entitlements necessary to be made whole.

Based on the foregoing argument asserted, the Union requests that the subject grievance be sustained in its entirety and the requested remedy be granted.

EMPLOYER POSITION

The Employer asserts that, in accord with Article 3 of the National Agreement (Jt. Ex. 1), Management retains the right to schedule overtime consonant with applicable provisions pertaining to overtime, specifically Article 8, as well as, applicable provisions of the LMOU (Jt. Ex. 3), specifically Item 14 pertaining to the assignment of overtime. At the same time however, the Employer asserts there are no provisions in either the National Agreement (Jt. Ex. 1) or the LMOU (Jt. Ex. 3) that places any restrictions on Management rights pertaining specifically to providing and assigning employees to work make-up overtime. The Employer acknowledges that with regard to make-up overtime, it is obligated by way of the

Filbey Letter (Jt. Ex. 4) to provide employees on the OTDL list who have been improperly by-passed to work an overtime opportunity with an offered make-up overtime opportunity as a remedy for the adverse economic consequence suffered as a result of the improper by-pass, within a defined ninety (90) day period and, if no such make-up overtime opportunity presents itself within the subject ninety (90) day period, then the remedy is to compensate the by-passed employee for the number of hours involved in the missed overtime opportunity at the appropriate overtime rate of pay. The Employer asserts that in other prior cases, the Union has vigorously argued that Management is precluded from assigning employees make-up overtime opportunities under circumstances when overtime is called and, in this instant case, the Union is asserting just the opposite, that is, Management is precluded from assigning make-up overtime under circumstances when regular overtime is not called. The Employer contends that the Union is attempting to achieve two objectives in adjudicating the subject class action grievance, to wit: (1) to restrict Management's ability to manage, specifically with respect to utilizing the services of employees entitled to work make-up overtime opportunities so as to maximize efficiency as per the mandate set forth in Article 3C of the Agreement (Jt. Ex. 1), absent any Contract language in support of its position; and (2) to obtain through this arbitration what it has been unable to obtain in contract negotiations specifically, subjecting the assignment of make-up overtime opportunities to the same restrictions as those imposed on Management with respect to the assignment of regular overtime opportunities.

In the case at bar, the Employer argues that the employees who work in the LSM, FSM, and Automation Sections and were assigned to work make-up overtime in the Outgoing Mails Section following the end of Tour 3 on September 17, 1996 were entitled to work make-up overtime as a result of having been previously improperly by-passed on the OTDL and that Management complied with this obligation by providing them with the subject make-up overtime opportunity within the defined window period of ninety (90) days. The Employer submits that a make-up overtime opportunity need not be restricted exclusively to an employee's regularly assigned section and, further, that the intent of the settlement language set forth in the Filbey Letter (Jt. Ex. 4) was to provide an overtime opportunity that normally would not occur. However, as noted by Lee Corbin, such make-up overtime opportunity must be predicated on an existent need to have overtime work performed, as opposed to, simply a make work circumstance as a sole means by which to rectify the economic consequences suffered by an employee or employees as a result of an improper by-pass.

Based on the foregoing argument asserted, the Employer requests the Arbitrator to deny the subject grievance in its entirety.

OPINION

The Arbitrator is persuaded by the whole of the record evidence that the Union's position is predicated on either a belief or, a strong desire, to subject the distribution of make-up overtime to the same restrictions governing the distribution of regular overtime as set forth by the October 20, 1988 LAMPS Settlement Agreement (Un. Ex. 2). In other words, the Union seeks to have make-up overtime assigned by applying the identical "pecking order" that was established by the LAMPS Settlement Agreement (Un. Ex. 2), notwithstanding the apparently conflicting testimony proffered by one-half of the LAMPS Team membership, specifically, Lee Corbin, that the "pecking order" created by the October 20, 1988 Settlement Agreement was intended to be applicable to the distribution of regular overtime and was never intended to be applicable to the distribution and assignment of make-up overtime. Except for the Union's own expressed interpretation of all documentary evidence submitted into this record proceeding that they all pertain to overtime, which encompasses, in the Union's view, both regular overtime and make-up overtime, the Arbitrator discerns from reading all the documentary evidence together, that a distinction exists between regular overtime and make-up overtime and that this distinction was first referenced, at least with respect to this record evidence, as long ago as twenty-five (25) years with the issuance of the January 13, 1975 Filbey Letter/Agreement (Jt. Ex. 4). In fact, the Filbey Letter actually sets forth the term, "make-up overtime opportunity" in Paragraph 1(a) of the Letter. This language makes unequivocally clear that make-up overtime is a different kind of overtime as compared to regular overtime opportunities and, as such, make-up overtime was to be governed by other considerations not applicable to the distribution of regular overtime opportunities.

The Filbey Letter unlike either the LMOU (Jt. Ex. 3) or the October 20, 1988 LAMPS Settlement Agreement (Un. Ex. 2), does not address the distribution of overtime in terms of either delineated **Sections** or **Tours**. In fact, it is interesting and significant to note that the Filbey Letter addresses the sole factor of **"necessary skills"** when referencing the circumstance under which an employee would experience being by-passed to work an overtime opportunity, as well as, the benefit which is afforded the employee improperly by-passed to work a **"similar make-up overtime opportunity."** The term **"similar"** in this quoted phrase is deemed by the Arbitrator to be of utmost significance as it exempts the make-up opportunity from having to be identical to the initial overtime opportunity that was missed as a result of the improper by-pass. This exemption surely would rule out the thesis, here advanced by the Union, that, in a majority of circumstances, with but one or two exceptions, a make-up opportunity must be confined to the Section and Tour to which the affected employee is regularly assigned. The only way in which the Union's thesis here advanced would be operative, is if the

Filbey Letter had been modified by the subsequent agreements mutually arrived at in the April 16, 1985 Letter (Jt. Ex. 5) and the October 20, 1988 LAMPS Settlement Agreement (Un. Ex. 2). The Arbitrator finds that neither of these two Agreements have modified the obligations placed upon the Postal Service by the still operative Filbey Letter.

First, with respect to the April 16, 1985 Letter (Jt. Ex. 5), it is clear that, nowhere is reference made by the Parties that, any of the individual agreements set forth in the letter pertain to "make-up overtime." Even assuming arguendo that the cited Paragraph C had applicability to make-up overtime, the provision lacks relevance to the instant case as there was never any claim asserted by the Union at any time relative to the handling of the subject grievance that Management assigned the overtime in question to out-of-section employees for the purpose of avoiding the payment of penalty pay.

Second, with respect to the October 20, 1988 LAMPS Settlement Agreement (Un. Ex. 2), it is evident from the clear language on its face in capital letters that the Agreement pertains to regular overtime with no intent to cover "make-up overtime." The Arbitrator is persuaded that the introductory sentence says it all, to wit: "THE ORDER IN WHICH OVERTIME IS TO BE SCHEDULED IS AS FOLLOWS:" As reproduced elsewhere above in the preceding Background Section of this Opinion and Award, the "pecking order" established was intended solely to govern the distribution and assignment of regular overtime. Had it been intended otherwise, the Parties would have to have stated specifically that the pecking order was also applicable to "make-up" overtime as well. In that the Parties made no such explicit specification of intent, the Arbitrator has no authority to read such an intent into the Agreement but, even if he had such authority to so do, he would not because this would represent a very bad example of judicial activism anchored by a complete absence of any justification whatsoever.

The record evidence in its totality is overwhelming in demonstrating without any doubt, that "make-up overtime" is an obligation on the part of the Employer to be fulfilled and one that is **not** subject to the same constraints, limitations, or restrictions that govern the distribution and assignment of regular overtime. Until such constraints, limitations and restrictions are placed on the administration of make-up overtime, the only obligations on Postal Management in complying with the distribution and assignment of "make-up" overtime are those set forth in the Filbey Letter (Jt. Ex. 4). This means that Management is not obligated to assign make-up overtime by Section by Tour as is required when assigning regular overtime. This further means that when assigning out-of-section overtime, the section to which the employee is sent to work the make-up overtime does not have to offer any of its regularly assigned employees on the OTDL, overtime work.

Based on the foregoing analysis and discussion, the Arbitrator finds that the Employer did not violate any provisions of the 1994-98 National Agreement (Jt. Ex. 1) nor any provisions of the LMOU (Jt. Ex. 3) or any other provisions set forth in applicable Letters of Agreement (Jt. Exs. 4 and 5) by assigning out-of-section employees to work make-up overtime in the Outgoing Mails Section at the end of Tour 3 on September 17, 1996.

AWARD

Based on the rationale set forth in the preceding Opinion Section, the Arbitrator finds the Postal Service committed no violation of any applicable provision of the National Agreement (Jt. Ex. 1), the LMOU (Jt. Ex. 3) or applicable Settlement Agreements by the manner in which it administered the make-up overtime opportunity in the Outgoing Mails Section on September 17, 1996. Accordingly, the Arbitrator rules to deny the subject grievance in its entirety.

GRIEVANCE DENIED.

GEORGE EDWARD LARNEY
Arbitrator

Chicago, Illinois
December 7, 1999