

MIDWEST EXPEDITED ARBITRATION PANEL

In the Matter of Arbitration  
Between

UNITED STATES POSTAL SERVICE

and

AMERICAN POSTAL WORKERS UNION,  
Omaha Area Local #0011

Grievant: S. Ford

Post Office: Des Moines, IA

Case No: I98C-1I-C99260206

*BEFORE:* Sharon K. Imes

*APPEARANCES:*

**For the Service:** Marcia G. Grant, Labor Relations Specialist, Hawkeye District, Des Moines, IA.

**For the Union:** Bruce Clark, President, Iowa Postal Workers Union, American Postal Workers Union, Dubuque, IA.

*PLACE OF HEARING:* Des Moines, IA

*DATE OF HEARING:* January 20, 2000

*DATE OF AWARD:* January 24, 2000

*RELEVANT CONTRACT PROVISIONS:*

*CONTRACT YEAR:* November 21, 1998 - November 20, 2000

*TYPE OF GRIEVANCE:* Contract Violation

*AWARD SUMMARY:*

A review of the language contained in the Filbey letter and the language contained in Article 8, Section 5, indicates that the term "similar" does not mean "identical" but that the make-up opportunity must be "comparable" to the opportunity that was bypassed. While it is possible, under this finding, to still argue that "comparable" means the Grievant should not be offered an overtime make-up opportunity on a holiday when the bypassed opportunity did not occur on a holiday, the fact that the parties have agreed in the Filbey letter that management must

offer this opportunity within 90 days after the missed opportunity was discovered or pay the bypassed employee at the overtime rate for a period equal to missed opportunity indicates the parties intend that an employee be offered any "comparable" opportunity that occurs during that 90 day period rather than one "identical" to that which was bypassed. Consequently, as long as management has offered the Grievant a make-up opportunity like that which for which she was bypassed and the opportunity is offered in conjunction with a regular service day as is set forth in Article 8, Section 4.B., it does not violate the National Agreement.

Having reached the above conclusion, however, it cannot be concluded with certainty that management did not violate the National Agreement when it assigned the Grievant her make-up opportunity on July 4, even though management asserts that she waived her right to the make-up opportunity, since the Grievant also alleges she was improperly scheduled to work on the holiday. Without this finding, there is no way to know whether the overtime make-up opportunity was properly scheduled. Accordingly, the finding in this matter is dependent upon the finding in the grievance addressing whether the Grievant was improperly scheduled to work on July 4. If management or an arbitrator concludes that the Grievant was improperly assigned, then it must also be concluded that she was improperly offered her overtime make-up opportunity. If it is concluded that she was properly assigned, then it must also be concluded that the make-up opportunity was also properly offered.

By: Sharon K. Imes  
Sharon K. Imes, Arbitrator

***THE ISSUE:***

Did the Service violate the National Agreement by providing the Grievant a make-up opportunity on July 4, 1999? If so, what is the appropriate remedy?

***STATEMENT OF THE CASE:***

The Grievant, as part of a group of people who were granted overtime resulting from a class action grievance, was scheduled to work on July 4, 1999 and, then, offered her make-up

opportunity that day. The Grievant, believing she had been improperly scheduled to work that day, also believed she was being improperly offered her make-up opportunity and, therefore, passed up the opportunity for overtime that day and grieved the Employer's actions. It is the allegation of improperly offering the make-up opportunity that is before this arbitrator.

**RELEVANT CONTRACT PROVISIONS:**

**ARTICLE 8  
HOURS OF WORK**

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**Section 2. Work Schedules**

A. The employee's service weeks shall be a calendar week beginning at 12:01 a.m. Saturday and ending at 12 midnight the following Friday.

B. The employee's service day is the calendar day on which the majority of work is scheduled. Where the work schedule is distributed evenly over two calendar days, the service day is the calendar day on which such work schedule begins.

C. The employee's normal work week is five (5) service days, each consisting of eight (8) hours, within ten (10) consecutive hours, except as provided in Section 1 of this Article. As far as practicable the five days shall be consecutive days within the service week.

...

**Section 4. Overtime Work**

A. Overtime pay is to be paid at the rate of one and one-half (1 ½) times the basic hourly straight-time rate.

B. Overtime shall be paid to employees for work performed only after eight (8) hours on duty in any one service day or forty (40) hours in any one service week. Nothing in this Section shall be construed by the parties or any reviewing authority to deny the payment of overtime to employees for time worked outside of their regularly scheduled work week at the request of the Employer.

C. Penalty overtime pay is to be paid at the rate of two (2) times the basic hourly straight-time rate. Penalty overtime pay will not be paid for any hours worked in the month of December.

D. Penalty overtime pay will be paid to full-time regular employees for any overtime work in contravention of the restrictions in Section 5.F.

...

**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.

...

D. If the voluntary "Overtime Desired" list does not provide sufficient qualified people, qualified full-time regular employees not on the list may be required to work overtime on a rotating basis with the first opportunity assigned to the junior employee.

...

**ARTICLE 11  
HOLIDAYS**

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**Section 6. Holiday Schedule**

A. The Employer will determine the number of categories of employees needed for holiday work and a schedule shall be posted as the Tuesday preceding the service week in which the holiday falls.

**Section 2.** As many full-time and part-time regular schedule employees as can be spared will be excused from duty on a holiday or day designated as their holiday. Such employees will not be required to work on a holiday or day designated as their holiday unless all casuals and part-time flexibles are utilized to the maximum extent possible even if the payment of overtime is required, and unless all full-time and part-time regulars with the needed skills who wish to work on the holiday have been afforded an opportunity to do so.

**Section 2.** An employee scheduled to work on a holiday who does not work shall not receive holiday pay, unless such absence is based on an extreme emergency situation and is excused by the Employer.

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**ARTICLE 15  
GRIEVANCE-ARBITRATION PROCEDURE**

**Section 1. Definition**

A grievance is defined as a dispute, difference, disagreement or complaint between the parties related to wages, hours, and conditions of employment. A grievance shall include, but is not limited to, the complaint of an employee or of the Union which involves the interpretation, application of, or compliance with the provisions of this Agreement or any local Memorandum of Understanding not in conflict with this Agreement.

...

**ARTICLE 19  
HANDBOOKS AND MANUALS**

Those parts of all handbooks, manuals and published regulations of the Postal Service, that directly relate to wages, hours or working conditions, as they apply to employees covered by this Agreement, shall contain nothing that conflicts with this Agreement, and shall be continued in effect except that the Employer shall have the right to make changes that are not inconsistent with this Agreement and that are fair, reasonable and equitable. This includes, but is not limited to, the Postal Service Manual and the F-21 Timekeeper's Instructions.

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**OTHER RELEVANT DOCUMENTS:**

*Local Memorandum of Understanding*

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**ITEM 13**

**THE METHOD OF SELECTING EMPLOYEES TO WORK ON A HOLIDAY**

**Section 1. Holidays – Overtime – All A.P.W.U. Bargaining Units**

- A. Management shall, two weeks prior to the Tuesday preceding the service week in which the holiday falls, post a list of the number of employees needed and the skills required in each section as established in Item 18 to establish a list of regular employees desiring to work their non-scheduled day for overtime.
- B. Two (2) weeks prior to Tuesday preceding the service week of the holiday, Management shall post a list of the number of employees needed and the skills required in each section. The list shall remain posted for seven (7) days affording employees the opportunity to volunteer to work the holiday or designated holiday by signing the list.

At the request of the Union president, or his/her designee, the Manager, General Mail Facility, or his/her designee shall jointly review APWU holiday scheduled prior to final posting. After a holiday scheduled has been reviewed, the APWU designee will be given an opportunity to review and initial any changes to the schedule. The Union will be provided a new copy of the schedule. The holiday work list shall be posted not later than one (1) hour prior to end of tour for each respective section, the Tuesday preceding the holiday.

- C. When a section has insufficient volunteers to fill holiday needs, volunteers from other sections, possessing the necessary skills, on the same tour will be used on a senior qualified basis provided sufficient volunteers were obtained in the employees bid section.

Volunteers will not be scheduled for holiday work on other than their scheduled tour, except for relief and pool employees who provide relief coverage on different tours.

Relief and pool volunteers, who provide coverage on other tours, may be utilized on other tours if all volunteers on that tour are utilized and no one is involuntarily required to work on the tour of the relief and pool employee.

The previously agreed to format will continue to be used to solicit volunteers. For the Maintenance Craft, the agreed to format is attached as Appendix A.

- D. It will be the responsibility of employees on leave to notify their supervisor of their desire to work.
- E. For purposes of holiday scheduling, the parties agree that part-time regulars are a separate category for scheduling purposes under Article 11, Section 6 of the 1994 National Agreement.

**Section 2. Priority for Establishing Holiday Scheduling**

- 1. Casual employees.
- 2. Part-time flexible employees.

3. All regular employees who have volunteered to work on their holiday or day designed as their holiday.
4. All regular employees who have volunteered to work on what would otherwise be their non-scheduled work day.
5. All regular employees who have not volunteered to work on their holiday, day designated as their holiday or in an overtime status, by juniority.

...

*Letter dated January 13, 1975  
(Pertaining to Arbitration Case No. AB-N-2476)*

... The underlying grievance involves the proper interpretation of Article VIII, Section 5, of the 1973 National Agreement when employees represented by the American Postal Workers Union, AFL-CIO, having their names on the "Overtime Desired" list, are improperly passed over by management in the selection for overtime work assignments. Agreement was reached to settle that grievance on the following basis:

1. When, for any reason, an employee on the "Overtime Desired" list, who has the necessary skills and who is available, is improperly passed over and another employee on the list is selected for overtime work out of rotation, the following shall apply:
  - (a) An employee who was passed over shall, within ninety (90) days of the date the error is discovered, be given a similar make-up overtime opportunity for which he has the necessary skills;
  - (b) Should no similar make-up overtime opportunity present itself within ninety (90) days subsequent to the discovery of the missed opportunity, the employee who was passed over shall be compensated at the overtime rate for a period equal to the opportunity missed.
2. When, for any reason, an employee on the "Overtime Desired" list, who has the necessary skills and who is available, is improperly passed over and another employee not on the list is selected for overtime work, the employee who was passed over shall be paid for an equal number of hours at the overtime rate for the opportunity missed.

...

4. The foregoing principles are without prejudice to either party's position as to the proper interpretation of Article VIII, Section 5. They shall be applied to all timely filed and currently active grievances and to future grievances filed pursuant to the 1973 National Agreement unless they are superseded by a future agreement between the Postal Service and the APWU, or by an arbitrator's award that the parties agree is dispositive of the issue.

...

*Memorandum of Understanding  
Between  
The United States Postal Service  
And  
The American Postal Workers Union, AFL-CIO  
And*

...

Holiday Work

The parties agree that the Employer may not refuse to comply with the holiday scheduling "pecking order" provisions of Article 11, Section 6 or the provisions of a Local Memorandum of Understanding in order to avoid payment of penalty overtime.

....

***POSITIONS OF THE PARTIES:***

There is no dispute over the facts that lead to this grievance. The Union contends, however, that the Grievant was not given a proper overtime make-up opportunity when the Employer offered that opportunity on the Fourth of July. It contends that by offering the make-up on this date, the Service was deliberately attempting to offer an opportunity when the employee would decline it. It continues that it believes the contract intends employees who are improperly denied overtime to be granted a similar opportunity to make up that overtime and that in this instance, it means the Grievant should have been offered a make-up opportunity that was not on a holiday, and particularly not on a holiday for which she had been improperly scheduled to begin with. It adds that although management has argued that the improper scheduling matter is not relevant to this dispute, it is appropriate since it provides additional reason for the Grievant to waive the one-time make-up opportunity given her. As a remedy, it seeks that the Grievant be paid for all losses at the applicable rate.

The Service, however, asserts that the Union has failed to prove its case and that the Union's argument regarding "similar" overtime opportunities is misplaced. Further, stating that the Union's argument concerning improper scheduling on that day has not been proved or decided yet and that it is not properly before this arbitrator, the Service maintains that it properly offered the Grievant the make-up opportunity on July 4 and that when the Grievant waived that opportunity it fulfilled its obligation. As further support for its position, the Service declares that it has the right to decide when overtime is scheduled. It also argues that the Union's claim that "similar" in the contract language means "identical" or "equal to" is wrong and, therefore, the Union incorrectly asserts the Grievant's rights were violated. Accordingly, it seeks that the grievance be denied. It adds, however, that if the grievance is granted, the Grievant should only

be given the opportunity to make up the overtime within 90 days as has been the standard in these situations.

***DISCUSSION:***

After reviewing the evidence, the arguments and the arbitration awards submitted by the parties in support of their positions, it is concluded that the Service did not violate the National Agreement when it offered the Grievant her make-up overtime opportunity on July 4, provided the Grievant was properly scheduled to work July 4. In arriving at this conclusion, several factors were considered: whether management's right to assign overtime make-up opportunities is limited by the term "similar" contained in the agreement regarding make-up opportunities reached by the parties in 1975 in what is referred to as "the Filbey letter"; whether the Grievant waived her right to an overtime make-up opportunity when she passed on that opportunity on July 4, and whether the allegation that the Grievant was improperly scheduled for work on July 4 has any impact upon this decision.

While the Service raised some question about whether the letter, known as the Filbey letter, was relevant since it represents an agreement reached by the parties in 1975 concerning remedy for employees who were improperly passed over for overtime, the parties agreed in that letter that the remedial action would apply to all timely filed and currently active grievances and to future grievances filed pursuant to the 1973 National Agreement unless they are superseded by a future agreement between the Postal Service and the APWU, or by an arbitrator's award that the parties agree is dispositive of the issue. Since the Service provided no evidence that this agreement is not still binding upon the parties it was considered in determining the outcome of this grievance since it establishes the procedures to be followed if and when employees are improperly bypassed for overtime. Consequently, even though there is no language in Article 8 of the National Agreement that refers to "similar" make-up opportunities when an employee is improperly bypassed, failure to follow the procedures outlined in the Filbey letter would constitute a violation of the National Agreement.

In this dispute, the Union has argued that management violates the meaning of "similar" contained in the "Filbey letter" when it schedules an overtime make-up opportunity on a holiday and the overtime originally bypassed was not on a holiday. While it correctly states that the term

“similar” must have some meaning or that word would not have been used, a review of the language contained in the Filbey letter and the language contained in Article 8, Section 5, indicates that the term does not mean “identical” as the Union has argued but that the make-up opportunity must be “comparable” to the opportunity that was bypassed. While it is possible, under this finding, to still argue that “comparable” means the Grievant should not be offered an overtime make-up opportunity on a holiday when the bypassed opportunity did not occur on a holiday, the fact that the parties have agreed in the Filbey letter that management must offer this opportunity within 90 days after the missed opportunity was discovered or pay the bypassed employee at the overtime rate for a period equal to missed opportunity indicates the parties intend that an employee be offered any “comparable” opportunity that occurs during that 90 day period rather than one “identical” to that which was bypassed. Consequently, as long as management has offered the Grievant a make-up opportunity like that which for which she was bypassed and the opportunity is offered in conjunction with a regular service day as is set forth in Article 8, Section 4.B., it does not violate the National Agreement. This conclusion is also consistent with other arbitration decisions in which the intent of this language has been discussed.<sup>1</sup>

This conclusion is reached despite the fact that the Union provided evidence that at least two other employees were similarly bypassed and similarly scheduled but were re-scheduled when the holiday objection was raised. While these settlements indicate their supervisor’s concern for accommodating his regular full-time employees as much as possible, there is nothing in the Filbey letter or the National Agreement that prevents management from offering the make-up opportunity on a holiday as was done with the Grievant. While this arbitrator understands that a full-time regular employee scheduled to work a holiday as a last resort under the “pecking order” established in the LMOU<sup>2</sup> might be less than thrilled at being offered an overtime make-up opportunity that would mean the employee must work additional hours, under that “pecking order” most full-time regular employees are not scheduled to work a holiday under duress. This

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<sup>1</sup> See Case No. C7M-4D-C 33400 (Bernstein, 1991); Case No. D90C-4D-C 92017850 (Miles, 1996), and Case No. 194C-11-C 97021338 (Larney, 1999).

<sup>2</sup> Local Memorandum of Understanding.

means, therefore, that under normal circumstances, an overtime make-up opportunity scheduled on a holiday would have little impact on most employees scheduled to work that day.

Having reached the above conclusion, however, it cannot be concluded with certainty that management did not violate the National Agreement when it assigned the Grievant her make-up opportunity on July 4, even though management asserts that she waived her right to the make-up opportunity, since the Grievant also alleges she was improperly scheduled to work on the holiday. If, in fact, the Grievant was improperly scheduled to work on July fourth, management's argument regarding waiver is not persuasive since the make-up opportunity must be offered in conjunction with a regular service day.

The issue of whether the Grievant was improperly scheduled to work on the holiday is not before this Arbitrator nor has it yet been determined in another forum. Without this finding, there is no way to know whether the overtime make-up opportunity was properly scheduled. Accordingly, the finding in this matter is dependent upon the finding in the grievance addressing whether the Grievant was improperly scheduled to work on July 4. If management or an arbitrator concludes that the Grievant was improperly assigned, then it must also be concluded that she was improperly offered her overtime make-up opportunity. If it is concluded that she was properly assigned, then it must also be concluded that the make-up opportunity was also properly offered. Given this fact, the award is as follows:

***AWARD:***

If there is a finding that the Grievant was improperly scheduled to work on July 4, it is concluded that the Service also improperly offered the Grievant her overtime make-up opportunity on that day and the grievance is sustained. Accordingly, under this finding, the Service is ordered to offer the Grievant another overtime make-up opportunity within 90 days of the finding in the other matter. If there is a finding that the Grievant was properly scheduled to work on July 4, it is concluded that the Grievant was also properly offered her overtime make-up opportunity on that day. Under that finding, should it occur, the grievance is denied.

January 24, 2000  
SKI:ms