

RECEIVED

National Arbitration Panel

ODS & A, PC

In the Matter of Arbitration)
)
)
 between)
) Case No.
) I90T-1I-C 93049644
 United States Postal Service)
)
) (Relief Assignments -
 and) Pay in Absence of
) Wednesday Prior Notice)
)
 American Postal Workers Union)

Before: Shyam Das

Appearances:

For the Postal Service: Charles J. Dudek, Esquire

For the APWU: Lee W. Jackson, Esquire

Place of Hearing: Washington, D.C.

Date of Hearing: February 20, 2003

Date of Award: January 13, 2004

Relevant Contract Provision: Article 38 and ELM Section 434.6

Contract Year: 1990-1994

Type of Grievance: Contract Interpretation

Award Summary

A Maintenance Craft employee who is temporarily assigned to work one of the relief schedules specifically included in his bid position in accordance with Article 38.7.E of the National Agreement is not entitled to additional compensation under ELM Section 434.612(b) when notice of the change is not given by Wednesday of the preceding service week. Section 434.612 in its entirety does not apply to employees who work a temporary assignment in accord with and permitted by the terms of their bid position, as provided in Section 434.622(h).



Shyam Das, Arbitrator

These five cases originated at postal facilities in and around St. Paul, Minnesota. They each raise the same interpretive issue, and were referred to Step 4 by the Postal Service. The issue is best understood in reference to the facts in the lead grievance filed on behalf of Timothy Tessman, a Maintenance Craft employee.

Tessman was a Level 9 Electronic Technician employed at the Minneapolis BMC. His bid assignment included several relief assignments, as provided for in Article 38.7.E of the National Agreement. When not assigned to a relief assignment, his regular schedule was Tour 2 (7:50 a.m. to 4:20 p.m.) with off days on Wednesday and Thursday. One of the relief assignments included in his bid position was that held by Mike Millonig, who worked Tour 3 (4:00 p.m. to 12:30 a.m.) with off days on Sunday and Monday. On Saturday, May 22, 1993, Tessman was notified by PS Form 1723 (Assignment Order) that he was assigned to Tour 3 with Sunday and Monday off days effective Sunday, May 23, through Saturday, May 30, as vacation relief for Millonig. (Millonig bid for that annual leave in February, although he did not submit his signed Form 3971 for his bid vacation until May 22.)

The Union contends that the Postal Service violates the National Agreement when it assigns a Maintenance Craft employee who holds a preferred-duty assignment which includes relief duties to a temporary relief assignment both without giving Wednesday prior notice of that assignment as set out in ELM Section 434.612 and without compensating that employee in accordance with ELM Section 434.612(b). The Postal Service

contends that an employee in the Maintenance Craft who bid and holds a relief assignment is not entitled to additional compensation pursuant to ELM Sections 434.61 and 434.62 when working in accord with and as permitted by the terms of his bid.

Since 1981, Article 38.7.E of the National Agreement has provided as follows:

E. Relief Assignments

1. When management determines that work coverage is necessary, relief assignments in the Maintenance Craft may be established only to provide coverage for absences of five working days or more for scheduled annual leave, sick leave, military leave, and national off-site and on-site training programs.
2. Relief assignments, which shall be kept to a minimum, will be posted by a notice of intent which, in addition to the information required in Section 4.C (Information on Notice of Intent), will also show the days and hours of the specific duty assignment(s) being relieved.

The provisions of ELM Section 434.6, which are incorporated into the terms of the National Agreement through Article 19, include the following:

434.6 Out-of-Schedule Premium

434.61 Policy

434.611 General

Out-of-schedule premium is paid to eligible full-time bargaining unit employees for time worked outside of and instead of their regularly scheduled workday or workweek when employees work on a temporary schedule at the request of management.

434.612 Timely Notice

Payment of out-of-schedule premium is dependent on timely notice being given by management of the temporary schedule change, as follows:

- a. If notice of a temporary change is given to an employee by Wednesday of the preceding service week, even if this change is revised later, the employee's time can be limited to the hours of the revised schedule, and out-of-schedule premium is paid for those hours worked outside of and instead of his or her regular schedule.
- b. If notice of a temporary schedule change is not given to the employee by Wednesday of the preceding service week, the employee is entitled to work his or her regular schedule. Therefore, any hours worked in addition to the employee's regular schedule are not worked "instead of" his or her regular schedule. The additional hours worked are not considered as out-of-schedule premium hours. Instead, they are paid as overtime hours worked in excess of 8

hours per service day or 40 hours per service week.

* * *

434.62 Eligibility

434.621 Eligibility for Out-of-Schedule Premium

Exhibit 434.621 indicates those employees who are eligible to receive out-of-schedule premium while working a qualifying temporary schedule within a bargaining unit or while detailed to a nonbargaining position (see exceptions in 434.622).

* * *

434.622 Exceptions

Eligible employees are not entitled to out-of-schedule premium under the following conditions:

* * *

- h. When in accord with and permitted by the terms of a bid.

* * *

Handbook F-21 (Time and Attendance) also provides in Section 232.23 that:

... Other exceptions to the obligation to pay "out of schedule premium" to full-time employees for work performed outside of schedule include:

* * *

d. Where an employee's schedule is temporarily changed, but such change was in accord with and permitted by the terms of his bid.

* * *

UNION POSITION

The Union contends that a full-time regular employee, such as Grievant Tessman, is guaranteed the right to work 40 hours per week, eight hours per day, of his preferred duty assignment (PDA). Since, at the request of the Postal Service, Tessman was required to work hours and days other than the regular hours of his PDA while he acted as relief for employee Millonig, he is entitled to be compensated therefore in accordance with ELM Section 434.612(b). According to the Union, that provision clearly provides for a method of compensation when the Postal Service does not give "Wednesday Prior Notice" to the employee whose schedule it seeks to change. Section 434.612(b) provides that, in the absence of Wednesday Prior Notice, the employee in question is entitled to work his or her regular schedule. It further provides that if Wednesday Prior Notice is not given and the Postal Service insists on changing the schedule of the employee, the employee must be compensated in accordance with that provision, under which additional hours worked beyond the employee's guaranteed hours are not considered as out-of-schedule premium hours, but as overtime hours. In support of its position, the Union cites Case Nos. H4N-NA-C-21

and H4C-NA-C-27, decided by National Arbitrator Mittenthal in 1987. It also cites regional arbitration awards by Arbitrator Benn, in Case No. I90T-1I-C 93031442 (1995) and Arbitrator Collins, in Case No. N4C-1N-C 27945.

The Union insists that the exception set out in ELM Section 434.622(h) simply does not apply to the compensation requirement of Section 434.612(b). Section 434.622(h) clearly only applies to payment of "out-of-schedule premium". Thus, the Union argues, the exception in 434.622(h) applies only to employees who are otherwise entitled to out-of-schedule premium. Section 434.612(b) makes a clear distinction between payment of "out-of-schedule premium" and "overtime". The Union's position is not that the Grievant is entitled to "out-of-schedule premium", but rather, under the terms of 434.612(b), the Grievant is entitled to be compensated in overtime hours. The Union argues that if the ELM intended that the exception in 434.622(h) apply to the "overtime hours" provided for in Section 434.612(b), it easily could have stated as such. Since the drafters of that provision did not so state, the expansive reading of that provision contended for by the Postal Service in this case should be rejected. The Union makes a similar argument with respect to the provision in Handbook F-21, Section 232.23(b).

The Union also points out that an employee holding a relief position has no right or any guarantee to work in any PDA listed for relief on the notice of intent to fill a vacant duty assignment. The positions listed on the notice of intent only

identify the PDAs that the employee may be directed to relieve under the limited circumstances set out in Article 38.7.E of the National Agreement. Even if the absence to be "relieved" is an absence qualified under that provision, a Postal Service supervisor must still determine whether any relief employee actually will be assigned. In many cases, no relief whatsoever is assigned. Thus, the Union asserts, the notice of intent cannot be equated to the Wednesday Prior Notice provided for in Section 434.612 of the ELM.

EMPLOYER POSITION

The Postal Service asserts that an employee who holds a relief job is put on notice by virtue of the notice of intent that he or she must at appropriate times work in another job on a different tour and with different scheduled days off. Typically, as testified to by both Postal Service and Union witnesses, the regular assignments of such relief jobs have desirable hours and off days. As testified to by a Postal Service witness, there are times when Management must make a sudden change in schedules. In these circumstances, relief assignment jobs are established to provide flexibility so that Management can move employees into assignments without the payment of any kind of penalty such as overtime or out-of-schedule pay.

The Postal Service contends that under the terms of the National Agreement, the ELM and Handbook F-21, an employee in the maintenance craft who bids and holds a relief position is

not entitled to additional compensation when working in an assignment in accord with and as permitted by the terms of his bid. The additional compensation at issue here, the Postal Service asserts, either is out-of-schedule premium or overtime pay. The Postal Service rejects the Union's position that the Postal Service must provide a relief employee notice of a schedule change no later than the Wednesday of the preceding service week when the change is to cover one of the assignments relieved from the employee's bid job. The Postal Service maintains that the only purpose of the notice provision in the ELM is to determine whether an employee whose schedule is changed will receive out-of-schedule pay or overtime pay. Since, pursuant to Section 433.622(h) of the ELM and Section 232.23(b) of Handbook F-21, an employee who is working in accord with the terms of his bid is not entitled to out-of-schedule pay, the employee is not entitled to receive Wednesday Prior Notice.

The Postal Service contends that Section 434.612(b) of the ELM applies only to employees who are "eligible" to be given advance notice of a change in schedule. By operation of Section 434.622(h), employees working in relief positions in compliance with their bid are not eligible for out-of-schedule premium or the advance notice of the change of schedule that triggers the type of premium they must paid.

The Postal Service maintains that its position is supported by several Step 4 grievance settlements between the

parties. It also cites a regional arbitration award by Arbitrator Levak, in Case No. W7T-5C-C 608 (1988).

FINDINGS

In Case Nos. H4N-NA-C-21 and H4C-NA-C-27, National Arbitrator Mittenthal indicated that the Wednesday Prior Notice provision in ELM Section 434.612(b) -- on which the Union relies in this case -- would be meaningless if an employee's regularly scheduled hours were not, absent such notice, guaranteed. That case, however, did not involve an employee whose bid position includes relief assignments as provided for in Article 38.7.E of the National Agreement. Nor were Arbitrator Mittenthal's comments regarding Section 434.612(b) made in the context of such a relief position.

Section 434.612(b) provides that:

If notice of a temporary schedule change is not given to the employee by Wednesday of the preceding service week, the employee is entitled to work his or her regular schedule. ...

The issue here is whether an employee, such as Grievant Tessman, whose bid assignment includes a relief assignment to which he is temporarily assigned, is covered by this provision in Section 434.612(b).

Section 434.622(h) provides that otherwise eligible employees are not entitled to out-of-schedule premium if their

assignment is "in accord with and permitted by the terms of a bid". The practice of providing out-of-schedule premium, later codified in Section 434.6 of the ELM, originated with a judicial determination that federal law required overtime pay for out-of-schedule work regardless of how much notice the Postal Service provided to the employee. See discussion in National Case No. H1T-4K-C-2127 (Mittenthal, 1982). Thus, by excluding employees with relief assignments from out-of-schedule pay, Section 434.622(h) in essence confirms that such relief assignments, although they may involve a temporary schedule change, are not out-of-schedule assignments, but rather are encompassed in the employee's bid position.

In my opinion, Section 434.612, as a whole, relates only to employees who are entitled to out-of-schedule premium when they work on a temporary schedule. It is those employees who are entitled to "timely notice", absent which they are entitled to work their "regular schedule". Indeed, 434.612 which is entitled "Timely Notice" is a subsection of 434.6, entitled "Out-of-Schedule Premium". The Wednesday Prior Notice referred to in subparagraphs "a" and "b" of 434.612 is the "timely notice" which determines whether an employee covered by that provision is to receive out-of-schedule premium or overtime in addition to pay for the employee's regular schedule. Under 434.622(h) an employee temporarily working a relief schedule included in his or her bid position is not entitled to out-of-schedule premium and, hence, is not covered by 434.612. There is no indication that the notice provision in 434.612 was intended to have broader application.

Stated differently, the "regular schedule" of an employee holding a bid relief assignment position encompasses the schedules specified in that assignment, not just the schedule the employee works when not scheduled on a relief assignment. Notably, there is no evidence of the Postal Service having paid relief employees as if they were covered by Section 434.612(b), although relief assignments in the Maintenance Craft predate 1982.¹

One of the Step 4 grievance settlements cited by the Postal Service also appears to support the conclusion reached in this decision. On July 2, 1987, Richard E. Beyer of the Postal Service and Richard I. Wevodau, Director of Maintenance Craft Division of the APWU, entered into a settlement agreement in Case H4T-5E-C 16931. They agreed to remand that case to Step 3 on the basis that:

The issue in this grievance is whether the grievant was entitled to Out of Schedule (OOS) premium pay for relief coverage provided in excess of 5 days and on short notice.

After reviewing this matter, it was agreed that no national interpretive issue is fairly presented in this case. Whether the

¹ The 1995 regional award by Arbitrator Benn, cited by the Union, was issued after the present grievances were appealed to regional arbitration. It also does not address ELM Section 434.622(h), which apparently was not raised in that case. Arbitrator Collins' 1990 regional award, also cited by the Union, does not involve a relief assignment position.

grievant was entitled to Out of Schedule premium is a local dispute suitable for regional determination by application of Part 434-622(h) of the ELM to the facts involved. Notwithstanding the above, we note the employee was paid OOS premium for three days work in the first week of work in the new assignment.

(Emphasis added.)


The Union, in this case, asserts that this 1987 settlement is inapposite because that case involved only out-of-schedule premium, and not the application of Section 434.612(b) when the Postal Service fails to provide Wednesday prior notice. The settlement states the issue in terms of "whether the grievant was entitled to Out of Schedule premium", but it also specifies that the temporary assignment was "on short notice", which is the situation covered by Section 434.612(b) at issue here. This settlement, as I read it, indicates the signatories viewed Section 434.622(h) as controlling with respect to the application 434.612 as a whole -- which expressly addresses when an employee entitled to out-of-schedule premium is to be paid that premium (timely notice) and when such an employee instead is to be paid overtime in addition to pay for his regular schedule (short notice).

For the reasons stated above, I conclude that a Maintenance Craft employee who is temporarily assigned to work one of the relief schedules specifically included in his bid position in accordance with Article 38.7.E of the National Agreement is not entitled to additional compensation under ELM

Section 434.612(b) when notice of the change is not given by Wednesday of the preceding service week. Section 434.612 in its entirety does not apply to employees who work a temporary assignment in accord with and permitted by the terms of their bid position, as provided in Section 434.622(h).

AWARD

A Maintenance Craft employee who is temporarily assigned to work one of the relief schedules specifically included in his bid position in accordance with Article 38.7.E of the National Agreement is not entitled to additional compensation under ELM Section 434.612(b) when notice of the change is not given by Wednesday of the preceding service week. Section 434.612 in its entirety does not apply to employees who work a temporary assignment in accord with and permitted by the terms of their bid position, as provided in Section 434.622(h).



Shyam Das, Arbitrator