American Postal Workers Union, AFL-CIO

1300 L Street, NW, Washington, DC 20005

To: Regional Coordinators
National Business Agents
Resident Officers

From: Tony D. McKinnon, Sr.
Director, Industrial Relations

Date: January 10, 2014

Re: Das Award on Allowing OTDL Employees on Penalty Overtime to be Priority-Scheduled over Casuals (Article 8.5.H of 2006 CBA)

In a recent national level award, Arbitrator Das sustained the APWU's position that Article 8.5.H of the 2006 National Agreement, which requires full-time employees on the overtime desired list (OTDL) to be given priority scheduling for overtime work over casual employees doing overtime, includes priority scheduling of OTDL employees for *penalty* overtime before allowing casuals to perform overtime work. In accordance with an agreement of the parties, the arbitrator remanded remedy issues to the parties for resolution but retained jurisdiction in the event the Postal Service and union are unable to reach an agreement on remedy. (USPS #Q06C-4Q-C 08031764, 11-19-2013)

This case arose as a result of the Postal Service's initiation of a 2007 national dispute regarding whether Article 8.5.H, negotiated as part of the 2006 Agreement, permitted OTDL employees to be priority-scheduled over casuals in the event they were on penalty overtime (Note that Article 8.5.H was removed from the 2010 Agreement as a result of the elimination of casuals.). Before adoption of Article 8.5.H in 2006, the Postal Service had been allowed to assign overtime to casuals without regard to whether there were available full-time regular employees on the overtime desired list in accordance with a 1985 national award by Arbitrator Zumas (in case no. H1C-4K-C 27344145).

The APWU contended that the plain meaning of Article 8.5.H encompasses priority scheduling of OTDL employees before casuals doing overtime work regardless of the rate of overtime pay the assigned OTDL employee would receive. We asserted that overtime includes all work performed in excess of specified limits, and there is nothing in Article 8.5.H that limits payment of overtime to "regular" or "normal" overtime, and not penalty overtime. The union argued that in only one circumstance, i.e. Article 8.5.G, the parties have expressly excluded assigning overtime to OTDL employees who would be paid penalty overtime in the event other OTDL employees who would not be paid that rate could be scheduled.

The Postal Service countered that Article 8.5.H does not specify that priority scheduling of OTDL employees before casuals for overtime work would include OTDL employees on penalty

overtime. It asserted that the terms "overtime work" and "priority scheduled" in that provision are undefined. Management maintained, on the other hand, that the parties' past practice has been to specify where priority scheduling for overtime work includes penalty overtime, such as when the parties agreed outside the National Agreement that assignment of overtime work to OTDL employees before TEs in accordance with Article 8.4.G would include penalty overtime. In addition, in the case of Article 11.6.B, the parties entered into a Step 4 settlement that would allow OTDL employees to work at the penalty overtime rate rather than assigning a TE to work.

Arbitrator Das rejected the Postal Service's arguments. Significantly, Das pointed to Arbitrator Mittenthal's conclusion [in his 1987 award in case nos. H4N-NA-C-21 (2d issue) and H4C-NA-C- 23] that "... 'penalty overtime' is still a form of 'overtime' and double time is simply a new type of 'overtime' rate." He ruled that "[w]ork performed by employees which entitles them to penalty overtime pay is a form of 'overtime work,' as Arbitrator Mittenthal observed [in his 1987 award], and as is reflected in various provisions of Article 8." Das stressed that the record did not support management's past practice argument. Evidence that the parties entered into a number of understandings and agreements regarding penalty overtime , such as the ones making it clear that penalty overtime is included in "overtime subject to the priority scheduling established in Article 8.4.G", according to the arbitrator, "... actually supports the Union's position in this case that use of the term 'overtime' or 'overtime work' includes overtime for which penalty overtime is payable." He cited the fact that Article 8.4.G "similarly establishes a priority for full-time employees on the OTDL and includes no reference to penalty overtime". Therefore, "[t]he parties' understanding – stated in various Q&As and Step 4 settlements – that Article 8.4.G applies to full-time OTDL employees who are eligible to receive overtime pay also supports a similar finding with respect to Article 8.5.G."

Arbitrator Das then concluded that the APWU's position must be sustained. He noted that "no compelling basis" existed to conclude that the parties "when they agreed to the operative terms of Article 8.5.H, as part of the Casuals/PTF MOU – had a joint preference to work casual employees on overtime, rather than utilize OTDL employees on penalty overtime."

Citing Section 4 of Article 8, Arbitrator Das' award also stresses that provisions in the National Agreement do not define "overtime work" but Article 8.4 contains definitions of both overtime pay and penalty overtime pay and cover both types of overtime within the same Article. In addition, Das refers to the parties' understanding regarding overtime work and Transitional Employees, that Article 8.4.G applies to full-time OTDL employees who are eligible to receive penalty overtime pay. Given the arbitrator's ruling, there can be no disagreement that even with the substitution of PSEs for Transitional Employees in the 2010 National Agreement Article 8.4.G continues to apply to full-time OTDL employees who are eligible to receive penalty overtime pay.

Attachment

TDM/MW:jm
OPEIU#2
AFL-CIO

NATIONAL ARBITRATION PANEL

In the Matter of the Arbitration	)	
	)	
between	)	
	)	
UNITED STATES POSTAL SERVICE	)	Case No. Q06C-4Q-C 08031764
	)	
and	)	
	)	
AMERICAN POSTAL WORKERS UNION, AFL-CIO	)	
	)	

BEFORE: Shyam Das

APPEARANCES:

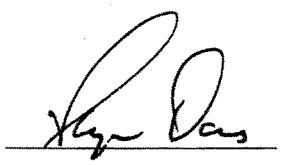
For the Postal Service:	Carl C. Bosland, Esq.
For the APWU:	Richard S. Edelman, Esq.

Place of Hearing:	Washington, D.C.
Date of Hearing:	April 24, 2013
Date of Award:	November 19, 2013
Relevant Contract Provisions:	Article 8.5.H
Contract Year:	2006-2010
Type of Grievance:	Contract Interpretation

Award Summary:

1. Article 8, Section 5.H of the 2006 USPS/APWU National Agreement, which requires full-time employees on the overtime desired list (OTDL) to be given priority scheduling for overtime work over casual employees includes priority scheduling for penalty overtime prior to casuals doing overtime work.

2. Remedy issues are remanded to the parties in accordance with their agreement, and I retain jurisdiction as to any remedy issues as provided therein.



Shyam Das, Arbitrator

BACKGROUND Q06C-4Q-C 08031764

On December 3, 2007, the Postal Service initiated a national interpretive dispute seeking resolution of the following issue:

> Whether Article 8, Section 5.H of the 2006 USPS/APWU National Agreement which requires full time employees on the overtime desired list (OTDL) to be given priority scheduling for overtime work over casual employees includes priority scheduling for penalty overtime prior to casual employees doing overtime work.

Article 8.5.H of the 2006 National Agreement provides:

> Full-time employees on the Overtime Desired List shall be given priority scheduling for overtime work prior to casual employees doing overtime work.

The provision in Article 8.5.H at issue here was negotiated as part of the 2006-2010 National Agreement. It originated in Paragraph 7 of an MOU Re: Supplemental Work Force; Conversion of Clerk Craft PTFs (Casuals/PTF MOU), which addressed a broader range of issues relating to the use of casual employees as a supplemental work force. The MOU is attached to the 2006 National Agreement.

Other relevant provisions of Article 8 of the 2006 National Agreement include the following:

ARTICLE 8
HOURS OF WORK

* * *

Section 4. Overtime Work

A. Overtime pay is to be paid at the rate of one and one-half (1½) 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.

E. Excluding December, part-time flexible employees will receive penalty overtime pay for all work in excess of ten (10) hours in a service day or fifty-six (56) hours in a service week.

* * *

G. Overtime Work Transitional Employees

Transitional employees shall be paid overtime for work performed in excess of forty (40) work hours in any one service week. Overtime pay for transitional employees is to be paid at the rate of one and one-half (1½) times the basic hourly straight-time rate.

When an opportunity exists for overtime for qualified and available full-time employees, doing similar work in the work location where the employees regularly work, prior to utilizing a transitional employee in excess of eight (8) work hours in a service day, such qualified and available full-time employees on the appropriate Overtime Desired List will be selected to perform such work in order of their seniority on a rotating basis.

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.

B. Lists will be established by craft, section, or tour in accordance with Article 30, Local Implementation.

C. 1. a. When during the quarter the need for overtime arises, employees with the necessary skills having listed their names will be selected in order of their seniority on a rotating basis.

b. Those absent or on leave shall be passed over.

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.

* * *

F. Excluding December, no full-time regular employee will be required to work overtime on more than four (4) of the employee's five (5) scheduled days in a service week or work over ten (10) hours on a regularly scheduled day, over eight (8) hours on a non-scheduled day, or over six (6) days in a service week.

G. Full-time employees not on the "Overtime Desired" list may be required to work overtime only if all available employees on the "Overtime Desired" list have worked up to twelve (12) hours in a day or sixty (60) hours in a service week. Employees on the "Overtime Desired" list:

1. may be required to work up to twelve (12) hours in a day and sixty (60) hours in a service week (subject to payment of penalty overtime pay set forth in Section 4.D for contravention of Section 5.F); and

2. excluding December, shall be limited to no more than twelve (12) hours of work in a day and no more than sixty (60) hours of work in a service week.

However, the Employer is not required to utilize employees on the "Overtime Desired" list at the penalty overtime rate if qualified employees on the "Overtime Desired" list who are not yet entitled to penalty overtime are available for the overtime assignment.

Section 434.13 of the Overtime and Premium Pay provisions of the ELM state as follows:

434.13 Types of Compensation

434.131 Postal Overtime

Postal overtime is compensation paid to eligible personnel at 150 percent of each employee's basic hourly rate for actual workhours in excess of 8 paid hours in a day, 40 paid hours in a service week or, if a full-time bargaining unit employee, on a nonscheduled day.

434.132 FLSA Overtime

FLSA overtime (see 444) is compensation paid to nonexempt personnel at 150 percent of each employee's FLSA regular hourly rate for all worktime that management suffers or permits to be actually worked in excess of 40 hours worked within an FLSA workweek.

434.133 Penalty Overtime

Penalty overtime is compensation paid to eligible personnel at two times the employee's basic hourly straight time rate for hours described in applicable labor agreements.

* * *

Casuals are entitled only to "FLSA overtime." Transitional employees (TEs), according to the Postal Service, are entitled only to "postal overtime," and only for work performed in excess of 40 work hours in a service week.[1]

Prior to adoption of Article 8.5.H in 2006, the Postal Service could assign overtime to casuals without regard to whether there were available full-time regular employees on the overtime desired list (OTDL), as determined in a 1985 national arbitration award by Arbitrator Nicholas Zumas in Case No. H1C-4K-C 27344145.

[1] The TE and casual category of supplemental employees were eliminated pursuant to the 2010 National Agreement. Article 8.5.H also was eliminated.

On March 2, 2007, the parties agreed to Q&As related to the Casuals/PTF MOU that included the provision that was incorporated as Article 8.5.H of the 2006 National Agreement.[2] Q&As Nos. 27 and 28 state as follows:

> 27. Are casuals paid at the overtime rate for hours worked beyond 8 hours in a service day?
>
> Response:
>
> • No. Casuals are paid at the overtime rate for hours worked beyond 40 in a service week.
>
> 28. Must full-time regulars on the OTDL be scheduled for overtime work prior to assigning casuals to work beyond 8 hours in a service day?
>
> Response:
>
> • No. Not unless the work in excess of eight hours in a day puts the casual into an overtime status.

Penalty overtime pay was first negotiated in 1984. On January 19, 1987, Arbitrator Richard Mittenthal issued an award in Case Nos. H4N-NA-C-21 (2d Issue) and H4C-NA-C-23 (Mittenthal Award) regarding the effect of penalty overtime pay on holiday scheduling under the following provisions of Article 11.6 that predated penalty overtime compensation:

> B. As many full-time and part-time regular 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.
>
> (Emphasis added.)

---

[2] The MOU addresses the Clerk Craft work force structure. In agreeing to the terms of Article 8.5.H, the parties expanded the scope of the corresponding MOU Paragraph 7 to encompass all APWU crafts.

Arbitrator Mittenthal concluded that the Postal Service was not permitted to deviate from the "pecking order" of Article 11.6.B to avoid the payment of penalty overtime to PTFs. In doing so, he stated:

> ... It is true that when Article 11, Section 6B was initially written, there was just one kind of "overtime" pay, namely, time and one-half. The parties established another kind of "overtime" pay, namely, double time, in the 1984 National Agreement and described it as "penalty overtime." Neither of these circumstances command a different conclusion in this case. For "penalty overtime" is still a form of "overtime" and double time is simply a new type of "overtime" rate. Moreover, these new arrangements have been included in the "overtime work" provisions of Article 8, Section 4. The parties' intent to make "overtime" (i.e., labor cost) considerations irrelevant in preparing a holiday schedule under Article 11, Section 6B strongly suggests that Management may not deviate from the "pecking order" because of "penalty overtime."

Arbitrator Mittenthal also held that a regular employee who volunteered to work on a holiday in accordance with Article 11.6 was volunteering only to work eight hours, not up to twelve hours as the Postal Service argued. Consistent with Article 8.5, he concluded, such a volunteer cannot work beyond eight hours without supervision first exhausting the OTDL, including penalty overtime.

In July 1997, the parties entered into a Step 4 settlement (APWU Exhibit 9) which states:

> The issue in this grievance is whether management violated the National Agreement by working a Transitional Employee (TE) at the overtime rate rather than working an employee on the Overtime Desired List (ODL) at the penalty overtime rate.
>
> After reviewing this matter, we mutually agreed that the provisions of Article 8.4.G and the [undated] "Q and A-Transitional Employees APWU" signed by Sherry A. Cagnoli, Assistant Postmaster General and William Burrus, Executive Vice President, APWU, [Postal Service Exhibit 14] control in this case.
>
> Q and A number 23 states as follows:

> Can TEs be used on nonscheduled days or beyond 40 hours prior to resorting to the ODL?
>
> Answer: No. Do NOT manipulate the TE's schedule rather than using someone from the overtime desired list in order to avoid this principle. (ref. item Article 8, Section 4.G)

Accordingly, we agreed to remand this case to the parties at Step 3 for further processing, or to be scheduled for arbitration, as appropriate.

(Emphasis added.)

A virtually identical Step 4 settlement (Postal Service Exhibit 13) was agreed to on November 4, 1998. An earlier Q&A dated February 1996 (Postal Service Exhibit 5) relating to a "February 2, 1993 APWU Memorandum of Understanding TE III" -- which appears possibly to have been in part a precursor to Article 8.4.G, states:

> 2. Can TEs be worked beyond eight (8) hours in a service day (or beyond 40 hours on overtime) before a career overtime desired list employee is scheduled to work (up to 10 or 12 hours, whichever applicable overtime desired list they are on)?
>
> Before a TE can be scheduled to work beyond eight (8) hours in a service day or for overtime (more than 40 hours), those career employees on the appropriate OTD list must be scheduled to work the overtime hours up to their applicable list preference, unless there is a need for simultaneous scheduling, in which case both the career and the TE are scheduled to work.
>
> As examples:
>
> There is a need for one person to work 4 hours beyond the tour. A career employee on the 12 hour OTDL and a TE who has worked 8 hours that service day (or 40 hours) are available. The career employee on the OTDL works the 4 hours OT.
>
> * * *

> There are many different situations which might arise. If there are any questions, the basic principle to be applied in filling operational needs is that, all things being equal in the opportunity, a career employee on the OTDL has a superior claim to overtime before a TE is scheduled for more than 8 hours in a service day or beyond 40 hours.
>
> (Emphasis added.)

UNION POSITION

The Union contends that the plain language of Article 8.5.H clearly shows that OTDL employees must be given priority in scheduling overtime work prior to casual employees doing overtime work regardless of the rate of overtime pay the assigned OTDL employee would receive. It insists there simply is nothing in this provision that provides support for the Postal Service's argument that it only applies to "regular" or "normal" overtime, but not penalty overtime.

Even without a contractual definition of "overtime," the Union asserts, that word has an ordinary and commonly accepted meaning of work done beyond a normal work day or work week. While a contract or statute may determine what the set limit is, performance of work in excess of that limit universally is understood as overtime. The fact that the National Agreement here establishes different rates of pay for different amounts of overtime worked does not change the fact that all work performed in excess of specified limits is "overtime."

Moreover, the Union points out, the National Agreement expressly designates penalty overtime as "overtime." Article 8.4 which is entitled "Overtime Work" includes penalty overtime. It defines overtime work and sets out the conditions in which employees will be paid for overtime work. That provision establishes two overtime rates -- a regular rate and a penalty rate -- each applicable to different employee circumstances when they are working overtime. Penalty overtime is a subset of overtime as a matter of contract; it is not something completely different from regular overtime such that citation to "overtime" without referring to the penalty type of overtime somehow excludes penalty overtime.

The Union stresses that the parties did identify a circumstance when management can avoid scheduling an OTDL employee when the employee would be paid at the penalty overtime rate. Article 8.5.G states that when a full-time employee on the OTDL whose turn it is to work overtime has worked enough such that the employee would be paid penalty overtime, but other OTDL employees would not be paid at that rate, the Postal Service is permitted to assign the overtime to another full-time OTDL employee who would not be paid the penalty overtime rate and who would not otherwise be in turn for the overtime assignment.

The Union notes that the Postal Service assertion that penalty overtime is not "overtime" was rejected in the 1987 Mittenthal Award, in which the arbitrator stated: "Penalty overtime is still a form of overtime and double time is simply a new type of overtime rate."

The Union contends that, while the parties issued authorized Q&As about Article 8.4.G that explicitly state that penalty overtime is included in the "overtime" addressed in that provision, that simply shows that questions arose about whether that provision included penalty overtime and the parties agreed to issue guidance that it did. This does not mean that penalty overtime is outside the meaning of "overtime" as used in Article 8.5.H; it means only that the parties were unable to come to an understanding about this particular provision.

EMPLOYER POSITION

The Postal Service contends that the priority scheduling of OTDL employees before casuals for overtime work provided for in Article 8.5.H does not require priority scheduling for penalty overtime. Penalty overtime is not specifically addressed in the language of Article 8.5.H. Nor does that provision contain triggering language implicating penalty overtime, such as the requirement to utilize employees on the OTDL "to the maximum extent possible, including overtime" (as in Article 11.B.6), or a requirement that employees on the OTDL work "up to twelve hours in a day," (as in Article 8.5.G). The parties also have not entered into any MOU recognizing the availability of penalty overtime in Article 8.5.H priority scheduling (as in Article 8.4.G). The Postal Service stresses that the terms "priority scheduling"

and "overtime work" used in Article 8.5.H are undefined, and that there is no bargaining history evidence as to whether priority scheduling includes penalty overtime under this provision.

The Postal Service insists that the parties' past practice, without exception, has been to specify where priority scheduling for overtime work includes penalty overtime. Priority scheduling for overtime also is addressed in Articles 8.4.G and 8.5.G. In those instances, however, the parties explicitly agreed that priority scheduling for overtime would include penalty overtime. Article 8.5.G requires the Postal Service to work full-time employees on the OTDL up to 12 hours in a service day or 60 hours in a service week, subject to penalty overtime, before full-time non-OTDL employees may be compelled to work overtime. Article 8.4.G requires the Postal Service to assign overtime work to qualified and available full-time employees on the OTDL for overtime work before using TEs in excess of 8 work hours in a service day. As early as 1995, the Postal Service asserts, the parties at the highest levels separately agreed that the assignment of overtime work to full-time employees on the OTDL before TEs pursuant to Article 8.4.G includes penalty overtime. Article 8.5.G expressly permits the Postal Service to utilize qualified and available full-time employees on the OTDL for overtime who will not incur penalty overtime before full-time employees on the OTDL will incur penalty overtime. The parties also specifically addressed the availability of penalty overtime for purposes of holiday scheduling in Article 11.6.B. That provision requires management to utilize casual and PTF employees "to the maximum extent possible even if the payment of overtime is required" before full-time and part-time regular employees may be compelled to work their holiday. The maximum allowable work hours for casual, TE, and PTF employees are 12 hours in a service day, and PTFs are entitled to penalty overtime for all work in excess of 10 hours in a service day or 56 hours in a service week.

The Postal Service contends that if the parties had intended priority scheduling in Article 8.5.H to include penalty overtime they easily could have done so in harmony with their past practice by: explicit reference in the text of that provision; by separate agreement; by verbatim use in Article 8.5.H of language in Articles 8.4.G, 8.5.G or 11.6.B; by incorporation of the standard in Articles 8.4.G, 8.5 or 11.6.B; by modification of Articles 8.4.G and 8.5.G to include casual employees; by use of a known technical term ("maximize"); by interpretive

guidance in the Joint Contract Interpretation Manual (JCIM); by jointly developed Q&As; by Step 4 decisions; or by Postal Service concession in special bulletins or letters to the Union. Unlike the parties' past practice regarding every other collective bargaining agreement involving priority scheduling, the Postal Service stresses, none of these reasonable and available avenues were utilized by the parties for Article 8.5.H.

The Postal Service argues that the 1987Mittenthal Award supports its position and undermines the Union's position. Arbitrator Mittenthal reasoned that the Article 11.6.B phrase, "even if the payment of overtime is required," made clear the unconditional nature of the scheduling obligation. Critically, he found the agency's admissions in a letter to the Union and in a special postal bulletin of availability of penalty overtime demonstrated the parties' understanding and past practice. Conversely because there was no reference in Article 11.6.B to "maximizing" full-time and part-time regular volunteers to work their holiday "including overtime" before management may conscript full-time and part-time regulars to work their holiday, Arbitrator Mittenthal held that holiday volunteers could not be required to work up to 12 hours on their holiday, but only a regular 8-hour shift.

The Postal Service also insists, as spelled out in its post-hearing brief, that its position is in harmony with fundamental axioms of contract interpretation. Among its arguments, the Postal Service asserts that the Union's interpretation of Article 8.5.H renders as a surplusage, the parties' specific, individually negotiated references to the availability of penalty overtime involving priority scheduling in Articles 8.4.G, 8.5.G, and 11.6.B, in MOUs, Step 4 decisions, and in the 2007 JCIM.

The Postal Service rejects the Union's argument that when the parties intended to permit the Postal Service not to schedule employees on the OTDL at the penalty overtime rate they have negotiated such exclusion in the National Agreement. The one example cited by the Union, Article 8.5.G, does not constitute an historical past practice. Moreover, the record is devoid of evidence that the only way an employee can be disenfranchised from penalty overtime is by specific exclusion as in Article 8.5.G. The Postal Service stresses that employees can be disenfranchised from penalty overtime by lack of eligibility, by lack of

qualification, lack of availability, by emergent circumstances or by lack of specific agreement by the parties that priority scheduling penalty overtime is available. In the only other situation involving priority scheduling of casual employees and full-time employees on the OTDL -- Article 11.6.B -- the parties specifically agreed on the applicability of penalty overtime.

The Postal Service also insists that its interpretation is consistent with the purpose of penalty overtime. Pointing to an MOU relating to Article 8 which is attached to the National Agreement, the Postal Service maintains that its construction of Article 8.5.H limiting priority scheduling of full-time employees on the OTDL to regular overtime is consistent with the stated purpose of penalty overtime to avoid excessive overtime, unless specifically agreed to otherwise, which is not the case with Article 8.5.H.

FINDINGS

No doubt, the parties could have expressly included or excluded penalty overtime from the priority scheduling provision in Article 8.5.H. But they did not do so. And, because their disagreement on this issue arose shortly after it was added to the National Agreement, there is no definitive guidance to be gained from the parties' JCIM, jointly developed Q&As or other agreed clarification directly relating to this provision.

The Postal Service's major contention is that there is an unvarying practice of these parties spelling out in some clear fashion or the other when penalty overtime is to be included in "overtime" subject to priority scheduling. In this regard, it cites Article 8.4.G, Article 8.5.G, Article 11.6.B, and various other interpretive guides agreed to by the parties or concessionary statements made by the Postal Service.

Article 8.4.G, however, says nothing directly or indirectly about penalty overtime, as opposed to "overtime." It is true that, since agreeing to that provision of the National Agreement, the parties have entered into a number of understandings or other joint statements that make clear that penalty overtime indeed is included in the overtime subject to the priority scheduling established in Article 8.4.G. But that actually supports the Union's position in this

case that use of the term "overtime" or "overtime work" includes overtime for which penalty overtime is payable.

Article 8.5.G is more specific regarding the handling of penalty overtime, but it covers a broader and more complex array of issues than Article 8.4.G or 8.5.H. The result is a more explicit and detailed provision, both as to how much overtime work OTDL employees may be required or allowed to work before employees not on the OTDL can be required to work overtime and as to when the Postal Service can avoid utilizing OTDL employees at the penalty overtime rate by assigning an OTDL employee not yet entitled to penalty overtime. Notably, the latter provision speaks in terms of "the overtime assignment," which lends support to the Union's contention that "overtime" is "overtime," whatever the overtime rate of pay that may apply.

Article 11.6.B, at issue in the 1987 Mittenthal Award, makes no mention of penalty overtime as such. It does provide for utilizing casuals and PTFs "to the maximum extent possible even if the payment of overtime is required," but that left the issue which the parties could not agree on -- does this reference to "overtime" include (in the case of PTFs) penalty overtime? -- to be decided by Arbitrator Mittenthal. As he stated, Postal Service statements in a special postal bulletin and letter to the Union: "show that employees on a holiday schedule can, where appropriate, qualify for 'penalty overtime' under Article 8, Sections 4 and 5." But the issue before him was whether the Postal Service was required to follow the established "pecking order" even if that would result in the payment of penalty overtime, rather than just regular overtime. He concluded that it was, at least in part because: "...'penalty overtime' is still a form of 'overtime' and double time is simply a new type of 'overtime' rate." While the parties had a past practice of strictly following the "pecking order," there was no practice with respect to penalty overtime which had just recently been adopted in the 1984 National Agreement.[3]

[3] The Postal Service points out that ELM 432.32 is entitled "Maximum Hours Allowed" and permits PTFs to work up to 12 hours in a service day. The Postal Service ties this into the meaning attributed to the term "to the maximum extent possible even if overtime is required" in Article 11.6.B. Arbitrator Mittenthal makes no mention of ELM 432.32 in his decision. In any event, that holiday scheduling provision provides little guidance in interpreting the overtime/priority scheduling provisions in Article 8.5.H.

The National Agreement does not define the term "overtime work," but this is the title given to Section 4 of Article 8, which defines both "overtime pay" and "penalty overtime pay" and the circumstances under which these various types of overtime compensation are to be paid to designated categories of employees. Section 4.D, notably, uses the term "overtime work" to cover overtime work for which penalty overtime pay is required. Section 5 likewise is entitled "Overtime Assignments" and covers assignments for which both "overtime pay" and "penalty overtime pay" apply. The ELM also has provisions regarding types of overtime compensation and overtime eligibility of various categories of employees.

Work performed by employees which entitles them to penalty overtime pay is a form of "overtime work," as Arbitrator Mittenthal observed, and as is reflected in various provisions of Article 8. The evidence does not support the Postal Service's past practice claim, as discussed above. The closest analogy to Article 8.5.H is Article 8.4.G, which similarly establishes a priority for full-time employees on the OTDL and includes no reference to penalty overtime. The parties' understanding -- stated in various Q&As and Step 4 settlements -- that Article 8.4.G applies to full-time OTDL employees who are eligible to receive penalty overtime pay also supports a similar finding with respect to Article 8.5.G.

The parties' elaborate set of rules relating to overtime work reflect a number of different policy objectives, some of which are addressed in the MOU Re: Article 8 attached to the 2006 National Agreement (at page 292). Suffice it to say that I see no compelling basis on which to conclude that the parties -- when they agreed to the operative terms of Article 8.5.H, as part of the Casuals/PTF MOU -- had a joint preference to work casual employees on overtime, rather than utilize OTDL employees on penalty overtime.

For all of these reasons, I conclude that the APWU's position in this case must be sustained. By email dated June 3, 2013, I was informed that after the close of the hearing in this case the parties agreed to the following:

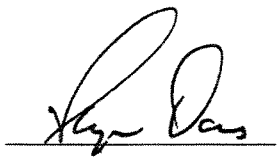
> The parties agree that the arbitrator should initially rule only on the merits, and that he should remand any remedy issues to the parties for them to attempt to resolve the issues. Further, the

parties request that the arbitrator retain jurisdiction as to any remedy issues. If the parties are not able to reach an agreement that fully resolves any remaining remedy issues within a period of 60 days following issuance of the merits award, the arbitrator will determine whether any additional hearing days are required, and will issue a briefing schedule for any remaining remedy issues to be decided by him.

AWARD

1. Article 8, Section 5.H of the 2006 USPS/APWU National Agreement, which requires full-time employees on the overtime desired list (OTDL) to be given priority scheduling for overtime work over casual employees includes priority scheduling for penalty overtime prior to casuals doing overtime work.

2. Remedy issues are remanded to the parties in accordance with their agreement, and I retain jurisdiction as to any remedy issues as provided therein.



Shyam Das, Arbitrator