



American Postal Workers Union, AFL-CIO

1300 L Street, NW, Washington, DC 20005

To: Local and State Presidents
National Business Agents
National Advocates
Regional Coordinators
Resident Officers

From: Greg Bell *B*
Director, Industrial Relations

Date: April 29, 2005

Re: Das Award on Sunday Premium in Cases of
Temporary Schedule Changes for Personal Convenience

Enclosed you will find a copy of a recent national award sustaining the union's position on Sunday premium for employees who are scheduled to work on Sundays due to temporary schedule changes for personal convenience. Arbitrator Das ruled that "[a]n eligible employee who is scheduled by management to work and does work on a non-overtime basis on a Sunday, even if the employee was scheduled on Sunday pursuant to a request for a temporary schedule change for personal convenience, is entitled to Sunday premium pay under Article 8.6 of the National Agreement." (*AIRS# 42272 – USPS# 190C-11-C 910325156 & H7C-4S-C 29885; 4/15/2005*)

This case arose after the local union filed a grievance in response to a 1990 posting by the Minneapolis/St. Paul BMC Acting Manager stating that the BMC would adhere to ELM Section 434.31(c) that Sunday premium does not apply if Sunday time "is due to a temporary schedule change at the employee's request." This provision was first included in ELM Issue 11, dated October 7, 1988 and ELM Issue 12. However, the language was removed later and was not included in Issue 13, in accordance with a settlement of Article 19 grievances that challenged Issue 11 and 12 changes. The local grievance was eventually appealed to Step 4 under the pre-1998 grievance procedure. At Step 4, the Postal Service asserted that the language change regarding Sunday premium "was made as a matter of clarification, and was not intended to change existing policy" and that by its agreement to delete such language, it did not "concede any change in its interpretation of the section." At arbitration, the Mail Handlers Union intervened in this case in support of the APWU position.

During the hearing, the APWU presented evidence that an employee requesting a temporary schedule change for personal convenience must complete a Form 3189 that only waives out-of-schedule premium pay and not Sunday premium pay. The Postal Service

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presented testimony by a Headquarters Payroll Accountant indicating that from 1984 until 1992, he was a PSDS Technician and supervisor with responsibility for ensuring proper administration of time and attendance issues in his district. He indicated that his understanding has always been that employees are only eligible for Sunday premium if they work on a Sunday in their assigned schedule or bid assignment, and he was not aware of any policy allowing employees to be paid Sunday premium for hours worked due to a temporary schedule change for personal convenience. The Accountant stated, however, that a “regular work schedule” within the meaning of Article 8.6 also includes a temporary assignment dictated by management, and for part-time flexibles the weekly schedule posted by management. Another Headquarters Payroll Accountant testified that from 1976 until 1983, she worked as an Accounting Officer in Milwaukee. She also said that she had always understood that an employee is not eligible for Sunday premium when he or she works on a Sunday due to a temporary schedule change for personal convenience, and had stated this opinion in response to questions from postal employees. She further claimed that the phrase “regular work schedule” in Article 8.6 means the bid schedule for full-time regular employees and the schedule given at the beginning of the week for regular flexible employees. In the case of part-time flexible employees, this witness stated that the phrase refers to the hours per day they are given to work.

The APWU argued that Article 8.6 cannot be interpreted as allowing an exception to Sunday premium when an employee works on a Sunday as a result of the Postal Service’s approval of his/her schedule change request. We asserted that over dozens of years, the Postal Service has applied Article 8.6 to entitle an employee to Sunday premium if two factors exist; i.e., management schedules the employee to work and the employee actually works on a Sunday. Moreover, the union argued that the “regular work schedule” in Article 8.6 has to be read “in context” and thus refers to the “non-overtime hours in an employee’s schedule that fall during a Sunday.” It was the union’s position that the legislative history of the Federal Employees Salary Act of 1965, the source of Article 8.6 language, clearly supports this interpretation. The APWU further contended that there is no merit to management’s contention that in accordance with Article 8.6, only employees who work Sunday as part of a fixed work schedule of their bid assignment are entitled to Sunday premium. We asserted specifically that such an interpretation is inconsistent with the National Agreement and the parties’ practice, as reflected in the F-21 Handbook, which allow flexible employees that do not have regular or fixed work schedules to be eligible for Sunday premium. In addition, the APWU contended that before ELM Issue 11 was issued in 1988, there was no written policy that employees requesting a temporary schedule change for personal convenience were not entitled to Sunday premium. Moreover, according to the union, the language in ELM Issue 11 did not reflect existing practice that entitled employees to Sunday premium if they were scheduled to work and actually worked, even if they had put in a request for a temporary schedule change. In addition, we argued that the Postal Service did not establish that the understanding of Payroll Accounting witnesses, that employees with temporary schedule changes for personal convenience were ineligible for Sunday premium, was actually followed in the field. Furthermore, the union contended that for reasons of equity and the fact that management ultimately has to approve employees’ requests for schedule changes, the Postal

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Service should not be allowed to “enjoy the fruits of its employees’ Sunday labor” and not pay them Sunday premium.

The NPMHU contended that the phrase “regular work schedule” in Article 8.6 is ambiguous, and cannot merely mean “recurrent” since flexible employees are eligible for Sunday premium and don’t have fixed or recurring schedules. Though there is no evidence regarding bargaining history of this language, according to the mail handlers, virtually identical language existed in the Federal Employees Salary Act of 1965 authorizing Sunday premium for postal employees before 1971. The NPMHU asserted, therefore, it is reasonable to assume that the parties that adopted the language in 1971 intended that the term “regular work schedule” have the same meaning it had in the statute. It then argued that a review of the legislative history of the Sunday premium provision in the federal law covering postal employees and the corresponding provision for other federal employees supports a conclusion that the provision was intended to cover “all Sunday work that was not subject to an overtime or 150% rate of pay.” It further asserted that the unions’ interpretation of Article 8.6 leads to an equitable result since an employee being paid for work on Sunday due to a temporary schedule shift would be replacing another employee with a schedule including Sunday who is not working that day. Therefore, according to the mail handlers, paying the 25% premium to the employee requesting a temporary schedule change would not cost the Postal Service anything in excess of what it would ordinarily pay to staff its Sunday shifts and actually would save management money by not requiring that it assign another employee overtime or out of schedule pay to cover work needs.

The Postal Service countered that the phrase “regular work schedule” in Article 8.6 must be read according to its plain meaning which is an employee’s bid schedule. It asserted also that an employee’s regular work schedule is the schedule established by management, including the posted part-time flexible scheduled and the assigned temporary detail schedule. Management contended that if the union’s interpretation were accepted, an employee’s regular work schedule could be changed merely by submitting a Form 3189 requesting a temporary schedule change for personal convenience. Moreover, it claimed that language in the F-21 Handbook and applicable provisions of the ELM are consistent with Article 8.6’s provision since they bar payment of Sunday premium unless employees actually work Sunday hours (with a few narrow exceptions) and such work is performed as a part of their regular work schedule. The Postal Service asserted, though, that since language in Article 8.6 is clear and unambiguous, there is no basis for looking at extrinsic evidence to determine its meaning. Also, management argued that nothing in the record shows that the parties intended to incorporate the 1965 law into the National Agreement when Article 8.6 was included in the first Agreement in 1971. Finally, it contended that no evidence exists of a national past practice of paying Sunday premium to employees working on a Sunday in accordance with a temporary schedule change for personal convenience.

Arbitrator Das found no merit in the argument that the clear or plain meaning of the words “regular work schedule” is evident and means fixed bid schedules. “If the only employees eligible for Sunday premium pay under Article 8.6 were employees with fixed bid schedules,” according to the arbitrator, “the Postal Service’s argument that this is the clear or plain meaning

of the words ‘regular work schedule’, as used in that provision, might have considerable appeal.” However, “even the Postal Service acknowledges that the term ‘regular work schedule’ in Article 8.6 does not necessarily mean recurring or fixed or bid – as the term ‘regular schedule’ evidently does on Form 3189 on which out-of-schedule premium is waived by full-time regular employees – but rather it encompasses a variety of schedules directed by management,” Das stressed. Accordingly, he determined that “it was necessary to look beyond the wording of Article 8.6 to resolve this dispute.”

Das then found that the unions showed that Article 8.6, including the terms “regular work schedule,” was carried over from the 1965 federal law governing postal pay before postal reorganization. Though acknowledging that there was no evidence regarding the bargaining history for Article 8.6, he said that “[i]t is reasonable to presume that in continuing to use the same entitlement language, [the 1971 negotiators] intended that language to be applied as it been applied before Postal Reorganization.” Moreover, according to the arbitrator, “[t]he detailed legislative history . . . shows . . . that Congress most likely used the term “regular work schedule” to refer to the basic five-day, forty-hour work week, as distinguished from overtime,” according to the arbitrator. Therefore, Das reasoned that “[t]he meaning of the term ‘regular work week’ that Congress most likely intended when it enacted the 1965 statute, at the very least . . . provides a solid basis on which to conclude that the parties quite possibly used it in that sense, rather than as referring to a fixed or bid schedule, when they carried forward the statutory language in Article 8.6 in 1971.” He also said that the fact that part-time flexible employees that do not have fixed or bid schedules became eligible in 1971 for Sunday premium supports this interpretation.

After reviewing the record, Das observed that evidence of past practice regarding how Article 8.6 was applied since 1971 “is mixed and far from conclusive.” He said that though the two Postal Service witnesses testified regarding their understanding of postal policy, the underlying grievance record “reveals that prior to ELM 11, the ‘policy’ at the MSP BMC was to pay Sunday premium to employees on a temporary schedule change for personal convenience.” “There simply is no way on this record to determine the extent to which the contrary postal policy described by management witnesses was applied in other offices,” according to the arbitrator.

He then referred to ELM Section 434.31 and Section 242.1 of the F-21 Handbook that stated and continue to state that Sunday premium “is paid to eligible employees for all hours worked during a scheduled tour that includes any part of Sunday.” In addition, he cited ELM Section 434.32 and Section 242.21 of the F-21 Handbook that say that “only those employees who have been scheduled to work on a Sunday are eligible to receive the premium.”

“Particularly in light of this stress on the employee having to be ‘scheduled’ to work on a Sunday, without other qualification,” according to Arbitrator Das, “the absence of any reference in the ELM or Handbook F-21 to ‘regular’ schedule – in the sense of fixed or bid – or to employees not being entitled to Sunday premium if scheduled on Sunday pursuant to a request for a temporary schedule change is striking.” He further determined that “the absence – prior to

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the disputed issuance of ELM 11 in 1988 – of any specific language in the ELM or Handbook F-21 or any other policy directive or document stating that employees who request a temporary schedule change are not entitled to Sunday premium does not seem an oversight.”

Das then concluded that the record does not establish that Postal Service witnesses’ interpretation of Article 8.6 constituted what the parties had agreed to in adopting that provision in 1971 and does not show that their interpretation was an established past practice when the grievance arose in 1990. He thus sustained the unions’ position in this case.

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Attachment

National Arbitration Panel

In the Matter of Arbitration)
)
 between)
)
 United States Postal Service) Case No.
)
 and) I90C-1I-C 910325156
)
 American Postal Workers Union) H7C-4S-C 29885
)
 and)
)
 National Postal Mail Handlers)
 Union - Intervenor)

Before: Shyam Das

Appearances:

For the Postal Service: H. Alexander Manuel, Esquire
For the APWU: Melinda K. Holmes, Esquire
For the NPMHU: Bruce R. Lerner, Esquire
Kathleen M. Keller, Esquire

Place of Hearing: Washington, D.C.
Dates of Hearing: January 14, 2004
May 18, 2004
Date of Award: April 15, 2005

Relevant Contract Provisions: Article 8.6

Contract Year: 1987-1990

Type of Grievance: Contract Interpretation

Award Summary

An eligible employee who is scheduled by management to work and does work on a nonovertime basis on a Sunday, even if the employee was scheduled on Sunday pursuant to a request for a temporary schedule change for personal convenience, is entitled to Sunday premium pay under Article 8.6 of the National Agreement.



Shyam Das, Arbitrator

The issue in this case is whether an employee who works on a Sunday pursuant to the employee's request for a temporary schedule change for personal convenience is entitled to Sunday premium pay under Article 8.6 of the National Agreement.

The underlying grievance in this case arose under the 1987-1990 National Agreement. The relevant portion of Article 8.6, which has not changed since the first National Agreement in 1971, states:

Section 6. Sunday Premium Payment

Each employee whose regular work schedule includes a period of service, any part of which is within the period commencing at midnight Saturday and ending at midnight Sunday, shall be paid extra compensation at the rate of 25 percent of the employee's base hourly rate of compensation for each hour of work performed during that period of service.....

The underlying grievance was filed at the Minneapolis/St. Paul Bulk Mail Center in response to an August 20, 1990 posting by the Acting Manager of the BMC, which reads:

It has been brought to my attention that section 434.3 of the Employee & Labor Relations Manual (ELM) is not always being adhered to with regard to Sunday premium pay.

Below is an excerpt from the ELM. The BMC will adhere to this language.

434.3 Sunday Premium

434.31 Policy Sunday premium is paid to eligible employees for all work and paid training or travel time performed during a scheduled tour that includes any part of a Sunday. Note that:

a. An employee entitled to Sunday premium may also be entitled to other premiums for the same tour (see 432.55).

b. An employee may not be credited with Sunday premium in excess of the hours worked per tour, of 8.00 hours per tour, or of 16 hours per service week.

c. Sunday premium does not apply if Sunday time is due only to late clocking out or early clocking in (see 432.464.b), to a temporary schedule change at the employee's request, or to a temporary schedule initiated by management if the employer receives out-of-schedule premium or nonbargaining rescheduling premium for the Sunday time.

d. Eligible exempt employees receive Sunday premium when those hours that are normally worked in a service day fall within the specified parameters of this premium.

(Emphasis added.)

In its Step 2 response to the grievance, management stated, in part:

Prior to August 20, 1990 the policy at the MSP BMC had been to pay employees on a temporary schedule change for personal convenience Sunday premium pay. As of August 20, 1990 the BMC no longer pays employees Sunday premium pay when they have requested to work a different schedule for personal reasons. (Those employees who do not normally have Sunday as a regularly scheduled workday.)

* * *

It is management's position that the language of the ELM is clear in that Sunday premium pay is not paid to employees working a Sunday on a schedule change at their own request. In the instant grievance management was erroneously paying Sunday premium pay to employees on a temporary schedule change. It is our position that the remedy for administrative error is to rectify the error....

The ELM 431.31(c) language quoted in the August 20, 1990 notice posted in the MSP BMC and referred to in management's Step 2 response was included in ELM Issue 11, dated October 7, 1988 and ELM Issue 12. In prior Issues, ELM 434.31(c) stated only:

c. Sunday premium does not apply if Sunday time is due only to late clocking out or early clocking in (see 432.464.b).

The language added to ELM 434.31(c) in Issue 11 later was removed and not included in Issue 13, pursuant to settlement of Article 19 grievances protesting ELM changes in Issues 11 and

12. In its Step 4 response in the present case, which is dated September 29, 1993, the Postal Service asserted:

The Union contends that since the language in question was removed from the Employee and Labor Relations Manual via Postal Bulletin #21849 the Sunday Premium Pay should be paid to employees on a temporary schedule change which the employee had requested.

It is the position of the Postal Service that the language in question was in fact removed from the Employee and Labor Relations Manual at the Union's request because it had been added to the ELM without complying with the provisions of Article 19. The language change in the Employee and Labor Relations Manual was made as a matter of clarification, and was not intended to change existing policy. In agreeing to delete the language which had been added to the 11th edition of the Employee and Labor Relations Manual, management did not concede any change in its interpretation of the section.

At arbitration, the Postal Service presented testimony to the same effect.¹

Section 242.1 of Handbook F-21 (Time and Attendance) states that Sunday premium "is paid to eligible employees for all hours worked during a scheduled tour that includes any part of a Sunday". This tracks the language in ELM 434.31. Section

¹ It is unnecessary to consider subsequent ELM editions in resolving the present dispute.

242.21 of Handbook F-21, which tracks the language in ELM 434.32, goes on to state:

... It is important to note that only those employees who have been *scheduled* to work on a Sunday are eligible to receive the premium. If the employee has not been scheduled, then he is not eligible for "Sunday premium."

Handbook F-21 also states that there are no special timecard procedures for Sunday premium hours, and that: "Supervisors are not required to approve Sunday premium hours."

The parties agree that full-time regular, part-time regular, full-time flexible and part-time flexible bargaining unit employees are eligible for Sunday premium under the terms provided in Article 8.6. The APWU and the NPMHU, which intervened in this case, contend that an eligible employee who is scheduled and actually works during a Sunday is entitled to Sunday premium -- if not working overtime or otherwise receiving premium pay -- regardless of the reason the employee is scheduled for that Sunday work. The Postal Service insists, however, that an employee is not entitled to Sunday premium if working on a Sunday only as a result of a temporary schedule change for personal convenience, because that Sunday work -- in the Postal Service's view -- is not part of the employee's "regular work schedule".

The APWU presented evidence that an employee requesting a temporary schedule change for personal convenience

must complete a Form 3189 on which the employee acknowledges that if the request is granted the employee will not be entitled to out-of-schedule premium.² The Form 3189 request also has to be agreed to and signed by a Union representative. The APWU stresses that Form 3189 only waives out-of-schedule pay, it makes no reference to Sunday premium pay. The Postal Service points out there is no need for a waiver of Sunday premium, because an employee only is entitled to Sunday premium if the Sunday work is part of the employee's "regular work schedule".

Louis Picciano, now a headquarters Payroll Accountant, testified that from 1984 to 1992 he had substantial responsibility as a PSDS (Postal Service Data System) Technician and Supervisor for ensuring proper administration in his district of time and attendance issues, including Sunday premium. His understanding always has been that employees are eligible for Sunday premium only if they work on a Sunday within their assigned schedule, that is, their official job or bid assignment. He added that "regular work schedule", for purposes of Article 8.6, also would include a temporary assignment dictated by management, and, in the case of a part-time flexible employee, the weekly schedule posted by management. He stated that in his entire tenure with the Postal Service since 1977 he has not been aware of any policy that would have allowed an employee to be paid Sunday premium for hours worked pursuant to a temporary schedule change for personal convenience. As he

² Only full-time regular employees are eligible for out-of-schedule premium. (See Handbook F-21, Sections 232.11 and 232.21.)

also put it: "There is no penalty for accommodating an employee."

Cheryl Hubbard, another Payroll Accountant, testified that from 1976 to 1983, before she came to headquarters, she served as an Accounting Officer and General Accounting Officer in Milwaukee. Her opinion and understanding always have been that an employee is not eligible for Sunday premium for working on a Sunday on a temporary schedule change for personal convenience. On many occasions, Hubbard testified, she has stated that opinion in response to questions from other postal employees. When asked for her understanding of the phrase "regular work schedule" in Article 8.6, she testified:

The regular work schedule, in my understanding and my application in the years I've worked in payroll, is it depends on the type of employee. If you have a full time regular employee, that is their bid schedule. If you have a regular flexible employee, it is the schedule that they are given at the beginning of the week. If it is a part time flexible employee, it is their hours per day that they are given to work.

APWU POSITION

The APWU contends that the only interpretation of Article 8.6 that is consistent with the National Agreement, the parties' application of Sunday premium, and the history of the provision itself does not allow for an exception to the Sunday premium entitlement simply because an employee works during a

Sunday as the result of the Postal Service approving an employee's schedule change request. As the Postal Service itself has reiterated numerous times and over dozens of years through its application of Article 8.6, the National Agreement entitles an employee to Sunday premium if two factors occur: the Postal Service schedules the employee to work and the employee actually works during a Sunday. Nowhere has the exception to these Sunday premium requirements for employee-requested schedule changes been expressed that binds the Union or the Postal Service. In a situation where both Sunday premium factors are satisfied, it is immaterial to the Sunday premium entitlement that management's exercise of its discretion to schedule an employee to work during a Sunday originated with a request from the employee.

The APWU, like the NPMHU, maintains that the term "regular work schedule" in Article 8.6, when read in context, refers to the nonovertime hours in an employee's schedule that fall during a Sunday. As the NPMHU has demonstrated, this is supported by the legislative history of the provision in the Federal Employees Salary Act of 1965, which is the obvious source of the language in Article 8.6. Moreover, the Postal Service's contention that this phrase limits Sunday premium to only those employees who work on Sunday as part of the fixed work schedule of their bid assignment is inconsistent with the National Agreement and the parties' practice -- reflected in Handbook F-21 -- that flexible employees, who do not have regular or fixed work schedules, are eligible for Sunday premium.

The APWU stresses that prior to the issuance of ELM 11 in 1988, there was no written policy that employees who request a temporary schedule change for personal convenience are not entitled to Sunday premium if they actually work their scheduled hours on Sunday. The exclusionary language added to ELM 434.3(c) in ELM 11 later was withdrawn and never has been agreed to or accepted by the Union. That language was not derived from the National Agreement, nor did it reflect the existing practice and policy recognized and followed by the parties since the first National Agreement, which has been that employees are paid Sunday premium if they are scheduled to work and actually work during a Sunday, notwithstanding their having put in a request for a temporary schedule change. This is demonstrated in the underlying grievance. The Postal Service offered no evidence that the understanding of its two Payroll Accounting witnesses that Sunday premium does not apply to employees who request a temporary schedule change for personal convenience was followed in the field, particularly prior to issuance of ELM 11.

The APWU also argues that the equities of the situation favor the Unions' interpretation of Article 8.6. As reiterated in numerous places, Sunday premium is available to employees only if they are scheduled by management to work during a Sunday. Although the request to work during a Sunday may initially emanate from the employee, it is nonetheless management's decision whether to approve the request. Thus, management ultimately decides whether to pay Sunday premium by how it schedules employees. If the Postal Service enjoys the

fruits of its employees' Sunday labor, the APWU asserts, there is no equitable explanation why it should not pay them Sunday premium.

NPMHU POSITION

The NPMHU argues that the term "regular" in Article 8.6 is ambiguous. It cannot be read simply to mean "recurrent", because flexible employees are eligible for Sunday premium and they do not have fixed or recurring schedules. Moreover, it is undisputed that over the years the practice of paying Sunday premium when an employee requests a temporary schedule change for personal convenience has been mixed.

There is no evidence regarding the bargaining history of the relevant language in Article 8.6, which has been part of the National Agreement since 1971. The record does show, however, that this language is virtually identical to that in the Federal Employees Salary Act of 1965, 29 U.S.C. §3573(3), which governed the payment of Sunday premium pay (25%) to postal employees prior to 1971. The NPMHU argues that, given the identical relevant language and lack of any contrary bargaining history, the only reasonable assumption is that the parties in 1971 intended the term "regular work schedule" in Article 8.6 to have the same meaning as that term had in the statute that governed postal pay prior to collective bargaining.

The NPMHU maintains that careful review of the legislative history of the Sunday premium pay provision in the

Federal Employees Salary Act of 1965, as well as the corresponding provision in the Federal Salary and Fringe Benefits Act of 1966 -- which was intended to provide the same Sunday premium pay entitlement to other federal employees -- supports the conclusion that this was understood to cover all Sunday work that was not subject to an overtime or 150% rate of pay. The NPMHU cites a 1969 decision of the Comptroller General of the United States, construing the 1965 Act, and a 1973 decision, construing the 1966 Act, as providing additional support for this interpretation.

Like the APWU, the NPMHU contends that the Unions' interpretation of Article 8.6 leads to an equitable result. The employee who is granted a temporary schedule change to a Sunday shift presumably is replacing another Sunday shift employee who is not working that day. This replaced employee would have been paid either an additional 25% for Sunday premium or an additional 50% for overtime or out-of-schedule pay. Paying the 25% premium to the employee who requests a temporary schedule change, therefore, does not cost the Postal Service anything beyond what it ordinarily would pay to staff its Sunday shifts, and, in many cases, saves the Postal Service money because the Postal Service otherwise would have to order more expensive overtime or out-of-schedule work to cover for the replaced employee.

EMPLOYER POSITION

The Postal Service contends that the words "regular work schedule" in Article 8.6 are assumed to be included in the contract for reasons intended by the parties and should be given their plain meaning. An employee's regular work schedule is a term of art which has particular meaning in the National Agreement. It refers to an employee's bid schedule. If the Unions' interpretation of these words were to be accepted, an employee's regular work schedule could be changed by the mere submission of a Form 3189 requesting a temporary schedule change for personal convenience. The Postal Service argues this result simply would be untenable and would result in literal chaos amongst the bargaining unit. If, in the Unions', submission of a Form 3189 does not cause the Sunday work hours to become part of the employee's regular work schedule, then their position in this case ignores the plain language of the contract.

The Postal Service asserts that just as mere service on a temporary relief assignment does not supplant one's "regular schedule" as determined by one's bid schedule, neither can the mere execution of a Form 3189 supplant one's regular schedule. An employee's regular work schedule, the Postal Service insists, is the schedule established by management. It is the bid schedule. It is the posted part-time flexible schedule. It is the assigned temporary detail schedule. All of these schedules are work schedules assigned by management. Sunday hours do not become part of one's regular work schedule,

however, when they are approved as a temporary schedule change for personal convenience.

To the extent that there is any ambiguity in the language of Article 8.6, and the Postal Service maintains there is none, it is completely dispelled by the express language of Handbook F-21 and the applicable provisions of the ELM, one or both of which have been in effect for the past 30 years. Both directives prohibit payment of Sunday premiums for employees unless they actually work the Sunday hours (with a few narrow exceptions) and they do so as part of their regular work schedule.

The Postal Service argues that since the contract language is clear and unambiguous, there is no basis for resort to extrinsic evidence to determine the meaning or intent of the parties in agreeing to the language of Article 8.6.

The Postal Service concedes that a fair reading of the legislative history presented by the NPMHU could lead one to conclude that the 1965 statute that governed Postal Service pay prior to 1971 used the term "regular work schedule" in the manner the Unions assert, although that is not the only possible conclusion. Nonetheless, there is no need to sort through what is at best obscure and conflicting legislative history to decide this case. There is nothing in the record to indicate that the parties intended to incorporate the federal statute and its legislative history into their collective bargaining agreement when they adopted the language in Article 8.6 in 1971. As

Arbitrator Garrett pointed out in an early Postal Service case involving a different issue relating to Sunday premium, the Postal Service was attempting to avoid paying Sunday premium wherever possible.

Insofar as past practice is concerned, the evidence at best shows that there were some local aberrations from the policy set forth in Article 8.6 and incorporated in postal handbooks and directives. There simply is no evidence of a national past practice of paying Sunday premium to employees who work a Sunday pursuant to a temporary schedule change for personal convenience.

FINDINGS

If the only employees eligible for Sunday premium pay under Article 8.6 were employees with fixed bid schedules, the Postal Service's argument that this is the clear or plain meaning of the words "regular work schedule", as used in that provision, might have considerable appeal.³ But ever since this Sunday premium provision was included in the parties' first National Agreement in 1971, it also has applied to part-time flexible employees, who clearly do not have a fixed or bid

³ As Arbitrator Snow, citing the Restatement (Second) of Contracts, pointed out, however: "It is not necessary to prove an ambiguity in the contractual language of the parties before evaluating the totality of circumstances that created the language. The language of the parties is understood only in context." APWU v. USPS, Case No. H4C-3W-C 8590 (1993), at 11.

schedule. Moreover, as Payroll Accountant Picciano testified, the Postal Service also considers "regular work schedule" in Article 8.6 to encompass a temporary assignment directed by management.

In other words, even the Postal Service acknowledges that the term "regular work schedule" in Article 8.6 does not necessarily mean recurring or fixed or bid -- as the term "regular schedule" evidently does on Form 3189 on which out-of-schedule premium is waived by full-time regular employees -- but rather it encompasses a variety of schedules directed by management. Indeed, it appears that the only nonovertime scheduled work that the Postal Service maintains should be excluded from "regular work schedule" is a temporary schedule change made at the request of an employee. This may be an arguable interpretation of Article 8.6, but it is not an interpretation that can be sustained simply on the basis of the plain meaning of the words "regular work schedule". Moreover, it should be pointed out that the schedule of an employee who successfully requests a temporary schedule change for personal convenience (using Form 3189) is the schedule assigned by management to that employee for that week.

Thus, it is necessary to look beyond the wording of Article 8.6 to resolve this dispute.

There is no evidence regarding the bargaining history of the relevant portion of Article 8.6, which was included in the first National Agreement in 1971. The NPMHU has made a

persuasive case that the pertinent language, including the term "regular work schedule" simply was carried over from the 1965 federal statute that governed postal pay prior to Postal Reorganization. The detailed legislative history presented by the NPMHU also shows, in my opinion, that Congress most likely used the term "regular work schedule" to refer to the basic five-day, forty-hour work week, as distinguished from overtime. The Postal Service does not concede the point, but does not dispute that this is as reasonable a reading of the legislative history as any.

It does not necessarily follow, however, that the 1971 negotiators meant the term "regular work schedule" to have that meaning. There is no evidence they were aware of the legislative history. It is reasonable to presume that in continuing to use the same entitlement language, they intended that language to be applied as it had been applied before Postal Reorganization.⁴ There is, however, no relevant evidence of how the statutory provision was applied prior to Postal Reorganization. The 1969 Postal Manual and F-21 Handbook, which

⁴ In APWU v. USPS, Case No. AB-C-10 (1975), at 2, Arbitrator Garrett noted that following enactment of the 1965 Act the Post Office Department "launched a program to revise all affected work schedules so as to reduce the impact of the required Sunday premium to the greatest extent possible". (Believing this to be still ongoing, the Unions in 1973 succeeded in adding new language to Article 8.6 to limit that program.) The Postal Service's goal of avoiding Sunday premium where possible, however, does not shed any light on the parties' mutual intent when they adopted the prior statutory language on entitlement to Sunday premium in 1971.

are in evidence, do not provide any more detail on how the 1965 statute was applied in cases where an employee's schedule was temporarily changed at his or her request, assuming that occurred on occasion.

The meaning of the term "regular work week" that Congress most likely intended when it enacted the 1965 statute, at the very least, however, provides a solid basis on which to conclude that the parties quite possibly used it in that sense, rather than as referring to a fixed or bid schedule, when they carried forward the statutory language in Article 8.6 in 1971. That conclusion is strengthened by the fact that part-time flexible employees, who do not have fixed or bid schedules, became eligible in 1971 for Sunday premium.

The evidence as to past practice since Article 8.6 was agreed to in 1971 is mixed and far from conclusive. There was testimony from two Postal Service witnesses with responsibility for time and attendance matters regarding their knowledge and understanding of postal policy on this matter, which they said they had passed on to other management personnel in the districts where they served as supervisors before coming to headquarters. There also was evidence that top management at headquarters considered the specific exclusionary language added to ELM 434.3(c) in Issue 11 in 1988 to reflect existing policy. But whatever official policy may have been, it was not specifically set forth in any manual, handbook or directive prior to ELM 11, and it evidently was not always followed in the field. The underlying grievance record in this case, for

example, reveals that prior to ELM 11, the "policy" at the MSP BMC was to pay Sunday premium to employees on a temporary schedule change for personal convenience. There simply is no way on this record to determine the extent to which the contrary postal policy described by management witnesses was applied in other offices.⁵

As previously noted, there is no indication in the record of any postal manual, handbook or directive that specifically addressed this issue in the period after Postal Reorganization in 1971 until Issue 11 of the ELM was promulgated in 1988. Significantly, however, neither the relevant provisions in the ELM, nor those in Handbook F-21, required more than that the work on Sunday be scheduled work. ELM 434.31 and Section 242.1 of Handbook F-21 both stated (and continue to state) that Sunday premium "is paid to eligible employees for all hours worked during a scheduled tour that includes any part of a Sunday". In addition, ELM 434.32 and Section 242.21 of Handbook F-21 state:

⁵ If, as the NPMHU has indicated, temporary schedule changes for personal convenience frequently involve employees swapping days off, local management quite possibly would not consider payment of Sunday premium to be a "penalty" for approving the change, because the premium would have been paid anyway. Only when management otherwise would not have scheduled an employee on Sunday would the payment of Sunday premium constitute an "extra" cost to the Postal Service for accommodating an employee's request, and management is not obliged to grant the request.

... It is important to note that only those employees who have been *scheduled* to work on a Sunday are eligible to receive the premium. If the employee has not been scheduled, then he is not eligible for "Sunday premium."

Particularly in light of this stress on the employee having to be "scheduled" to work on a Sunday, without other qualification, the absence of any reference in the ELM or Handbook F-21 to "regular" schedule -- in the sense of fixed or bid -- or to employees not being entitled to Sunday premium if scheduled on Sunday pursuant to a request for a temporary schedule change is striking. This absence also is in marked contrast to ELM 434.611, relating to out-of-schedule premium -- which only full-time regular employees are eligible for -- which specifically refers to "regularly scheduled workday or workweek".⁶

In these circumstances, the absence -- prior to the disputed issuance of ELM 11 in 1988 -- of any specific language in the ELM or Handbook F-21 or any other policy directive or document stating that employees who request a temporary schedule change are not entitled to Sunday premium does not seem an oversight. This is not to say that at least some postal officials, including witnesses in this case, read the language

⁶ ELM 434.611 provides:

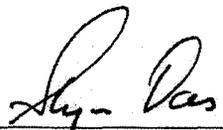
Out-of-schedule premium is paid to eligible full-time bargaining unit employees for time worked outside of and instead of their regularly scheduled workday or workweek when employees work on a temporary schedule at the request of management.

in Article 8.6 to have that meaning prior to 1988, but I am not persuaded that was the intent when the parties agreed to Article 8.6 in 1971, and the record does not establish that was an established past practice when the underlying grievance in this case arose in 1990.

For these reasons, I conclude that an eligible employee who is scheduled by management to work and does work on a nonovertime basis on a Sunday, even if the employee was scheduled on Sunday pursuant to a request for a temporary schedule change for personal convenience, is entitled to Sunday premium pay under Article 8.6 of the National Agreement.

AWARD

An eligible employee who is scheduled by management to work and does work on a nonovertime basis on a Sunday, even if the employee was scheduled on Sunday pursuant to a request for a temporary schedule change for personal convenience, is entitled to Sunday premium pay under Article 8.6 of the National Agreement.



Shyam Das, Arbitrator