

In the Matter of

DEPARTMENT OF AGRICULTURE
GRAIN INSPECTORS, PACKERS
AND STOCKYARDS ADMINISTRATION
FEDERAL GRAIN INSPECTION SERVICE
NEW ORLEANS FIELD OFFICE
DESTREHAN, LOUISIANA

and

LOCAL 3157, AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES, AFL-CIO

Case No. 13 FSIP 149

ARBITRATOR'S OPINION AND DECISION

The Department of Agriculture, Grain Inspectors, Packers and Stockyards Administration, Federal Grain Inspection Service, New Orleans Field Office, Destrehan, Louisiana (Employer) filed a request for assistance with the Federal Service Impasses Panel (Panel) to consider a negotiation impasse under the Federal Service Labor-Management Relations Statute (Statute), 5 U.S.C. § 7119, between it and Local 3157, American Federation of Government Employees, AFL-CIO (Union).

Following investigation of the request for assistance, arising from negotiations over a successor local supplemental agreement (LSA), the Panel determined that the dispute should be resolved through mediation-arbitration with the undersigned, Panel Member Edward Hartfield. The parties were informed that if they were unable to reach a voluntary resolution during mediation, I would issue a binding decision to resolve the issues.

Consistent with the Panel's procedural determination, on November 5, 2013, I conducted a mediation-arbitration proceeding with representatives of the parties at the Employer's facilities in Destrehan, Louisiana. During that meeting, the parties were unable to voluntarily resolve the issues. The proceeding continued by teleconference, on December 30, 2013, but again there was no resolution, and the parties submitted their final offers on the issues at impasse. Post-hearing briefs were filed on January 9, 2014.

In its brief, the Employer belatedly argues that it has no obligation to bargain over the Union's proposals because they involve tours of duty, a permissive subject of bargaining under 5 U.S.C. § 7106(b)(1) of the Statute, which the Employer elects not to negotiate. Moreover, it contends for the first time that the Union's proposals interfere with management's rights to determine its budget and assign work under 5 U.S.C. § 7106(a)(1) and 7106(a)(2)B) respectively, thereby relieving management of its bargaining obligation. Nevertheless, the Employer continues to urge the adoption of management's proposals on the basis of their merit.

The Union denies the Employer's allegations of non-negotiability noting in particular that with respect to its proposal concerning tours of duty and assignments, the Federal Labor Relations Authority concluded in American Federation of Government Employees, Local 3157 and U.S. Department of Agriculture, Federal Grain Inspection Service, 44 FLRA 1570 (1992) that a similar proposal was within the duty to bargain. Accordingly, the matter now is before me for final resolution in accordance with the Statute and 5 C.F.R. § 2471.11 of the Panel's regulations. In reaching this decision, I have considered the entire record, including the testimony of witnesses, documentary evidence and post-hearing submissions.

BACKGROUND

This case, filed by the Employer, concerns a dispute over two provisions in a successor LSA that affect employee overtime compensation. The Employer provides a variety of inspection, weighing, and grading services to U.S. grain exporters to facilitate the marketing of America's grain in domestic and international markets. The Union represents approximately 171 employees who are part of a nationwide consolidated bargaining unit. Typical bargaining-unit positions are agriculture commodities grader (ACG or grader), GS-9, whose primary duties are the inspection and grading of grain, and agriculture commodities technician (ACT or technician), GS-4 through GS-6, whose duties are of a more routine nature relating to grading activities. The Employer's operations primarily are funded through fees paid by grain exporters who enter into service agreements with the Agency. The parties are covered by a master collective-bargaining agreement that has been in effect since 1984, and rolled over annually. At the local level, the parties' current LSA has been in effect since 1995, and continues until April 1, 2014.

ISSUES AT IMPASSE

Portions of two articles remain unresolved: (1) In Article 8, "Assignments," Section 7, "Hours of Work," the parties disagree over whether employees should be assigned to a non-standard tour of duty that extends over 6 days in a workweek; and (2) in Article 11, "Overtime," Section 1, "Weekend Overtime," they disagree over whether the Employer should assign overtime on weekends according to an employee's seniority status in a work team or the skill level needed to perform the overtime work.

POSITIONS OF THE PARTIES

Issue 1. Work Schedules for Employees Assigned to Non-standard Tours of Duty

The current LSA lists the work shifts to which employees may be assigned when they are stationed at a facility that has a 24/7 operation. The Employer assigns staff to those facilities so that they are immediately available, around the clock, to provide grain inspection services and meet the changing needs of the grain elevator operators. Employees assigned to these "non-standard tours of duty" earn overtime when they work more than 8 hours in a workday. Often, employees are kept on the job, and paid their normal wages, even when the need for their services has been reduced or grain operators have temporarily closed their facilities.

The Employer proposes the following:

Hours of Work

Full time employees (except those subject to alternate work schedules) basic workweek shall be 40 hours performed over not more than six days of any consecutive seven days.

In situations where employees are assigned to a facility working a 24-hour around the clock operation for the administrative workweek, the Agency will normally assign employees to the First-8-Hour Indefinite Non-Standard Tour of Duty in accordance with MRP Desk Guide Subchapter 4610 and MRP Directive 4601.1. The following shifts will be used:

Sunday	Monday	Tuesday	Wednesday
0000-0800	0800-1600	0000-0800	0000-0800
0800-1600	1600-2400	0800-1600	08:00-1600*
1600-2400	0800-2000	1600-2400	1600-2400
0800-2000	2000-0800*	0800-2000	0800-2000
2000-0800*		2000-0800*	2000-0800*
Thursday	Friday	Saturday	
0000-0800	0000-0800	0000-0800	
0800-1600	1800-1600	0800-1600	
1600-2400	1600-2400	1600-2400	
0800-2000	0800-2000	0800-2000	
2000-0800*	2000-0800*	2000-0800**	

* Shift covers 2 administrative days

** Shift covers 2 administrative workweeks

Employees with assignments in other than a 24-hour around the clock operation will normally work the same shift as described above, subject to work demands.

In other circumstances and subject to work demands, employees may be assigned to the First-40-Hour Non-Standard Tour of Duty in accordance with MRP Desk Guide Subchapter 4610 and MRP Directive 4601.1.

Essentially, the Employer wants the ability to reduce its overtime expenditures by better synchronizing employee work schedules with work demands and, it maintains, implementing its proposal would help it achieve that end. It does not dispute the Union's claim that the scheduling changes would help reduce overtime for employees, but management must take steps to contain those expenses particularly when the Agency, in 2015, will undergo a review of its operations; it is in both parties' interest that the agency be able to demonstrate during those reviews that it can perform grading services in an efficient, cost effective manner, lest it lose the work to private contractors.

The Employer contends that a modification of the *status quo* is needed because there has been a "fundamental downward change" in the level of exports of U.S. grain. Exports of U.S. grain in FY 2013 are expected to be as much as 25 percent lower than FY 2012. As a result, there no longer is justification to retain, during certain times of the year, the current "first-8

indefinite tour of duty" which often results in a mismatch between the arrival of grain shipments for inspection and normal workweek scheduling, especially during the spring and summer when exporters sometimes temporarily close their grain elevators or significantly reduce operations. In the past, some grain elevators operated on a 24/7 basis and the Employer was committed to providing its services to make employees available to exporters on an as-needed basis. These assignments often meant that full time permanent employees, who worked a first-8 tour of duty, would need to work overtime when their assignment required them to work at a grain exporting operation that was open 24/7.

Now that the work has slowed during certain times of the year, the Employer does not want to be committed to staffing grain operations with employees receiving overtime pay who essentially go to their work sites but have little or no work to perform. In lieu of staffing such operations with employees working overtime, the Employer's proposal would allow it to assign the work "when and where" to intermittent employees on a first-40 non-standard tour of duty, who would perform the work on straight time because they would not have fulfilled 40 hours in their administrative workweek. The change would mean a reduction in overtime for full-time permanent employees and that an intermittent employee would not begin to earn overtime until the employee completes 40-hours of work in an administrative workweek. Comparability data show that the League City, Texas Field Office implemented a similar first-40 tour of duty and that it has worked well to reduce overtime costs. Similarly, the Employer's proposal would likely result in more efficient utilization of inspection staff, and a reduction of overtime expenditures.

The Union proposes the following:

Article 8 Tours of Duty and Assignments

The New Orleans field office will be divided into three Areas (1, 2, 3) as well as the Crowley and Brunswick duty points with separate official duty stations. Boundaries that do not over-lap. Under normal circumstances employees will be assigned duties within their assigned Area.

Section 2

The Local President and Executive Vice Presidents will have the options to be retained on a regular shift. In the Area where the Local President and the Executive Vice President are both assigned and both are in the same classification, they may not be retained on the same shift.

Section 3

Basic work assignments will be scheduled not less than Fourteen (14) days in advance of the start date, will cover periods of not less than (six weeks) forty-two (42) days, and will include the location(s) and assigned duty point(s). The shift rotation will be from third to second, second to first, and first to third. Ship hold rotation(s) will be every six weeks, (42) forty two days.

Section 5

Employees may be allowed to swap shifts and/or elevators provided that proper written request is given to Management and there is no adverse impact upon the Agency or scheduling.

A. Documentation of swaps is required to be on file in the field office before employees can change work sites or shifts. It is the employee's responsibility to ensure the documentation is on file.

Section 6

Under normal circumstances, each employee's starting, quitting times, and work locations assigned for each day of the workweek will be scheduled in advance of the workweek not later than 1530 hours on the Friday preceding the workweek. Under normal circumstances, daily work schedules will be posted not later than 1530 hours. Under normal circumstances, Management will notify an employee of an altered starting time not less than (16) sixteen hours before the shift starts.

Section 7

In situations where employees are assigned to a facility working a 24-hour shift around the clock operation the following shifts will be used:

Sunday-Monday

0800-1600
1600-2400
2400-0800
2000-0800
0800-2000

Workweek for all Full-Time Permanent Employees Hired before 2003 shall be Monday-Friday

Employees may be subject to one or more of the following Tours of Duty depending on the needs of the Agency:

- A. Non-Standard Tour of Duty--All full time employees are subject to working the Non-Standard Tours of Duty: First 8 Indefinite;
- B. Compressed Work Schedule (CWS) Tour of Duty--All permanent employees may volunteer for the CWS;
- C. Standard Tour of Duty; and
- D. Mixed Tour of Duty

Management will attempt to schedule a minimum off-duty period of 10 hours between tours, except when prevented by abnormal or unforeseen circumstances.

Section 9

Employees may submit their preferences for shift assignments for all or part of the six (6) week schedules.

The Union contends that the Employer has not demonstrated that it is suffering economically because of employee overtime. When employees work overtime, the grain operators and elevators pay their fees at an overtime rate; therefore, the funds to pay employee overtime do not come from the Employer's coffers but from the fees charged to companies that utilize the Agency's

services. It asserts that the Employer's "real motive" is to save money that would be deferred to support its "bloated" research and development operation in Kansas City, and management is attempting to do so "on the backs of employees." The Employer has not provided the Union with any data to support its stated claim that overtime costs have resulted in a financial burden on the Agency.

According to the Union's understanding of management's First-40 proposal, not only would employees have to defer earning overtime until they work more than 40-hours in a workweek, but the Employer also would have the discretion, mostly on weekends when inspection services may be reduced or curtailed at an employee's assigned facility, to send the employee to other work locations. Not knowing where they would be assigned on a daily basis creates significant scheduling uncertainties for employees who, in the past, have been able to rely on working at a specific facility. The impact of such a change would be "extremely family unfriendly" as employees would have no idea on a daily basis where they may be assigned to work. There often are long distances between grain operation facilities in Louisiana and, for an employee who lives near the facility where they had been working for years, to have to travel long distances to and from work at other facilities would adversely affect their ability to care for their children and/or aging parents. Furthermore, the Employer's proposal does not provide a procedure for assigning intermittent employees, on a first-40 non-standard tour of duty, to perform the work. Lack of a process could easily result in scheduling disparities and abuses.

The Union's proposal, on the other hand, would provide employees with procedures that would give them reasonable notice of assignments that would change their usual work location and allow them to balance work schedules with family responsibilities. Employees who were hired prior to 2003, as permanent employees with full time appointments, would be permitted to have Monday through Friday schedules, which would maintain the *status quo* for those individuals who have become accustomed to working fixed tours of duty and have acquired certain responsibilities outside of work based upon those long-standing work schedules. The Union's proposal allows the Employer to determine work schedules for all other employees as it sees fit.

Issue 2. Criteria for Assigning Weekend Overtime

The Employer proposes the following:

Section 1 - Weekend Overtime

- (A) All bargaining-unit employees in Area 1, 2, 3 and 4 will be divided into three (3) teams that are balanced as much as possible between shifts and qualifications. Normally, ACGs will be assigned to ACG positions and ACTs will be assigned to ACT positions.
- 1) Normally, employees will not be required to work outside their respective Areas on weekends, except where there are an insufficient number of employees available to cover the workload. In this case volunteers will be scheduled first.
 - 2) Employees may volunteer to work in another Area provided employees are not assigned to work in their respective Area and did not sign off. Volunteers will be assigned and replace the last employee that would be drafted. Volunteering does not constitute approval.
 - 3) When a bargaining unit employee is detailed to an Area within the field office for two (2) or more weeks, he/she will be placed on the weekend rotation for the Area to which he/she has been detailed. The assignment will become effective on the first weekend or holiday period after the first week of detail.
 - 4) For scheduling purposes, employees who have not completed 40 hours of regular time may be assigned first if available before assigning employees to work overtime.

Currently, employees are assigned to work in teams consisting of both graders and technicians. When management must assign overtime work on weekends, it is offered first to the employee on the work team with the greatest seniority, regardless of whether the employee is a grader or technician. Management

wants to modify the LSA so that the assignment would be determined based on the type of work and the level of skills needed to perform the work. As it stands now, when there is a need for technician work to be performed (which involves lesser skilled duties), the Employer must first offer it to the employee with the highest seniority on the work team, even if that individual is a grader, paid at a higher rate than a technician. Its proposal would give management the discretion to assign, by seniority in a work team, graders to perform grader work and technicians to perform technician work. The procedure would result in a cost saving for the Employer if the work to be performed on weekends were aligned with the level of skill needed to perform it. Furthermore, by first making weekend assignments to employees who have not completed 40 hours of regular time, the Agency would reduce overtime expenditures because those employees would not receive overtime compensation until they worked more than 40 hours in their administrative workweek.

The Union proposes to modify the LSA provisions in Article 11, concerning weekend overtime assignments, as follows:

Section 1. Weekend Overtime

(A) All bargaining unit employees in Area 1, 2 and 3 will be divided into three (3) teams that are balanced as much as possible between shifts and qualifications.

(1) Each location will be divided into 3 or 4 teams that are balanced as much as possible between shifts and qualifications.

Employees will not be required to work outside their respective Areas on weekends, except where there are an insufficient number of employees available to cover the workload. In this case, volunteers will be scheduled first (by priority list).

(3) Employees may volunteer (seniority) to work in another Area provided the employees are not assigned to work in their respective Area and did not sign off. Volunteers will be assigned and replace the last employee that would be drafted. Volunteering does not constitute approval.

(4) When a bargaining unit employee is detailed to an Area within the field office for two (2) or more

weeks, he/she will be placed on the weekend rotation for the Area to which he/she has been detailed. The assignment will become effective on the first weekend or holiday period after the first week of detail.

(M) By 1530 hours Friday, Management will post schedules at each facility. Employees may swap assignments with other qualified employees, subject to Management's approval. In addition, shift swaps may only occur when there is no effect on the following week's schedule. Requests will be made to one of the shift supervisors at the elevator where the swap will occur. If no Shift Supervisor is available the request is to go to the Manager on duty for that weekend, the Assistant Field Office Manager or the Field Office Manager.

(Q) If an employee does not receive notification that an overtime assignment is cancelled, and reports for duty, the employee will be assigned at least 2 hours for callout.

(U) When an employee is reassigned after reporting to his scheduled work site, he will retain his priority at the original work site.

(V) Double back: Employees can arrive to work two (2) hours late with supervisor approval of leave, if applicable.

(W) This system shall not prevent employees from being off on the weekends adjacent to scheduled annual leave.

(X) If a mistake is made on the weekend schedule causing an employee to lose his/her priority entitlement, the Field Office Manager and Local 3157 president or designed appointee(s) will determine whether the employee should be made whole with special overtime opportunities.

(Y) Normally, overtime shifts will be twelve (12) hours or eight (8) hours in duration

Essentially, the Union contends that the current practices for assigning weekend overtime should be retained because the Employer's proposal is merely another unwarranted "take back" of

the opportunity to earn overtime for those who hold GS-9 grader positions. The change proposed by management would be an economic sacrifice for this group of employees who, over the years, have counted on bolstering their annual income through overtime compensation. The Employer has failed to provide data to demonstrate a need to modify a contract provision that has been in effect for 18 years.

CONCLUSIONS

In reaching a decision on this case, the arbitrator must address three issues, two substantive and one jurisdictional. Since the jurisdictional issue is the most troubling, that is, the Employer's last minute claim that the Union's proposals are non-negotiable, I will address it first.

As noted above on page 2, the Employer belatedly argues that it has no obligation to bargain over the Union's proposals because they involve tours of duty, a permissive subject of bargaining under 5 U.S.C. § 7106(b)(1) of the Statute, which the Employer elects not to negotiate. Moreover, it contends for the first time that the Union's proposals interfere with management's rights to determine its budget and assign work under 5 U.S.C. § 7106(a)(1) and 7106(a)(2)(B), respectively, thereby relieving management of its bargaining obligation. Nevertheless, the Employer continues to urge the adoption of management's proposals on the basis of their merit.

While I recognize that such a claim is within the rights of the Employer, a review of the record leads me to conclude that this claim is both untimely and insincere, and gives the appearance of the Employer attempting to hedge its bets. To begin with, the Employer initiated the request for Panel assistance in June 2013 without raising a possible negotiability issue. Once the Panel asserted jurisdiction, the Employer voluntarily collaborated in the mediation-arbitration proceeding which involved, first of all, the writer making a trip to the Destrehan Field Office and participating in an 11-hour on-site procedure during which time no mention was made of the claim of negotiability. On December 30, 2013, I convened another all day dispute resolution effort via teleconference in which once again, no mention of the negotiability argument arose. Finally, I would note that the Employer submits its negotiability argument while still proposing adoption of its proposals on the merits. This strategy has the effect of undermining the substantial merit of the arguments raised by the Employer during the mediation-arbitration procedure.

An analysis of the merits on the two substantive issues finds that economics is at the core of the differences on both issues. On the first proposal--hours of work--the Union is concerned with maintaining the *status quo* with respect to overtime being paid after 8 hours of work in a day as opposed to after 40, as the Employer is proposing. The Union alleges that the Employer has not proved that it suffers economic harm and, furthermore, that the contracts between the Employer and the grain exporters automatically include payment of their fees at an overtime rate. Therefore, the Union argues that there is no real loss to the Employer since the costs of the employees' salaries already is covered. The Union further argues that the Employer's "real motive" is to save money that would be deferred to support its "bloated" research and development operation in Kansas City, and management is attempting to do so "on the backs of employees." The Union also makes the point that the Employer's proposal does not provide a procedure for assigning intermittent employees, on a first-40 non-standard tour of duty, to perform the work, and that lack of a process could easily result in scheduling disparities and abuses. Finally, the Union argues that the Employer's proposal also provides management with the discretion to send employees to work at other sites in the area, and that this uncertainty creates stress for employees.

I am not persuaded by the Union's arguments for several reasons, all of which are variations on the theme of the Union refusing to acknowledge that the Employer's interest in fiscal responsibility has a potentially significant impact on its members. First, while the Union's efforts to protect the *status quo* of paying overtime after 8 hours are both admirable and understandable, it has no argument for the fact that, owing to the change of carrier schedules, the Employer is paying employees their regular wages during the week when no ships are arriving and there is little work for the employees to do. Payment of overtime to these employees on the weekend until the ships carrying the grain finally arrive seems like a double penalty for the Employer.

Second, the Union has no response for the macro-economic factors that the Employer details, including: (1) the overall reduction in grain exports due to diversion of part of the crop to flexible fuel needs; and (2) the impact of recent droughts, etc. The Union also chooses not to address the reduction of \$9 million in the Agency surplus, preferring instead to characterize it as management's problem. Similarly, the Union does not appear to place any importance on the Employer's

concern for the upcoming 2015 Oversight hearings during which the Employer asserts that it must demonstrate some effort to recognize the financial problems of the grain exporting companies or risk losing the grain inspection and grading work to private contractors. This position of the Union is confusing in light of what has been a Government-wide phenomenon of reducing Government services and contracting out Federal employee work, wherever possible.

Finally, with respect to the Union's argument that the Employer proposal provides the unwarranted discretion to management of being able to assign employees to other sites in the area, potentially creating difficulties for employees with child care and elder care responsibilities, I can only conclude that this argument, however accurate, underestimates the importance of the employee's financial needs. If employees are both willing and able to make child and elder care arrangements when overtime opportunities arise on the weekends, then I have difficulty understanding why they will not make similar arrangements to protect against the loss of income when working straight time.

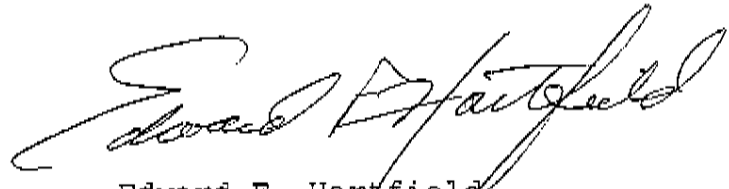
The second issue--the method of selecting employees for overtime--revolves around a similar economic difference. The Employer wishes to reduce its overtime expenditures to demonstrate its active consideration of the financial interests of the grain exporting companies and, ultimately, to retain the contracts and employees' jobs. The Union, seeing no threat on the horizon, wants to continue the status quo in which the higher graded employees--the ACG or grader (GS-9), whose primary duties are the inspection and grading of grain, are offered first choice at the lucrative overtime assignments even when the work in question involves primarily that of the lower graded employees--ACT or technician (GS-4 through GS-6)--whose duties are of a more routine nature relating to grading. The Union argues that the ACGs' job description also enables them to do the more routine work, but they do not address the cost savings to the Employer if the more routine work is offered by classification rather than by pure seniority.

I recognize that, for a long time, the Union has enjoyed the double bonus of having employees paid their regular wages even when there is little or no work for them to do and then to collect overtime pay for the off-shift arrival of ships. The Union has also enjoyed payment of overtime after 8 hours. I also recognize that the ACGs have enjoyed regular overtime pay for doing ACT work for many years. I believe that it is time for

the Union to pay closer attention to what is happening in the world and to share the financial interests of the Employer, since these will undoubtedly have an impact on the job security of its members.

DECISION

Pursuant to the authority vested in me by the Federal Service Impasses Panel under the Federal Service Labor-Management Relations Statute, I hereby find in favor of the Employer's proposals on both issues, and order their adoption.



Edward F. Hartfield
Arbitrator

February 14, 2014
St. Clair Shores, Michigan