The parties have specifically agreed that when an OTDL employee is required to work beyond the 12 and 60 hour limits the remedy is a 50% premium. When the OTDL employee is bypassed by another OTDL employee the remedy is a matter of make-up opportunity. When the OTDL employee is bypassed by a non-OTDL employee the remedy for the OTDL employee is compensation for the denied work opportunity at the appropriate overtime (or penalty overtime) rate. But what happens to the non-OTDL employee? Their right to enjoy their time away from work was violated when the CBA was violated. Is a remedy available? There has been considerable arbitral debate on that question. Some arbitrators conclude that because the parties have not specifically agreed upon a remedy no remedy other than a “don’t do it again” admonition is available. Others subscribe to the theory that where the contract has been violated an appropriate remedy must be found.

This case study examines the arbitrator’s general authority to create and grant a remedy and specifically the application of that authority to find a remedy for the non-OTDL employee improperly required to work overtime in violation of the CBA. Relevant case cites on the arbitrator’s authority to fashion a remedy for contract violations; administrative leave as an appropriate remedy; 50% or other monetary premium as an appropriate remedy; and, no remedy appropriate other than a general “cease and desist” instruction have been included.
Useful Case Citations on the
Arbitrator’s Authority to Create Remedy

A. United Steelworkers v. Enterprise Wheel & Car Corporation, 363 U.S. 593, June 20, 1960

After the Court of Appeals had overruled an arbitration award as unenforceable under the terms of the Contract, the Supreme Court reversed, noting:

“When an arbitrator is commissioned to interpret and apply the collective bargaining agreement, he is to bring his informed judgment to bear in order to reach a fair resolution of the problem. This is especially true when it comes to formulating remedy. There the need is for flexibility in meeting a wide variety of situations. The draftsman may never have thought of what a specific remedy should be awarded to meet a particular contingency.”

B. Arbitrator Howard G. Gamser, NC-S 5426, National Award
April 3, 1979

This is an NALC case. The issue before the Arbitrator was whether, when the USPS fails to equitably distribute overtime among the OTDL during a quarter, the appropriate remedy is one of payment or make-up opportunities. The Postal Service argued that “in the absence of an express provision in the Agreement” the Arbitrator did not have authority to provide such a remedy. Addressing this argument, the Arbitrator said:

“It is necessary at the outset to dispose of one threshold contention raised by the Employer. It was contended that the Agreement provides in Article XV that the arbitrator has no authority to add to, subtract from, or modify the terms of the agreement. So it does. That restriction upon the jurisdiction of the arbitrator must be scrupulously observed. However, to provide for an appropriate remedy for breaches of the terms of an agreement, even where no specific provision defining the nature of such remedy is to be found in the agreement, certainly is found in the inherent powers of the arbitrator…”

C. Arbitrator Richard Mittenthal, H4N-NA-C 21 (4th Issue) and H4C-NA-C 27, National Award, June 9, 1986

The issue in this case, as stated by the Arbitrator, was whether a violation of Article 8, Section 5.G.2 (i.e., working an employee more than 12 hours in a day or more than 60 hours in a week), justifies a remedy beyond the penalty overtime pay provided by Article 8, Section 4C and D. The Arbitrator said:
“…A ‘premium rate’ and a remedy (even when expressed in terms of some multiple of straight time pay) are different concepts. Hence, the fact that the Postal Service pays double time for most work over 12 or 60 does not preclude, in appropriate circumstances, a remedy which would require a further payment beyond double time. Section 4F cannot be read as a device for limiting the amount of a money remedy for a violation of Section 5G2.”

D. Arbitrator Richard Mittenthal, H1N-4G-C 35899, National Award, July 11, 1986

The NALC sought a single uniform monetary penalty whenever an employee was required to work overtime for more than five consecutive days in a week. The Arbitrator said:

“The point is that there are likely to be vary degrees of culpability in violations of Section 5F. The arbitrator should consider these kinds of matters in fashioning a remedy. That is precisely what the Supreme Court must have had in mind when it referred to the arbitrator’s ‘need…for flexibility’ in formulating remedies to ‘meet…a wide variety of situations’ (United Steelworkers of America v. Enterprise Wheel & Car Corp). I therefore will not grant the single, uniform remedy requested by NALC. The remedy will depend on the facts of each case as it comes along.”

E. Arbitrator Carlton J. Snow, W1C-5F-C 4734, Albuquerque, NM, August 31, 1987

In this case the Employer conceded that it failed to give the Union 14 days notice of an impending change of an entire sections starting time as required by the parties’ LMOU. The Union argued that out-of-schedule premium for the affected employees was an appropriate remedy for the violation. The Employer argued that such a remedy was improper. The Arbitrator provided this thoughtful analysis on remedy:

“It is recognized that arbitrators posses reasonably broad powers to fashion an effective remedy…

“In fashioning remedies, however, arbitrators generally have adhered to the principle that damages should correspond to the harm suffered. A deeply rooted principle of measuring contract damages is that such damages must be based on the injured party’s expectation…The expectation interest of the party in contract cases generally have been measured by the actual worth that performance of the agreement would have had for the individual, and in this case the Union has not demonstrated that any employe was harmed…

“It is recognized that some arbitrators have awarded punitive damages when a party’s violation of an agreement has been constant and repeated or malicious. That approach, however, has not been consistent with the common law which has taught that, no matter how reprehensible a breach, punitive damages which were in excess of an injured party’s lost expectation generally have not been awarded for a breach of contract…

“Even if one accepted the teaching of some arbitrators that punitive damages should be awarded when a party’s violation has been malicious or persistent, the principle would not be applicable in
this particular case…[N]o circumstances showed a basis for awarding punitive damages even if that arbitral principle were followed.

“On the other hand, the Union established a violation by management which must be addressed…

“…The Employer is obligated to adhere to the terms of the Local Memorandum of Understanding. While no retroactive remedy is appropriate in this case at this time, it is reasonable to require the Employer to cease and desist…”


The parties’ LMOU included a provision for one hour notice for overtime. The focus at the hearing was the question of remedy. The local parties had previously agreed that if the one hour notice was not given, the overtime would be voluntary and that the Union would encourage employees to remain and work the overtime. They had also reached an understanding that those employees who stayed and grieved would receive a 50% premium. This grievance arose after the Employer notified the Union that it would no longer pay the 50% premium. The Arbitrator said:

“…[Management’s] notice to the Union…effectively undermined the agreement between the parties that management would give employees one hour of notice if overtime would be needed. That is, the Employer concluded that it could not give penalty pay because the National Agreement did not permit it, and management also refused to make such overtime voluntary. As a result, the parties were left without any mechanism to deter supervisors from not giving an hour of notice to employees. Accordingly, since there is no mechanism in the explicit provision of the agreement to enforce the ‘one hour notice’ requirement, it is the arbitrator’s obligation to fashion an appropriate remedy.

“After considerable thought about the matter, it is reasonable to conclude that an appropriate remedy consists of a cease and desist order from making overtime mandatory for employees who have not received an hour of notice as well as a fifty percent payment (two times the base hourly straight time rate) to individuals who are required to work when the one hour notice of overtime has not been given…”
The question before the Arbitrator in this case was a matter remedy where the Employer had improperly engaged in issuing No-Time Off suspensions under various local programs in violation of the National Agreement. The Arbitrator said:

“...[T]he purpose of a remedy is to place employees (and Management) in the position they would have been in had there been no contract violation. The remedy serves to restore the status quo ante.”
Non-OTDL Letter Carrier was required to work his off day while OTDL Letter Carrier was not scheduled to work. The OTDL Carrier was compensated in a separate grievance. The Union sought a remedy of administrative leave for the non-OTDL Carrier. The entitlement to such a remedy was the sole issue in this case. In awarding administrative leave, the Arbitrator said:

“When the Service required the Grievant to work…it violated his right under [Article 8.5.D].

“The Service argues that the Grievant has been adequately compensated through the payment of the overtime rate. The Arbitrator cannot agree. The rate of time and one-half is the contractually established premium for overtime work properly assigned under the terms of the National Agreement. The payment of that minimum premium cannot be deemed to compensate an employee for deprivation of a right improperly denied him. Stated another way, because the Grievant has been denied an express, extraordinary right under the National Agreement, he must be accorded a remedy.

“Assume, for the sake of argument, that the Grievant had refused to comply with the order to report…He most certainly would have subjected himself to discipline. As a defense, the Union would have undoubtedly argued that he had the right to refuse to work overtime because the Service was in violation of Article 8, Section 5D. The Service would have undoubtedly countered with the argument that it was the duty of the Grievant to ‘work, then grieve.’ Indeed, an arbitrator might very well have sustained the discipline under the theory that the Grievant should have worked then grieved to receive an appropriate remedy. There lies the linchpin to this case.

“An employee who is required to perform overtime work in violation of the National Agreement has no choice but to work, then grieve and seek his remedy. The ‘work, then grieve’ rule necessarily implies that the employee will be accorded a meaningful remedy for the Service’s violation. The forms of remedy of which the Arbitrator is aware of are either one day’s pay at the straight time rate or one day’s administrative leave with pay.

“The fact that [the OTDL Carrier] has also been compensated as a result of the Service’s violation is irrelevant. Article 8 of the National Agreement specifically protects the rights of both employees.

“The fact that the violation was not a deliberate act is irrelevant. It is the established rule that an employee’s right to relief under a collective bargaining agreement does not depend upon the motives of the employer. It is the violation itself which creates the right to a remedy.

“Finally, the provisions of Article 8 Section 4C, regarding the pyramiding of overtime or premium rates, are clearly not applicable to the instant dispute. Those provisions relate to the application of overtime and premium rates specifically set forth in the National Agreement, and not to the remedy to be accorded an employee for an improper application of the National Agreement.”

After determining that the Employer violated the National Agreement in assigning overtime to non-OTDL Letter Carriers without first maximizing the OTDL, the Arbitrator provided the following remedy:

“Accordingly, the Arbitrator will enter a general award providing for overtime pay for all overtime desired list Carriers that would have been paid had the National Agreement been adhered to, and compensation for the non-overtime desired list Carriers in the form of administrative leave equivalent to the amount of overtime worked.”

C. Arbitrator William Eaton, W4C-5H-C 47462, Stockton, CA, October 24, 1989

After finding that the Employer violated Article 8.5 by mandating all Tour 1 Clerks to work overtime before maximizing those on the OTDL, the Arbitrator concluded:

“…the Union is entitled to the remedy it asks…Six hours of overtime shall be paid to those who would have been qualified to perform the work…In addition, the six employees for whom one hour of overtime was mandated shall each receive one hour of administrative leave at a time mutually agreed upon, but within the next 90 days.”

D. Arbitrator Fred Blackwell, C90C-1C-C 94000078, Philadelphia BMC, PA, October 22, 1996

On two occasions management required non-OTDL clerks to work overtime while permitting OTDL clerks to waive the 3rd and 4th hour of overtime. After finding that this was a violation, the Arbitrator turned to remedy, saying:

“Therefore, as indicated, the grievance is meritorious and as sustaining Award is in order. However, the ODL Employees who were allowed to waive the eleventh and twelfth hours of their required twelve hours of the overtime call have not been harmed and the request that they be compensated for all hours worked by the non-ODLs on the dates in question will not be approved. The requirement for administrative leave for all hours worked by the non-ODL Employees… is an appropriate remedy, in light of the Postal Service violation of the Agreement…”

E. Arbitrator Thomas F. Levak, E94C-1E-C 96051423, Pasco, WA, April 20, 1998

The Arbitrator determined that the USPS violated Article 8.5 by simultaneously scheduling OTDL and non-OTDL clerks for overtime. The Arbitrator then concluded:
“Regarding remedy, arbitral precedent establishes that it is appropriate both (1) to direct the payment of overtime pay for ODL Clerks who were passed over, and (2) to direct the award of administrative leave to non-ODL Clerks who were required to work.”

F. Arbitrator Patrick Hardin, G94C-4G-C 99033586, Fort Smith, AK, July 13, 1999

Management mandated overtime work for 3 CFS Clerks not on the OTDL while, in order to avoid penalty overtime, not maximizing the overtime worked by the OTDL. The Arbitrator concluded:

“The evidence compels the conclusion that only reason, the desire to avoid penalty overtime, motivated the assignment of mandatory overtime to the non-listed employees…The violation of Article 8, Section 5.G. of the National Agreement could not be more clear…Legions of arbitrators, including Mittenthal at the National Level, have ruled that a desire to avoid penalty overtime does not legitimate or excuse such a violation of Article 8, Section 5.G.

“…The remedy requested by the Union is a reasonable means of redressing the harm done to the non-listed employees by the commandeering of their non-scheduled time in violation of the National Agreement. Accordingly, each shall be awarded administrative leave, at a time or times to be agreed between the parties…”


The only issue in this case was the appropriate remedy for non-OTDL letter carriers who were required to work overtime in violation of the National Agreement. Stating that “[a]rbitral principles require the Arbitrator to fashion a remedy” to correct the employees’ loss of a contractual benefit, the Arbitrator concluded:

“For the reasons more fully set forth in the attached opinion, the Arbitrator determines that in the circumstances of these matters, the following is the appropriate remedy for the Service’s admitted contract violation of requiring employees, not on the Overtime Desired List, to work overtime. The Arbitrator awards each of the Grievants in the above captioned matters, who were not on the Overtime Desired List and who were required to work overtime, one hour of leave with pay for each hour, or major fraction thereof, they were required to work overtime in violation of the Agreement. The awarded leave will be taken at the Grievant’s option. The Grievants will provide the Service with thirty days advance notice of the day or days they wish to take awarded paid leave.”
H. Arbitrator William J. Miller, C94C-1C-C 97017816, Southeastern, PA, March 14, 2001

Finding that the USPS violated Article 8.5.D and Article 8.5.G of the CBA when it utilized non-OTDL FSM Clerks for overtime without maximizing the OTDL FSM Clerks, the Arbitrator then offered this discussion as to remedy:

“With respect to the appropriate remedy for this case, the Union has contended that administrative leave should be provided to the non overtime desired list employees who were required to work overtime rather than certain overtime desired list employees who did not work a maximum amount of overtime. The Postal Service contends a remedy this nature would be inappropriate because it would be outside the scope of what is contemplated by ‘administrative leave’ provisions of the ELM. I have carefully considered the arguments and contentions of the parties. In my opinion, based upon the unique circumstances which occurred in this situation, this would be the kind of case where providing administrative leave to those non overtime desired list employees who were required to work overtime because certain overtime desired list employees were not required to work overtime in accordance with the Agreement would be justified…”

I. Arbitrator Garry J. Wooters, B98N-1B-C 01014531, Framingham, MA, May 19, 2002

The sole issue before the Arbitrator was whether an Arbitrator has the discretion to grant the remedy of administrative leave to non-OTDL employees required to work overtime in violation of Article 8.5. The Employer did not dispute the violation or the propriety of the requested remedy. The Employer solely challenged the discretion of the arbitrator to grant such a remedy. The Arbitrator said:

“Remedies in arbitration are normally intended to be compensatory. Arbitrators also seek to ensure compliance with the contract where the rights of employees or the Union have been violated, but there is no discernable economic harm. Care must be taken in such cases, however, to avoid punitive remedies unless a clear basis for such relief has been established…Where the evidence shows an intent to disregard or avoid the contractual obligations, the arbitrator will find and apply an appropriate remedy.

“Requiring the payment of administrative leave in addition the other remedies available seem to go beyond compensatory relief and beyond the relief the parties contemplated in ‘normal’ cases. Administrative leave instead of overtime could be argued as appropriate compensatory relief for non-ODL carriers required to work in violation of Article 8.5G in that it would give back what was lost – the freedom not to work more than agreed to hours. Administrative leave in addition to overtime cannot be justified as purely compensatory.

“…Repeated or flagrant violations might constitute a basis for craft a remedy which goes beyond compensatory relief. The employer cannot purchase the right to violate the contract by a
willingness to pay damages. The Union is entitled to what it bargained for, not a monetary substitute.

... 

“Although not appropriate in the ‘normal’ case, I find that the remedy of administrative leave is available and within the authority of the arbitrator to remedy a violation of Article 8.5.G in extreme or repeated or flagrant cases…”

J. Arbitrator, Nicholas Duda, Jr., C98N-4C-C 00194553, Toledo, OH, June 5, 2002

Non-OTDL Letter Carriers were required to work overtime on routes other than their own while the OTDL was not maximized. The Employer agreed to compensate the OTDL but denied the grievance because the Union insisted that the non-OTDL Letter Carriers were entitled to be made whole. In addition to awarding payment to the OTDL, which had been conceded at Step 2 but not paid, the Arbitrator said:

“The broad rule in cases of this type is to award only compensate remedy for violations. However, as shown in the decisions cited, punitive award, an exception to the broad rule, may be appropriate if the employer has been especially egregious or has practiced repeat violations. Here we do not find any repetitions…”

“Under the circumstances of this case, I am actually awarding a compensatory award. Here the non-ODL Carriers were deprived of the time away from work ‘…they had shown they wanted by not signing the ODL lists.’ This remedy is consistent with the Arbitrator’s inherent authority to restore to aggrieved employees what the Service improperly took away from them…Here if the Service had lived up to its commitment in the Contract, the non-ODL employees would have had time away from work and not been required to work overtime.

“…[T]he Service is directed to allow administrative leave to be used during the next 12 months…”

K. Arbitrator J. Reese Johnson, Jr., G98N-4G-C 01214938, Austin, TX, October 15, 2002

Management, in this case, utilized non-OTDL letter carriers on Saturday for off day overtime. Obviously, OTDL letter carriers had not yet worked up to the maximums of 12 and 60 hours. The OTDL letter carriers had already been compensated in a separate grievance. The Arbitrator reasoned:

“It is further my finding that although the Grievants…were compensated for the overtime hours they worked, that in order to deter the Postal Service from repeating this continuing violation, that the said Grievants would be entitled to additional compensation other than payment of overtime for the overtime hours that they had worked…”
To accomplish this, the Arbitrator awarded:

“The Postal Service is directed to give the Grievants…at a time and date mutually agreeable eight (8) hours of administrative leave for which they will be paid their regular eight (8) hours at straight time. If the parties cannot mutually agree on a time and date, it is further awarded that this time and date shall be within six (6) months from the date of this AWARD.”

L. Arbitrator Harry Graham, C98N-4C-C 00219027, Toledo, OH, December 11, 2002

The USPS acknowledged that it erred in requiring non-OTDL Letter Carriers to work overtime before maximizing the OTDL. The only dispute was one of remedy. The Employer argued that the Letter Carriers were paid at the appropriate overtime rate and no further remedy was appropriate. The Arbitrator reasoned:

“In this situation the Employer has already acknowledged its use of non-OTDL Carriers was improper. It was unreasonable. The question is thus one of remedy. The Carriers not on the OTDL have indicated their off-duty time is highly valued. By not placing themselves on the OTDL they indicate it is more highly valued than extra pay. While they received pay that pay had a lower priority in their desires than time off work. As Arbitrator Duda noted, ‘Here, if the Service had lived up to its commitment in the Contract, the non-ODL employees would have had time away from work and not been required to work overtime.’…This Arbitrator agrees with Arbitrator Duda. By not signing the OTDL the Grievants sought to avoid precisely the situation in which they found themselves. Thus, the remedy must be time.

“…The grievance is sustained. Grievants Harrington and Mims are receive one hour of compensatory time. Grievant Crompton is to receive 1.25 hours of compensatory time.”

M. Arbitrator Harry Graham, C01N-4C-C 03049992, Mentor, OH, October 3, 2003

Letter Carriers who did not sign the OTDL were required to work overtime before the OTDL was maximized. Although there was some history in this office of Step 2 settlements awarding administrative leave to aggrieved non-OTDL letter carriers in this type of situation, the Postal Service declined to do so in this instance, arguing that the Employer acted in good faith in the face of a necessity to get the mail delivered. The Arbitrator said:

“When Carriers decline to sign the Overtime Desired List they are expressing a value judgment. They have determined in their personal circumstances they value time off duty more than the extra pay to be gained from overtime work…

“…Certainly it was difficult to allocates its resources to deliver the mail. However, the standard that must be met is found in Section 8.5.G which indicates that people not on the OTDL may be
required to work overtime ‘only if all available employees on the Overtime Desired list have worked twelve hours in a day or sixty (60) hours in a service week.’ As that standard was not met in this circumstance and administrative leave has been routinely provided as compensation…under such circumstances in the past the grievance must be sustained.”

N. Arbitrator Lawrence R. Loeb, C98C-4C-C 01231061, Harrisburg, PA, March 31, 2006

In this case the Employer failed to meet at Step 2 or issue a Step 2 decision. It then issued a very incomplete Step 3 decision which failed to address the Union’s arguments. For that reason the Arbitrator determined that the grievance must be sustained, with the only issue remaining one of remedy. The Arbitrator said:

“...for those reasons that the only question concerns the remedy to which the Union is entitled as a result of the violation. For those employees who were bypassed the answer is simple: the individuals who were on the overtime desired list who were bypassed during the time period in question are entitled to be paid at the overtime rate for the number of hours equal to the opportunity missed. The individuals who were improperly required to work overtime are also entitled to relief. Although the JCIM makes no provision for any remedy for them, they too were victims of Management’s mistake and they too, therefore, have a right to be made whole. That can only be accomplished by giving them administrative leave for the number of hours they were required to work in place of those individuals on the overtime desired list.” [emphasis added]
50% Premium or Other Monetary Remedy


The Arbitrator concluded that the Employer properly could exclude employees from working more than 60 hours but that an OTDL Clerk only became unavailable when they had actually worked 20 hours of overtime. He ruled that the USPS could not add in “planned future overtime” to meet the 60 hour limit, as they did in this case. Turning to remedy, the Arbitrator concluded:

“With respect to remedy for violations, the following rules shall be applied:

a. If an employee has been improperly denied overtime opportunity in work which would otherwise be accorded him as an ODL employee, he shall be paid for all hours denied at the appropriate overtime or penalty overtime rate.

b. If an employee has been improperly forced to work overtime, such overtime should be paid at the penalty overtime rate, and he shall receive the difference between the regular and penalty rate for all hours so worked.”

B. Arbitrator John C. Fletcher, C7C-4K-C 33984, et al, Des Moines, IA, February 7, 1992

Several non-OTDL Clerks were required to work overtime for up to two hours while OTDL Clerks were not maximized. The Union filed a grievance on behalf of the non-OTDL Clerks seeking additional compensation as a remedy for the violation of the National Agreement. The Arbitrator reasoned:

“Much of the Services’ arguments on this these Grievances are being pursued on behalf of the wrong individuals. It infers (as their arguments were understood by the Arbitrator) that if any party may have been injured it was the employees on the ODL who were not used when non-ODL employees were required to work. It may well be correct that ODL employees were injured when non-ODL employees were required to work, but that is not issue in this Arbitration. The issue here is that non-ODL employees were forced to work overtime before the pecking order of assigning overtime from the ODL was exhausted and before the 12 and 60 maximums were reached. A fair reading of the Agreement and the MOU at page 187 makes it clear that non-ODL employees are entitled to have their wish to not to work over time protected until such time as they may be properly forced assigned to work overtime…

“Thus non-ODL employees may also be injured when they are improperly forced to work overtime and payment of only that which the Agreement establishes as payment for overtime worked does not protect their wish to not work overtime and will not discourage future violations
of the Agreement. Almost this same situation occurred in Arbitration E7C-2A-C 31397 (Howard, 1991) and the remedy provided there required that certain non-ODL employees improperly forced to work overtime be paid at the penalty overtime rate rather than the regular overtime rate. That remedy is appropriate in this matter and it will be one awarded here."

C. **Arbitrator Barbara Zausner Tener, N7C-1P-C 2139, NJ BMC, NJ, April 1, 1992**

The Arbitrator determined that the Employer had violated the Agreement when employees not on the OTDL were required to work overtime on days when not all employees on the OTDL had worked 12 hours. The Arbitrator awarded:

“The grievance is sustained. Employees not on the ODL who worked overtime on August 10 and 17, 1987 shall be paid an additional ½ time for the overtime hours worked.”

D. **Arbitrator Bernard Cushman, E4C-2N-C 0041304, Cincinnati, OH, February 10, 1995**

Non-OTDL clerks were required to work in excess of ten (10) hours. They were paid at the penalty overtime rate. The issue in this case was whether they were entitled to any additional remedy. The Arbitrator said:

“In H4N-NA-C 21 (3rd Issue) and 27 Arbitrator Mittenthal held that the 60 hours weekly limitation in 5.G.2. constitutes an absolute bar from employees work more than 60 hours a week. A similar result would seem applicable to the ten hours daily limitation in 5.F. particularly in light of the decision H1N-4G-C 35899 concerning the sixth consecutive day limitation likewise contained in 5.F. In the view of this Arbitrator the thrust of the holdings in these National arbitration decisions, including their rationale, compels a holding in this case that the remedy for exceeding the ten hour limit may include a monetary remedy exceeding double-time. This conclusion is reinforced when one considers that a contrary conclusion would lead to an incongruous result, namely that employees not on the ODL and forced to work overtime would not fare as well as employees on the ODL.

“This conclusion is further reinforced by reference to the content of the last paragraph of the Memorandum. It is quite true that the Memorandum may not supplant or change the terms of the contract. The Memorandum may, however, clarify the intent of and/or meaning of the contractual language. In light of the bargaining history narrated without contradiction by Gervais the last paragraph of the Memorandum does have clarifying impact. The parties did agree that the pending overtime provisions of 8.4. are not intended to result in the use of overtime in excess of the restrictions of Article 8.5.F.

“Finally, the language of Article 8, Section 5 must be interpreted in light of its objectives. The sixth day and daily work overtime restrictions and the other restrictions in 5.F. are intended to eliminate excessive overtime. At least a flat prohibition like that of the number of hours beyond which an employee may not be required to work on a day constitutes, as found here, and by Arbitrator Mittenthal a prohibitory command. The objective of 5.F. is to stop such assignments as to employees who do not wish to work overtime. Arbitrator Mittenthal held that where employees
on the Overtime Desired List are forced to work beyond the prohibition a remedy other than 4.D. may be applicable tailored to the circumstances of each case. That reasoning applies here.

“Section 4.D. of Article 8 does not provide the exclusive remedy for violations of prohibition again work over ten hours on a regularly scheduled day set forth in Section 5.F. of Article 8…”

E. Arbitrator Michael Wolf, D90C-4D-C 93025014, Danville, VA, January 10, 1997

Grievant, who was not on the OTDL was required to work overtime while OTDL clerks were available but not utilized. Finding that the USPS failed to rebut the Union’s \textit{prima facie} showing, the Arbitrator concluded:

“Because the Grievant was improperly ordered to work overtime…he deserves to be compensated for the breach of his contractual rights. The Union cites the Award of Arbitrator Howard in Case # E7C-2A-C-31397 to support its request that the Grievant be paid the penalty rate for the extra two hours he was forced to work. Arbitrator Howard concluded that ‘[i]f an employee has been improperly forced to work overtime, such overtime should be paid at the penalty overtime rate, and he shall receive the difference between the regular and penalty rate for all hours so worked.’ Id. The Postal Service opposed this remedy, but offered no clear alternative. In essence, the Postal Service would leave the Grievant without any remedy, even in the event of a violation.

“I am aware that Article 8, Sections 4(C) and 4(D) preclude the payment of penalty pay in the month of December when employees are worked in contravention of the time limits in Section 5(F). However, the Postal Service has not presented any prior awards which conclude that an arbitrator is precluded from awarding penalty pay when Management contravenes Section 5(G) by forcing a non-ODL employee to work overtime during the month of December. Because a refusal to award a penalty differential in this case would, in effect, permit a breach of the contract without any remedy, I conclude the Arbitrator Howard’s resolution is an equitable one and consistent with the parties’ intent, as expressed in Article 8…”

F. Arbitrator Ed Escamilla, E90C-4E-C 9305310, Redmond, WA, February 25, 2000

The Union argued that the Employer violated Article 8 by requiring non-OTDL clerks to work overtime before OTDL clerks had reached their 12 and/or 60 hour ceilings. Finding that the USPS had not rebutted the Union’s \textit{prima facie} case and that the number of violations warranted a remedy, the Arbitrator said:

“With respect to the remedy, the National Agreement provides double time as a penalty when the Postal Service violates Article 8.5.F. Although, that provision is not directly involved herein, I find that the same underlying principle of Article 8.5.F and 8.5.G exist, namely management ordering employees to work overtime contravention of the National Agreement. I therefore order all ODL employees be compensated for the overtime hours they should have worked at the rate of double time and than non-ODL employees be compensated an additional one half time for the
overtime hours they actually worked. I also conclude that interest on the backpay shall be paid on monies owed…”


[Note: Although the Arbitrator carefully explained that the parties had specifically authorized him to deal with this matter as a Regular Panel Arbitrator even though it had originally been appealed under the Expedited Process, his inclusion of the parenthetical (Expedited) on the Regular Arbitration Panel cover sheet warrants caution when citing this Award]

Two (2) non-list employees were required to work after tour overtime while an OTDL clerk was excused from working. The Arbitrator said:

“The above discussion leads to the inescapable conclusion that management violated the provisions of Article 8 and the LMOU by assigning end of tour overtime to two non-list employees since there were available and qualified ‘Overtime Desired’ list employees available and qualified. The appropriate remedy in this situation would appear to be to pay the available OTDL employee (Quast) and additionally order a 50% premium to be to Wiesner and Gallagher who were forced to work despite their clear indication, in declining to sign the ‘Overtime Desired’ list, that they preferred not to work overtime. However, the Arbitrator declines to order the normal remedy in the case of Quast. It would be inequitable to reward Quast, who by his own admission had been on the ‘Overtime Desired’ list for three to four years, for declining overtime which was obligated to accept simply because he found it inconvenient to do so for personal and unexceptional reasons.”

H. Arbitrator Joe Henderson, E98C-1E-C 99244147, Seattle, WA, October 13, 2001

The Arbitrator rejected the Employer’s argument that the language of Article 3 prevails over the language of Article 8.5 when those provisions are in conflict and found that the assignment of overtime violated the clear and unambiguous language of Article 8.5. Turning to remedy, in addition to awarding payment to the appropriate OTDL clerks who were available for overtime the Arbitrator awarded:

“The non-ODL employees, who were mandated to work when the ODL was available, shall be paid an additional 50% of the base rate for all overtime hours they were improperly worked.”

I. Arbitrator Joseph F. Gentile, F98N-4F-C 01038775, Salinas, CA, January 2, 2002

Grievant, a non-OTDL Letter Carrier was required to work 1.65 hours of overtime. Initially the local Union sought a remedy of 2000% additional compensation. Management had previously settled several grievances compensating non-OTDL Letter Carriers at either an additional 100%
or 200% for the overtime hours improperly worked and agreeing to progressively larger penalties in the future. Subsequently, grievances were settled for 400%; 500%; 600%; and even 1000%. The Arbitrator determined that NALC had established a violation of the CBA and that the only remaining issue was one of remedy. Finding that the Employer had apparently corrected the problem for some time before this incident, the Arbitrator awarded a 200% penalty.

**J. Arbitrator Jan Stiglitz, E94C-1E-C 99166475, Phoenix, AZ, August 8, 2002**

The Union filed this grievance on behalf of employees not on the OTDL who were required to work overtime. The Union asserted that this was done to avoid paying penalty pay to the OTDL clerks. Although the bypassed employees were compensated, the Union through this grievance, sought a remedy for the non-OTDL employees who were required to work. The Union submitted only one award supporting a remedy. The Employer submitted four (4) awards suggesting no remedy is appropriate. The Arbitrator said:

“It thus appears that reasoned arbitral case law does not support a remedy for the employee who is improperly forced to work overtime except in unusual circumstances, variously characterized as ‘blatant’ or ‘flagrant’ (Klein), ‘intentional and repeated’ (Krider) or ‘necessitating extraordinary remedial measures’ (Hayduke).

“I conclude therefore that the Union has not met its burden with regard to the first grievance, covering Pay Period 17/98. I think Lindley made a conscious but stupid mistake. But at that point, I would not characterize his action as ‘flagrant’ or ‘repeated’ and I do not believe that it warrants an extraordinary remedy.

“However, the same cannot be said for the grievance based on Pay Period 18/98. Lindley and Kalandyk met on the first grievance on August 17, 1998…Yet Lindley did not change the schedule for August 18 or 19. Lindley testified that if he had known about the problem, he would have changed the schedule. Obviously, that is not true. Kalandyk told him about the problem and Lindley did nothing. As a result, more employees who did not want to work overtime were forced to work and the union was forced to file a second grievance.

“Accordingly, those employees who were not on the OTDL and who were forced to work on August 18 and 19 are entitled to an additional 50% pay (on their basic hourly rate) for each hour of overtime worked on those days.”


Cease and Desist Only Appropriate Remedy


In this case, the Union grieved the assignment of two (2) non OTDL employees to overtime bypassing an OTDL employee. The Union sought a remedy for the two (2) non-OTDL employees as well as compensation for the bypassed OTDL employee. The Arbitrator said:

“A determination of the appropriate remedy for the violations can be easily ascertained from a review of the Step 4 Settlement Agreement in Case No. AB-N-2476 and the language of Sections 5 F and G and Section 4 D of the National Agreement. Under the Step 4 Settlement, an employee on an OTDL who is passed over in favor of a non-volunteer shall be paid for an equal number of hours at the overtime rate for the opportunity missed…However, the Union’s request for a monetary remedy to go to the non-volunteers who received the improper overtime assignments on the dates in question is denied, having no basis in either the contract, Step 4 Settlement Agreement or equity.”

B. Arbitrator Ernest E. Marlatt, S7C-3W-C 36925, Fort Myers, FL, January 27, 1991

In this case, CFS employees not on the OTDL were required to work beyond the limitations of Article 8.5.F. The employees were paid at the penalty overtime rate and the issue which remained was whether they were entitled to any further remedy. The Union requested that the Arbitrator compensate the employees with an additional 100% premium because the violation was egregious and ongoing for more than a month. The Arbitrator said:

“The National Agreement anticipates that there will be occasions when management will find it expedient to assign work in excess of the Article 8.5.F. limits. It is provided in Article 8.4.D. and 8.5.G.1 that penalty overtime will be paid on such occasions. This penalty is, in effect, a liquidated damages clause….

“Where the parties spell out an agreed remedy for a contractual violation, an arbitrator has no discretion to impose a different remedy. Article 8.4.D provides clearly and unequivocally that the remedy for any violation of the restrictions of Article 8.5.F. shall be the payment of the 200% penalty.

“A different situation exists, of course, it employees are ordered to work more than 12 hours a day or more than 60 hours a week, in violation of Article 8.5.G. The penalty overtime clause does not specifically apply to that situation, and an arbitrator would be free to fashion a remedy which he would consider appropriate. That situation is expressly addressed by Mittenthal under the ‘Fourth Issue’ decision. However, it is not the case before me.

“A different situation might also exist if employees who are not on the overtime desired list are required to work beyond the Article 8.5.F limits despite the fact that there are available employees
on the ODL who have put in the hours specified in Article 8.5.G but who are not utilized to perform the work. That could be viewed as a more serious contract violation than merely giving an employee more overtime work than he really wants, because it inconveniences both the employee who doesn’t want to work and also the employee who wants the extra income. Again, however, that is not the case before me and I express no opinion as to what remedy I might find appropriate.”

C. Arbitrator Linda DiLeone Klein, C0C-4U-C 1455, Colorado Springs, CO, October 19, 1992

A non-OTDL employee who was required to work their off day prior to scheduling an OTDL employee in order to avoid payment of penalty overtime. The grievance was partially sustained at Step 2 compensating the OTDL employee for the denied work opportunity. The remaining issue before the arbitrator was whether the non-OTDL employee was entitled to any further remedy. The Union argued for an additional 50% premium. The Arbitrator said:

“This case is unique in that an overtime grievance is generally initiated on behalf of the employee who is bypassed. In this instance, the remaining complaint involves an employee not on the OTDL who was required to work overtime instead of an employee who had previously expressed his desire for such assignments. The non-OTDL employee was compensated at the appropriate overtime rate for the hours worked. This compensation was paid in accordance with the contract; the contract is silent on the question of any further entitlement for being mandated to work overtime…

... .

“It was not shown that any damage or loss occurred as a result of the overtime assignment at issue. The Union, however, is asking for a penalty payment for the error. While it is true that an arbitrator has the authority to fashion a remedy, this Arbitrator is reluctant to do so in the absence or an express or implied contractual language pertaining to additional entitlement for a non-OTDL employee who is required to work overtime under the circumstances here.

“Although there are three other cases similar to the matter at hand, it cannot be held that the violation was blatant or flagrant….The Arbitrator is of the opinion that the Union is in essence seeking ‘punitive’ damages; the facts of this case do not warrant such additional penalty. A monetary award is not always required to remedy a contract violation. It is sufficient to admonish the Postal Service to assign overtime in accordance with Article 8.”

D. Arbitrator Michael E. Zobrak, E0C-2L-C 6177, Columbus, OH, March 10, 1993

Nine non-OTDL Clerks were required to work their off day. Fourteen OTDL Clerks also worked their off day but they were given only ten hours. The Arbitrator determined that this violated the National Agreement in that maximizing the OTDL would have permitted at least three (3) more non-OTDL Clerks to be excused. Turning to remedy, the Arbitrator ruled:
“Based on all of the foregoing, it is found that Management violated Article 8.5.G. of the National Agreement when it did not work those employees on the OTDL for twelve (12) hours before requiring those employees not on the OTDL to work overtime...For all these reasons, the Postal Service is directed to pay two (2) hours of penalty overtime to each of the employees on the OTDL who worked on September 7, 1991. Non-OTDL employees worked their hours in accordance with Article 8.5.G. of the National Agreement and are not entitled to any remedy.”

E. Arbitrator Charles E. Krider, C0C-4J-C 6842, Madison, WI, December 20, 1993

The issue in this case was the appropriate remedy, if any, for non Overtime Desired List employees who were required to work overtime when employees on the OTDL were improperly bypassed. The Union filed two (2) grievances. The first, on behalf of the OTDL employees, was settled. This case went to arbitration. The Union sought a make whole remedy.

“I do not find that a make whole remedy as sought by the Union is appropriate or required in this case. First, it is clear that the Postal Service has the right to require employees not on the OTDL to work overtime when such employees are required to process mail. When that happens the employees who are forced to work overtime are paid overtime in accordance with the Agreement but are not given additional administrative leave or penalty overtime. Such employees lose the opportunity to pursue non work activities and, in return, receive overtime pay.

“Second, the remedy for the violation of Article 8.5.G. is the payment of overtime to employees on the OTDL who did not work. The violation that has occurred is the Postal Service’s failure to use the employees on the OTDL and they are due overtime pay. This is the conventional remedy for such a violation; it is sufficient to make the OTDL employees whole and to discourage violations by the Postal Service…”

“Third, the make whole remedies sought by the Union are not appropriate. The provision of administrative leave, in particular, would go beyond the purposes of a make whole remedy. An employee who received this remedy would be in a better position than if he had never been required to work the overtime…”

“The payment of a penalty premium would also be inappropriate as a make whole remedy in this grievance. The overtime paid to employees who work overtime is intended to make them whole for the extra hours of work. That is what the parties have agreed to. There is no basis for an arbitrator to add to the overtime premium that has been paid in this case…”

“Finally, the arbitrator notes that an additional remedy might be appropriate if it is shown that the employer has intentionally and repeatedly violated Article 8.5.G. That is not the situation in this grievance.” [emphasis added]

F. Arbitrator Thomas E. Terrill, D90C-1D-C 93033592, et al, Baltimore, MD, December 30, 1994

Several non-OTDL employees were required to work overtime beyond the Article 8.5.F limitations. They were paid penalty overtime. The Union’s grievance sought an additional remedy. The Arbitrator said:
“The material in this case…does not support a finding that the Postal Service willfully or deliberately violated the overtime provisions of the National Agreement. Therefore, these grievances are denied.

“…However, this Arbitrator would resist attempts to put arbitrators in strait jackets that would arbitrate with virtually no discretion in analyzing cases and in developing remedies. As the parties know and Arbitrator Mittenthal reminded them, the courts have deferred to reasonable applications of discretion by arbitrators when those applications have been founded in the contracts between the parties and have legal standing. Arbitrator discretion does not, however, mean that arbitrators are free to adopt the ‘shoot from the hip’ style of Ross Perot.”


Clerk Craft employees not on the OTDL were required to work overtime on their fifth consecutive work day. It was undisputed that these overtime assignments violated Article 8.5.F. It was also undisputed that the employees were paid at the penalty overtime rate. The Arbitrator said:

“Article 8.4.D applies to both OTDL and non-OTDL employees, since it covers ‘full-time regular employee[s].’ …As a result, it is the conclusion of the Undersigned Arbitrator that Arbitrator Mittenthal’s reasoning compels the conclusion that Management has the same contractual discretion with respect to both non-OTDL and OTDL employees…

“It is the further conclusion of the Undersigned Arbitrator that the Union has not proven that Management abused that discretion in the instant case. The grant of discretion identified in Mittenthal-1 is not without limits. Rather, Management’s decisions in this regard violate the Contract if they are made in an arbitrary, capricious or discriminatory manner.”

H. Arbitrator Christopher E. Miles, K90C-1K-C 93033564, Baltimore, MD, April 2, 1997

Management required non-OTDL clerks to work beyond eight (8) hours on their non-scheduled day in violation of Article 8.5.F., while at the same time not maximizing the utilization of OTDL clerks. This was one of fourteen (14) similar grievances seeking an additional remedy for the non-OTDL clerks beyond the penalty overtime payment they had received. Noting that Arbitrators had previously ruled on this issue in this installation, the Arbitrator concluded:

“It is my considered opinion, that the Union was correct in their assessment that the Postal Service violated Article 8, Section 5F of the Agreement when it assigned the non-ODL employees to work on their scheduled off day. The Postal Service essentially concedes that certain employees worked in contravention of the provisions of the Agreement. However, it is my considered opinion that the Postal Service has already paid the appropriate overtime penalty specified in Article 8, Section
4C and 4D of the Agreement, that is, double time. Thus, I find no contractual basis for the Union’s request for triple time, nor do I find any valid contractual reason to apply another penalty as the remedy.”

I. Arbitrator Ronald L. Miller, E90C-4E-C 95034969, Vancouver, WA, December 26, 2000
Finding that the Postal Service had not factually demonstrated a legitimate need for the simultaneous scheduling of OTDL and non-OTDL clerks to work overtime the Arbitrator awarded that the OTDL clerks be made whole. However, as to the non-OTDL clerks, the Arbitrator reasoned:

“In addition to its compensation request for ODL clerks, the Union also asks that administrative leave be granted to non-ODL clerks for the time they were required to work. In support of this administrative leave request, the Union submitted the award of Arbitrator Thomas Levak (USPS E94C-1E-C 96051423, dated April 20, 1998). The record of this case and the award provide scant argument and justification for the administrative leave remedy. The adverse impact on the non-ODL clerks is acknowledged, however the Arbitrator is not persuaded to grant the administrative leave remedy.”

J. Arbitrator George Edward Larney, I94C-1I-C 98022134, Des Moines, IA, January 19, 2001
The Arbitrator found that the USPS violated the CBA by requiring non-OTDL clerks to work overtime when OTDL clerks were available. Turning to remedy, the Arbitrator said:

“Having so found…the issue of inappropriate remedy remains. On this argument, the Arbitrator concurs in the Employer’s position that the penalty pay sought by the Union is inappropriate given the provisions of Article 8, Sections 4 and 5. It is clear from a straightforward reading of the relevant provisions set forth in these two sections of Article 8 that penalty overtime pay is applicable only to those situations in which the employees are made to work in excess of maximum overtime hours allowable on either a daily or weekly basis…The Union argues that because the Employer committed a violation of the Contract it should be subject to some penalty for if it is not, it will continue to incur the same infraction knowing it can do so with impunity. While the Arbitrator is sympathetic with the Union’s stated position, it does not appear there is an appropriate remedy here beyond issuing a cease and desist order…”

K. Arbitrator Christopher E. Miles, H98C-1H-C 99259223, Orlando, FL, February 16, 2001
Four Clerks not on the OTDL were required to work beyond 10 hours on their regular work day. They were paid at the penalty overtime rate for that time. The Arbitrator found that the utilization of non-OTDL Clerks for overtime when the OTDL was not maximized violated Article 8.5. However, as to remedy, the Arbitrator stated:
“Be that as it may, the record is clear that the Grievants were paid the penalty overtime in accordance with the Agreement. Based of the provision for payment of penalty overtime, it is obvious that the parties recognize that such occasions may occur. Therefore, no monetary award is made but the Postal Service is directed to cease and desist from utilizing non-VOT employees for overtime prior to maximizing those employees who have volunteered for overtime assignments. The Postal Service must recognize that if it would continue to schedule the non-VOT employees on a consistent or repetitive basis in contravention of Article 8, Section 5.F, punitive measures may become appropriate.”

L. Arbitrator Michael E. Zobrak, C94C-1C-C 97053137, Southeastern, PA, April 10, 2001

The arbitrator concluded that the USPS violated Article 8, the LMOU, and past practice in the office when full-time regulars not on the OTDL were required to work overtime before part-time flexibles. The Arbitrator granted a make whole remedy to the single OTDL clerk not maximized and to the part-time flexible clerks. However, with regard to a remedy for the non-OTDL clerks, that Arbitrator stated:

“The Union’s request that those non-OTDL employees who were required to work overtime on the days in question be granted administrative leave equal to the number of hours they were required to work is denied. Those employees were properly compensated for their work and an additional payment is not warranted.”