



James M. Gattey
Michael P. Baranic*
Jason L. Aldrich
* Also admitted in Arizona and
the District of Columbia

ATTORNEYS AT LAW

San Diego Office
Telephone (619) 232-8142
Facsimile (619) 234-4553

Tucson Office
Telephone (520) 628-8142
Facsimile (520) 628-8143

December 22, 2006

Carl McClafferty
Chief Patrol Agent
U.S. Customs and Border Protection
United States Border Patrol
1111 N. Imperial Avenue
El Centro, CA 92243

VIA FACSIMILE AND CERTIFIED U.S. MAIL

RE: UNION INITIATED GRIEVANCE PURSUANT TO ARTICLE 33.F.(1)
REQUIREMENT OF PAYMENT OF FLSA SUFFER OR PERMIT PAY
(Fixed-Area Work Assignments Requiring Attendance Beyond 8-Hour
Shift)

Dear Chief McClafferty:

The following constitutes a Union Initiated Grievance pursuant to Article 33.F(1) of the Collective Bargaining Agreement between the National Border Patrol Council ("NBPC") and the Legacy I&NS (hereinafter, "CBA").¹ This grievance concerns the Agency's failure to compensate bargaining unit members assigned to fixed-area assignments (such as traffic checkpoints and "X" assignments) Fair Labor Standards Act ("FLSA") Suffer or Permit pay, also known as "45 Act" pay.

FACTUAL BASIS FOR GRIEVANCE

Border Patrol Agents are routinely assigned to work "fixed post" assignments, such as traffic checkpoints and "X" assignments along the border. When assigned to these locations, Agents are under a standing order to work their regular eight hour shift, and continue to work beyond the eight hour shift until their relief arrives. These hours worked beyond the eight hours have been compensated as "administratively uncontrollable overtime" ("AUO"), however, law, regulation, the CBA, and prior litigation between the National Border Patrol Council and the Agency require the compensation to be that as FLSA Suffer or Permit Pay.

¹ Despite the dissolution of the Immigration and Naturalization Service, the CBA maintains its effect with the Department of Homeland Security.

THE DISPUTE AND REASON FOR DISSATISFACTION

The issue presented here by this Union Initiated Grievance has already been addressed to the Agency by the NBPC. Attached please find a copy of Arbitrator Samuel J. Nicholas, Jr.'s decision of a grievance presented for arbitration by the NBPC. Arbitrator Nicholas was mutually agreed to by the NBPC and the Agency, and his decision on the matter issued on March 22, 2001. At page 20 of his decision, Arbitrator Nicholas "reiterated his understanding of the very essence of [that] case:"

The central character of AUO work is lack of control by management *when and whether* such work is performed by its employees. Indeed one of the other defining characteristics of AUO is that the employee himself/herself makes the decision whether the nature of his/her position demand that he/she perform the overtime at hand. Here, that discretion on the part of the employees was lacking, since the agents participating in Operation Rio Grande were not given the latitude to leave or not leave their AOR [area of responsibility] at then end of their shifts. Rather, for all practical purposes, they were under a standing directive from management to remain at their area of responsibility until relief arrived. As such, I cannot say this properly falls within the domain of AUO work.

Thus, I conclude that Agency took improper advantage of the language of the AUO regulations and erroneously paid Grievants AUO pay for work which was routine, predictable, and under Management's control.

(Emphasis in original.)

The law, regulation, and provisions of the CBA as presented by the Union and Arbitrator Nicholas in the attached decision by Arbitrator Nicholas, and specifically, 5 U.S.C. § 5542, § 5545(c), 5 C.F.R. § 550.151 and § 550.153, are incorporated herein to this Grievance as if fully set forth here. Please also note that Article 30 of the CBA requires the Agency to pay bargaining unit members "equal pay for equal work."

Here, the standing order is the same as that of the "Operation Rio Grande" grievance. Border Patrol Agents are under a standing order to remain at fixed area assignments until relief arrives. These posts include all traffic checkpoints within the Sector, "X" assignments, and any other assignment that requires a bargaining unit member to remain at the location beyond the eight hour shift until his/her relief arrives.

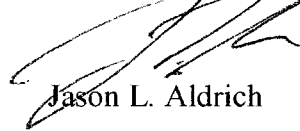
CORRECTIVE ACTION DESIRED

The National Border Patrol Council demands the Agency:

1. Cease and desist from violating the decision rendered by Arbitrator Samuel J. Nicholas, Jr., issued March 22, 2001, by not paying bargaining unit members FLSA Suffer or Permit pay to bargaining unit members who work fixed location assignments beyond an eight hour shift and who may not leave that assignment until relief arrives.
2. By compliance with number 1, above, begin paying bargaining unit members FLSA Suffer or Permit pay (“45 Act” pay) when the bargaining unit member works beyond an eight hour work assignment and is not permitted to leave until his/her relief arrives.
3. Pay all affected bargaining unit members backpay in accordance with number 2, above, and as required by the Backpay Act, codified at 5 U.S.C. § 5596.

Very truly yours,

GATTEY BARANIC LLP



Jason L. Aldrich

Enclosure

c: AFGE/NBPC President T.J. Bonner
AFGE/NBPC Southwest Region Vice President George McCubbin II
AFGE/NBPC Local 2554 President Lombardo Amaya

IN THE MATTER OF ARBITRATION

OPINION

between

AND

UNITED STATES IMMIGRATION AND
NATURALIZATION SERVICE (AGENCY)

FINDINGS

and

FMCS CASE NO. 00-10336-3

AMERICAN FEDERATION OF
GOVERNMENT EMPLOYEES,
NATIONAL BORDER PATROL
COUNCIL (UNION/GRIEVANTS)

March 22, 2001

Arbitrator: Samuel J. Nicholas, Jr., Jackson, Miss., mutually selected by the parties to serve as Impartial Arbitrator.

Representatives: For Agency - Hon. Peter Gregory

For Union - Hon. Gregory K. McGillivray

OPINION

I

The parties to this dispute, the United States Immigration and Naturalization Service ("Agency") and the American Federation of Government Employees, National Border Patrol Council ("Union"), are signatories to a certain three-year collective bargaining agreement ("the Agreement"), effective from February 6, 1995, through February 6, 1998, inclusive of the date on which this dispute arose. Pursuant to the Agreement, Union is duly recognized as the sole and exclusive representative for all Border Patrol Personnel of the Agency assigned to Border Patrol Sectors except professionals and those excluded from coverage under the Civil Service Reform Act. See Article 1 of the Agreement. At the same time, Agency has reserved unto itself the right to exercise the normal management rights of an employer, including the right to determine the mission, budget, organization, number of employees, and to assign work and

make other determinations relative to the work force. See Article 4 of the Agreement.

This arbitration stems from a certain complaint (or "grievance"), filed by Union on September 27, 1997, on behalf of certain aggrieved employees ("Grievants"), comprising all employees affected by an alleged improper administration of the overtime provisions of the Agreement and of applicable federal regulations and statutory law. The grievance (Joint Exhibit 1), as filed by Union, reads in pertinent part as follows:

"Since on or about August 26, 1997, Border Patrol Agents in the McAllen Sector have been detailed to 'Operation Rio Grande' and 'Operation White Shark.' Agents are being held responsible for maintaining an 'Area of Responsibility' and are expected to remain in that area until they are relieved by another shift. The next shift does not relieve them until into the ninth (9th) or tenth (10th) hour of work. Agents have been told by their supervisors during this Operation they are to work eight (8) hours of 45 act overtime on a mandatory sixth (6th) day of work and any hours thereafter will be 'A.U.O.' Agents are ordered or induced to remain in their area, yet are not being allowed to claim these hours as overtime under 5 U.S.C. § 5545 or the Fair Labor Standards Act.

Employees are being ordered to remain in their 'Area of Responsibility' until relieved by another agent and use A.U.O. to travel back to the station.

* * * * *

It is clear that the employees covered by the instant grievance do not meet any of the aforementioned criteria [for A.U.O.], and should be paid 45 act overtime or FLSA Suffer Permit, whichever is the higher rate of pay.

The foregoing actions violate applicable laws and regulations governing compensation for regularly scheduled work."

As a matter of remedy, Union requests back pay for all affected employees, reimbursement of all attorneys' fees and costs, and notification that the Agency will, in the future, comply with relevant federal law and regulations concerning overtime pay. The grievance was properly processed through the

various stages of the contractual grievance procedure. However, when no satisfactory resolution of the matter was reached, Union notified Agency of its intent to forward the grievance to arbitration. In this regard, the undersigned was mutually selected to serve as Impartial Umpire/Arbitrator in this matter, and he being duly empowered by the parties to make factual findings and to render a binding decision and award on the grievance. To that end, a hearing was held on November 29 & 30, 2000, at McAllen, Texas, when and where the parties were permitted to present their respective cases via the elicitation of testimony from witnesses on direct and cross-examination, together with the submission of pertinent documentary evidence into the Record. The proceedings were recorded and transcribed by a licensed court reporter and at the close of the hearing the Arbitrator granted the parties leave to file post-hearing briefs in support of their respective contentions.

The Record is now complete and this matter is ripe for a final decision and award. The parties have stipulated that the case is bifurcated on the issues of liability and damages. Thus, this Opinion addresses only the question of liability.

II

The provisions of the Agreement deemed pertinent and relevant to the issues in dispute here are noted as follows:

ARTICLE I RECOGNITION

“The Service recognizes the American Federation of Government Employees (National Border Patrol Council) as the bargaining agent for all Border Patrol Personnel of the Immigration and Naturalization Service assigned to the Border Patrol Sectors except professionals and those excluded from coverage by the Civil Service Reform Act.”

**ARTICLE 2
EFFECT OF LAW AND REGULATION**

"A. In the administration of all matters covered by this Agreement, the parties are governed by existing or future laws; and government-wide rules or regulations in effect upon the effective date of this Agreement. In the administration of the Agreement, should any conflict arise between the terms of this Agreement and any present or future laws, provisions of such laws shall supersede conflicting provisions of this Agreement.

C. In any conflict between the terms of this Agreement and any provisions of Service Orders, Policy Letters, Manuals, etc., regardless of date of issuance, the terms of the Agreement will govern."

**ARTICLE 4
RIGHTS AND OBLIGATIONS**

"A. This agreement or its provisions may not in any manner diminish or impair any rights which would otherwise be available to any employee in the absence of such an agreement.

B. Management officials of the Service retain the right to determine the mission, budget, organization, number of employees, and internal security practices of the Service; and in accordance with applicable laws and regulations - (1) hire, assign, direct, layoff, and retain employees in the Service, or to suspend, remove, reduce in grade or pay or take other disciplinary action against such employees; (2) to assign work, to make determinations with respect to contracting out, and to determine the personnel by which Service operations shall be conducted. . . ."

**ARTICLE 27
OVERTIME - OTHER THAN UNCONTROLLABLE OVERTIME**

"A. Overtime assignments will be distributed and rotated equally among eligible employees. Supervisors shall not assign overtime work to employees as a reward or a penalty, but solely in accordance with the Service's need. Complaints or disagreements on distribution of overtime shall be processed in accordance with the negotiated procedure.

- B. All employees in an overtime status will perform the duties of the position to which assigned. They will wear the necessary uniform and identification that the duties of the position require."

**ARTICLE 34
ARBITRATION**

- "A. If the Service and Union fail to settle any grievance processed under the negotiated grievance procedure, such grievance, upon written request by the Union, may be submitted to arbitration within fifteen (15) calendar days from the date the Service's final decision is personally delivered or mailed. If service is by mail, five (5) additional calendar days shall be allowed."

Also pertinent to this matter are the following excerpts from applicable federal statutes:

5 U.S.C. § 5542

"(a) For full-time, part-time and intermittent tours of duty, hours of work officially ordered or approved in excess of 40 hours in an administrative workweek, or (with the exception of an employee engaged in professional or technical engineering or scientific activities for whom the first 40 hours of duty in an administrative workweek exceeds the minimum rate for GS-10) . . . in excess of 8 hours in a day, performed by an employee are overtime work and shall be paid for, except as otherwise provided by this subchapter, at the following rates:

(1) For an employee whose basic pay is at a rate which does not exceed the minimum rate of pay for GS-10, . . . the overtime hourly rate of pay is an amount equal to one and one-half times the hourly rate of basic pay of the employee, and all that amount is premium pay. . . .

(2) For an employee whose basic rate of pay is at a rate which exceeds the minimum rate of pay for GS-10, . . . the overtime hourly rate of pay is an amount equal to one and one-half times the hourly rate of the minimum rate of basic pay for GS-10, and all that amount is premium pay. . . ."

5 U.S.C. § 5545(c)

"The head of an agency . . . may provide that -

(1) an employee in a position requiring him regularly to remain at, or within the confines of, his station during longer than ordinary periods of duty, a substantial part of which consists of remaining in a standby status rather than performing work, shall receive premium pay for this duty on an annual basis instead of premium pay provided by other provisions of this subchapter, except for irregular, unscheduled overtime duty in excess of his regularly scheduled weekly pay. . . .

(2) an employee in a position in which the hours of duty cannot be controlled administratively, and which requires substantial amounts of irregular, unscheduled overtime duty *with the employee generally being responsible for recognizing, without supervision, circumstances which require him to remain on duty*, shall receive premium pay for this duty on an annual basis instead of premium pay provided for by other provisions of this subchapter, except for regularly scheduled overtime, night, and Sunday duty, and for holiday duty. Premium pay under this paragraph is an appropriate percentage, not less than 10 percent nor more than 25 percent, of the rate of basic pay for the position, as determined by taking into consideration the frequency and duration of irregular, unscheduled overtime duty required in the position." (Emphasis added)

5 C.F.R. § 550.151 Authorization of premium pay
on an annual basis.

"An agency may pay premium pay on an annual basis, instead of other premium pay prescribed in this subpart (except premium pay for regular overtime work, work at night, on Sundays, and on holidays), to an employee in a position in which the hours of duty cannot be controlled administratively and which requires substantial amounts of irregular or occasional overtime work, *with the employee generally be responsible for recognizing, without supervision, circumstances which require the employee to remain on duty*. Premium pay under this section is determined as an appropriate percentage, not less than 10 percent nor more than 25 percent of the employee's rate of basic pay (as defined in § 550.103)." (Emphasis added)

5 C.F.R. § 550.153. Bases for determining positions for which premium pay under § 550.151 is authorized.

“(a) The requirement in § 550.151 that a position be one in which the hours of duty cannot be controlled administratively is inherent in the nature of such a position. A typical example of a position which meets this requirement is that of an investigator of criminal activities whose hours of duty are governed by what criminals do and when they do it. He is often required to perform such duties as shadowing suspects, working incognito among those under suspicion, searching for evidence, meeting informers, making arrests, and interviewing persons having knowledge of criminal or alleged criminal activities. His hours on duty and place of work depend on the behavior of the criminals or suspected criminals and cannot be controlled administratively. In such a situation, the hours of duty cannot be controlled by such administrative devices as hiring additional personnel; rescheduling the hours of duty (which can be done *when, for example, a type of work occurs primarily at certain times of the day*); or granting compensatory time off to offset overtime hours required.” (Emphasis added.)

III

Grievants are INS Border Patrol Agents who have worked in the McAllen Sector during the Agency's operational emphasis known as “Operation Rio Grande”, which commenced in August 1997. The basic purpose of Operation Rio Grande was to deploy Border Patrol Agents all along certain sections of the U.S.-Mexico border so as to increase the presence and visibility of Border Patrol Agents and thereby deter aliens from gaining illegal entry into the United States. *See Transcript, Vol. 1, at 17, 24, 38-39, 161-162, 175.*

Operation Rio Grande was carefully planned in advance of its actual implementation, so as to assure that most of the Border Patrol Agents were assigned general duty in a specific area of responsibility along the border and required to stay at that precise location (known as the agent's “AOR” or “X” denoting his precise spot on the border) throughout the duration of his/her shift. *Transcript, Vol. 1 at 17-18, 38.*

In the McAllen Sector, there were some nine duty stations, six of which are on the border and were affected by Operation Rio Grande. Transcript, Vol. 1 at 177. It is undisputed that Operation Rio Grande represented a significant change in the method and means by which the Agency sought to maintain the security of the border. For example, prior to Operation Rio Grande, Border Patrol Agents observed and waited for illegal aliens to cross the border and then Border Patrol Agents would pursue and apprehend said aliens. Transcript, Vol. 1 at 176. Suffice it to say, Operation Rio Grande constituted a change to a proactive and preventive border patrol approach, whereby high visibility of Border Patrol Agents all along the border was used to discourage illegal aliens from crossing the border in the first instance. Transcript, Vol. 1 at 176.

Understandably, Operation Rio Grande was (and remains) a very labor intensive undertaking which required that agents increase their hours of work. The goal of Operation Rio Grande was to place an agent along the border approximately every 1/8 of a mile. Transcript, Vol. 1 at 17, 38, 183. This new emphasis required a tremendous amount of manpower and man-hours from the agents working in the McAllen Sector. Thus, during certain periods beginning in August 1997, Agency ordered Grievants to work a mandatory sixth day (or on occasion a seventh day) of overtime during an administrative workweek. Transcript, Vol. 1 at 19-20, 41-42, 133-134, 162, 178. Because Agency was knowingly scheduling the agents/Grievants for a sixth or seventh day to work at least eight (8) hours in advance of the administrative workweek, Agency paid the employees overtime pursuant to 5 U.S.C. § 5542 (referred to as "45 Act overtime") for these eight hours. Transcript, Vol. 1 at 23, 192.

Border Patrol Agents are generally assigned to one of three eight-hour regular shifts: 6:00 a.m. - 2:00 p.m.; 2:00 p.m. - 10:00 p.m., and 10:00 p.m. to 6:00 a.m. Transcript, Vol. 1 at 20, 38. Understandably, because of the unpredictable nature of border patrol work, many of the agents working their mandatory sixth or seventh day in an administrative work week have ended up working 10 or more hours due to the fact that their relief sometimes takes awhile to be accomplished and they generally have to return to their duty station. Transcript, Vol. 1 at 20-21.

In the early stages of Operation Rio Grande, Grievants sought to record these hours in excess of eight (8) hours on the mandatory sixth or seventh workday as "45 Act" overtime. Transcript, Vol. 1 at 22-24, 168-169. However, those agents who had recorded these extra one or two hours of work on their sixth or seventh day as "45 Act" overtime were instructed that they should change the designation to administratively uncontrollable overtime or "AUO". Transcript, Vol. 1 at 22; Vol. 2 at 11-13. In addition to AUO, Agency also paid the Grievants Fair Labor Standard Act overtime for all work over eight hours which they performed on their mandatory sixth or seventh day. Transcript, Vol. 1 at 219.

Based upon the Agency's decision not to pay "regular" overtime for the additional time work on the sixth and seventh workday, Union filed the instant grievance, seeking backpay for the aggrieved employees and recognition by Agency that this overtime had been incorrectly paid as AUO.

IV

The positions of the parties are summarized as follows:

UNION

1. Agency's decision not to pay Grievants regular overtime for their hours in excess of eight (8) hours on the sixth and seventh day of an administrative workweek during Operation Rio Grande was not consistent with applicable statutes, regulations, or past practice at other Agency locations throughout the country. Accordingly, Union has shown that Agency is liable for additional overtime pay to the Grievants.

2. As Union made clear at the hearing, when Border Patrol Agents work beyond their regularly-scheduled 40-hour administrative workweek, they are entitled under Title 5 of the United States Codes to receive additional pay under two provisions: either 5 U.S.C. § 5545(c) -- which provides for administratively uncontrollable overtime -- or under 5 U.S.C. § 5542(a), which provides for general overtime compensation, also known as "regularly scheduled overtime" at the rate of time and one-half. These are two independent and mutually exclusive provisions for overtime. See Slugocki v. United States, 816 F.2d 1572, 1574 (Fed.Cir. 1987).

3. The reason that employees are eligible to receive both "general" overtime and AUO is that the purposes for each type of overtime are quite different and serve different needs of the Agency. AUO is a lump sum amount of overtime payment which is paid without regard to the actual number of overtime hours worked, provided the employee's position has been certified as AUO-eligible. Conversely, general overtime is paid for those overtime hours which do not qualify as AUO hours. Because AUO hours generally cost the Agency less money, once an employer has certified a position as AUO-eligible,

the employer attempts to classify as many overtime hours as AUO for that particular position.¹

4. In this case, Agency plainly recognized that the mandatory eight-hour shifts which it formally scheduled its agents to work on their sixth and seventh workdays in a workweek did not qualify as AUO work because the work was scheduled *in advance by the employer*. The only real issue in this case, then, is whether the additional two hours that agents spent manning their particular Area of Responsibility ("AOR" or "X") on the border, waiting for their relief to arrive, traveling to the duty station, and performing other routine responsibilities at the station at the end of their shifts should have been paid as general overtime. Plainly, if these additional two-hour periods do not qualify as AUO, then the employees affected were entitled to be compensated pursuant to 5 U.S.C. § 5542 and should have received general overtime instead of AUO. Union demonstrated at the hearing that these employees should not have been paid AUO for these additional two hours on their sixth and seventh workdays.

5. OPM's regulations on AUO, and the guidance issued by Agency to its field supervisors, make it clear that AUO has been given a very distinct and precise definition: AUO is limited to overtime work which is so unpredictable in nature that it cannot be scheduled in advance and arises when the employee makes the decision that the work is necessary. The "uncontrollable" nature of the work is the essence of AUO work. While both the employer and the employee may be aware that such overtime *will* occur on a regular basis, neither the employer nor the employee can determine in advance *when the need for*

¹ Since AUO is a lump sum payment disbursed in biweekly increments, Agency's monetary obligations under Title 5 do not increase if additional overtime hours are classified as AUO. However, when general overtime is paid, Agency may owe the affected employees up to time and one-half compensation for additional hours worked.

such work will occur. Thus, management is not in a position to schedule additional employees to relieve employees who have decided that they need to work such "uncontrollable" overtime.

6. There is no real question here that Border Patrol Agents work in positions to which AUO is applicable. Indeed, Grievants had to have been certified eligible for AUO for Agency to pay them AUO. However, the two factors which are crucial in this case are the unpredictable nature of the work and the flexibility of the employees in question to decide *whether* to work the overtime in question. Given that so many employees were being regularly scheduled to work more than eight hours on their sixth and seventh workday, it must be said that these hours had come to be a part of the employees' predictable work pattern under Operation Rio Grande.

7. In effect, these additional two hours each sixth or seventh day were subject to scheduling and administrative control by Agency, yet it chose to treat them as "unpredictable" AUO work. Additionally, the employees really had no discretion to decide *not to work* these additional two hours, since they were required to stay at the AOR post until relieved and were required to carry out certain "end of shift" duties before they could leave for the day. The mere fact that the Agency chose not to schedule these overtime hours into the sixth and seventh day of work does not mean that the overtime was occasional, irregular, or unpredictable. See Aviles v. United States, 151 Ct.Cl. 1, 22 (1960). As the Slugocki court concluded, work which constitutes "recurrent duties" which were required to be performed on an "on-going basis" does not constitute AUO. *Id.*, 816 F.2d at 1577.

8. The most obvious explanation for the regularly required overtime during Operation Rio Grande was Agency's lack of available manpower. As Union demonstrated at the hearing, Border Patrol Agents from other sectors in other parts of the country were brought into the McAllen Sector to provide the kind of "full coverage" on the border which Agency desired. As one court has noted: "A shortage of manpower rather than anything intrinsic to the performance of these functions accounts for the overtime. [Thus,] . . . such overtime is administratively controllable by the very terms of the regulations." Fox v. United States, 416 F.Supp. 593, 597 (E.D.Va. 1976).

9. Employees simply waiting for relief do not qualify for AUO, because management is capable of administratively controlling the need for additional time to provide relief and relief is a regularly-occurring event, not one which occurs infrequently, occasionally, or unpredictably. See 5 C.F.R. § 550.153(c)(3). The work which the employees performed back at the station also are ministerial in nature, which is further evidence of the fact that this is not work of the emergency or uncontrollable type nature to which AUO applies. Moreover, the reason that agents work this overtime at the end of their shift is not due to the nature of the work at all, but rather as the result of a manpower shortage in connection for providing timely relief to the employees.

10. For all the reasons set forth above, Union has plainly demonstrated that these additional two hours of work were regular overtime which should have been compensated at the regular overtime rate and not as AUO. Any suggestion by Agency that the employees "voluntarily" made an independent decision to stay at their assigned AOR until their relief arrived is belied by the agents' testimony and by the Agency's own documentary record, which states

that employees must remain at their assigned AOR until they are relieved by the oncoming shift. See Union Exhibits 3 and 4. The nature of the work did not change significantly on the sixth or seventh day so as to suddenly become AUO type work on the sixth or seventh day.

11. Agency has offered no adequate explanation or justification for its decision not to pay the Grievants regular overtime for the extra two hours they worked on the sixth or seventh workday. As a result, all affected employees should receive the overtime differential pay which they have been denied for the past three years. Therefore, the grievance should be sustained by the Arbitrator and the Arbitrator should order that Agency make all employees whole for any losses in overtime pay they have suffered.²

AGENCY

1. In filing the grievance, Union has failed to comprehend the proper interpretation of the language of 5 U.S.C. §§ 5542 and 5545 and of 5 C.F.R. § 550.103. The grievance finds no support under the Agreement or under these statutory and regulatory guidelines and the Arbitrator should so find.

2. Agency explained both at the hearing and in its post-hearing brief the various distinctions between regular or "45 Act" overtime and AUO. Suffice it to say that AUO is applicable and authorized for positions in which the hours of duty cannot be controlled administratively and which require a substantial amount of irregular or occasional overtime work. AUO is paid to employees without any specific relation to the actual hours worked in a given week, since AUO is computed on a percentage basis and paid biweekly.

² The parties have agreed that only the liability issue is before the Arbitrator. However, Union is confident that once a ruling in its favor is rendered, the parties will be able to work out the damages aspect of the case without further assistance from the arbitrator.

3. In order to prevail in this case, Union has the burden of establishing that all the hours Grievants worked in excess of the first eight (8) hours on the sixth or seventh day of work could have been regularly scheduled or administratively controlled. Grievants and Union have failed to meet their burden.

4. Manpower shortages did not cause Grievants to work overtime beyond the first eight hours on the sixth or seventh day of their workweek during Operation Rio Grande. Union's emphasis on the manpower shortage which Agency experienced with Operation Rio Grande misses the point: the fact that manpower shortages required management to implement a six-day workweek is not relevant because Agency's manpower shortages merely required the scheduling of a sixth eight-hour work day. Since it is not disputed that 45 Act overtime was due for the first eight hours worked on the sixth or seventh day, the crucial issue here centers on what caused Grievants to work more than eight hours on the sixth day.

5. It is impossible for Union to argue successfully that manpower shortages required Grievants to work more than eight hours on the sixth or seventh day. Indeed, the evidence demonstrates that Grievants all admitted that they performed the same overtime duties on day six as they did on days one through five of their administrative workweek. Grievants further admitted that they received only AUO for their overtime hours on days one through five of their administrative workweek. The AUO worked performed on days one through five is identical to the AUO work performed on day six or seven.

6. Grievants are not entitled to 45 Act overtime on the basis of the fact that they were required to remain on duty until being relieved by the next shift.

When relief fails to report, generally employees are not eligible for AUO because this is a predictable and routine occurrence. However, the evidence at the hearing of this case demonstrated that Grievants were required to stay at their AOR not as a mere convenience to the oncoming shift but because their presence is required and they would be negligent if they were to leave without being relieved. In short, their AOR would be left "vacant" and a potential unprotected "hole" in the border would arise if Grievants left their AOR before relief occurred. In this regard, remaining at their AOR serves a necessary protective function not unlike continuing to conduct surveillance on suspected aliens at the end of an assigned shift. An unattended AOR could essentially be "overrun" by narcotics traffickers or aliens flooding across the border through the open AOR. There is a compelling reason for Grievants to remain at their AOR and they know that they must provide continuous coverage to their AOR.

7. There may be some ambiguity in the regulations since Grievants admittedly could not leave their areas of responsibility unless relieved. The need to wait for relief seems to mirror the situation described in 5 C.F.R. § 550.153(c)(2). Yet, it is equally true that Border Patrol Agents who abandon their post without relief would be negligent in carrying out their duties and remaining at the AOR is unquestionably a definite and official requirement of the agents' position. These facts suggest that § 550.153(c)(1) and (2) apply to the work performed pursuant to Operation Rio Grande. Any ambiguity between the language of paragraph (3) of the regulation and the language of paragraphs (1) and (2) should be resolved in favor of the Agency.

8. Agency's method of calculating overtime and AUO pay for Grievants in this case follows the language of the Agreement and is consistent with the

language of 5 C.F.R. § 550.153(c). Thus, on the merits of the grievance, Union cannot prevail. Since Union has the burden of proof in this case to show that Agency's actions were improper under the Agreement and since Union has failed to carry its burden of proof, the grievance must be denied in its entirety.

V

The parties submitted a stipulation on the issue which is properly before the Arbitrator for final decision. Moreover, the parties agreed that the Arbitrator should address the following question:

Whether the INS improperly compensated border patrol agents by classifying their overtime work beyond 8 hours on the sixth and seventh day of their workweek as administratively uncontrollable overtime.

The parties recognize that in such a dispute as we have here, Union bears the burden of proof. Thus, as the party bringing the complaint, Union has the ultimate burden of convincing the Arbitrator that its position on the dispute is on a firmer foundation than Agency's and that the interpretation of the relevant contractual, statutory, and regulatory language which it urges should be applied by the Arbitrator in resolving the matter. After having made a careful review of the voluminous proof offered by both Union and Agency – and after having given careful scrutiny to the words and phrases of the applicable statutes at 5 U.S.C. §§ 5542 and 5545 as well as the regulation set forth at 5 C.F.R. § 550.153 – I am compelled to conclude that Union's suggested interpretation of the language in question makes for the more persuasive reading. Accordingly, I find that the grievance has merit.

At first blush, the Arbitrator was intrigued (and, honestly, even somewhat amused) by the term, the so-called “administratively uncontrollable overtime”. In my more than 30 years plus as an active third party neutral, I have never

encountered a more unusual concept and, from my experience I dare say, it is unlikely that a similar concept(s) exists outside the confines of the federal sector. However, given the continuous attention afforded cost-savings measures by federal agencies, it is not surprising to find a cost-reducing version of overtime such as AUO. Thus, and needless to say, I commend the ingenuity of the managerial consultants who first conceived this new overtime animal.

Notwithstanding the apparently unique nature of AUO in the federal sector, the Arbitrator must determine here whether the concept has any application to the hours in excess of eight hours which Grievants worked on their sixth and seventh workdays during their participation in Operation Rio Grande. In that connection, I have made a thorough review of the applicable regulations and Agency's AUO Training Guide (Union Exhibit 14) and I have viewed the training videotape provided by Union (Union Exhibit 15). On the whole, the AUO concept explained in the training guide and in the training videotape is not the kind of work which these Grievants were performing on their sixth and seventh workday. Thus, I find that AUO has no application as urged by Agency, i.e., compensation for two hours worked on the sixth and/or seventh days.

The training video makes it clear that AUO does not apply when the work in question is due to a delay in the arrival of one's relief or due even to the absence of one's regular relief at the end of a shift. This is simply not the kind of "emergency" or unpredictable event which generally leads to AUO work. For the most part, I find that these additional two hours of work performed by the employees in question was and remained essentially predictable and

controllable by management and, for that reason, cannot be said to qualify as AUO work.

Agency makes much of the fact that Border Patrol Agents were and are required to man their so-called "AOR" on a continuous basis until their relief arrives and that abandoning one's AOR would constitute negligence. Additionally, Agency points out that if a Border Patrol Agent were to abandon his AOR, there would develop a hole in the "net" of protection which Agency seeks to provide to the border. With this much of Agency's argument, I concur. To be sure, and as I understand the change in emphasis wrought by the introduction of Operation Rio Grande, Agency has effectively redefined its approach to border patrol from its former "reactive" stance to the current "proactive" or preventive stance. And in order to maintain that constant presence at the border, Agency decided to cast a wide protective format over the border, spacing Border Patrol Agents at points as close as 1/8 mile apart all along the border. This is a commendable innovation for maintaining the border and one which the Arbitrator finds to be well-reasoned. But, at the same time, by making the decision that it wanted essentially "round the clock" coverage on the border, Agency should have -- and plainly could have -- recognized that there would be a need to significantly increase its manpower to meet these new demands. Moreover, by choosing the mandate that agents remain at the AOR until relieved, Agency had adequate advance notice that this practice likely would -- as it ultimately did -- generate a demand for additional overtime work from its employees in order to assure the continuous coverage on the border which is the heart and soul of Operation Rio Grande.

Accordingly, it is my finding that the manpower and overtime impact of the operation were, in my estimation, administratively controllable and predictable in advance by the Agency. Thus, I hold that Agency should have taken the necessary precautions either to schedule additional manpower to cover its needs or simply scheduled this additional overtime as "45 Act" overtime.

The record also indicates that in some other sectors of the country, similar, if not identical work conditions, are viewed by other INS Sectors as justifying "45 Act" overtime for the work which was paid here as AUO. Since Agency has provided no meaningful explanation for this obvious discrepancy among its own management personnel, I am further persuaded that an improper assessment of the nature of the overtime was made in this case.

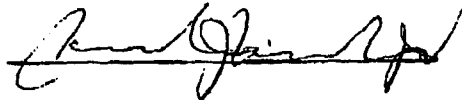
Finally, I wish to reiterate my understanding of the very essence of this case, i.e., the central character of AUO work is lack of control by management over *when and whether* such work is performed by its employees. Indeed, one of the other defining characteristics of AUO is that the employee himself/herself makes the decision whether the nature of his/her position demand that he/she perform the overtime at hand. Here, that discretion on the part of the employees was lacking, since the agents participating in Operation Rio Grande were not given the latitude to leave or not leave their AOR at the end of their shifts. Rather, for all practical purposes, they were under a standing directive from management to remain at their AOR until relief arrived. As such, I cannot say this properly falls within the domain of AUO work.

Thus, I conclude that Agency took improper advantage of the language of the AUO regulations and erroneously paid Grievants AUO pay for work which

was routine, predictable, and under Management's control. Therefore, the grievance must be sustained.

AWARD

The grievance is deemed to be meritorious. The Arbitrator finds that Agency acted improperly in compensating the Grievants at their AUO rate for the two hours of additional work routinely worked on their sixth and seventh work day. The parties are hereby directed to make a good conscientious attempt to resolve the damage issues in this matter and to report back to the Arbitrator on or before May 17, 2001 for further proceedings, if they are unable to resolve said issues.



Samuel J. Nicholas, Jr.

Arbitrator & Umpire



ATTORNEYS AT LAW

James M. Gattey
Michael P. Baranic*
Jason L. Aldrich
* Also admitted in Arizona and
the District of Columbia

San Diego Office
Telephone (619) 232-8142
Facsimile (619) 234-4553

Tucson Office
Telephone (520) 628-8142
Facsimile (520) 628-8143

FACSIMILE TRANSMITTAL SHEET

Date: December 22, 2006

To: Carl L. McClafferty, Chief Patrol Agent
Customs and Border Protection
U.S. Border Patrol

From: Jason L. Aldrich, Esq.
GATTEY BARANIC LLP

RE: Union Initiated Grievance Pursuant to Article 33.F(1) Requirement of Payment of FLSA
Suffer of Permit Pay

FAX No. Sending to: (760) 352-3127

FAX No. Sending from: (619) 234-4553

Total number of sheets **including** this page: 25

MESSAGE

- Original being mailed
- Original **NOT** being mailed.
- Please confirm receipt by calling (619) 232-8142.

WARNING

The information contained in this facsimile message is confidential information (and may be a privileged attorney-client communication) intended only for the use of the individual or entity named above. If the reader of this message is not the intended recipient, you are hereby notified that any dissemination or distribution of this communication to anyone other than the intended recipient is strictly prohibited. If you have received this communication in error, please immediately notify us by telephone and return the original message to us at the above address via the U.S. Postal Service.

Thank you.

Message Confirmation Report

DEC-22-2006 03:17 PM FRI

Fax Number : 6192344553
Name : LAW OFFICES OF GK&D

Name/Number : 17603523127
Page : 25
Start Time : DEC-22-2006 03:14PM FRI
Elapsed Time : 03' 24"
Mode : STD ECM
Results : [O.K.]



James M. Gattey
Michael P. Baranic*
Jason L. Aldrich
* Also admitted in Arizona and
the District of Columbia

San Diego Office
Telephone (619) 232-8142
Facsimile (619) 234-4553

Ducson Office
Telephone (520) 628-8142
Facsimile (520) 628-8143

FACSIMILE TRANSMITTAL SHEET

Date: December 22, 2006

To: Carl L. McClafferty, Chief Patrol Agent
Customs and Border Protection
U.S. Border Patrol

From: Jason L. Aldrich, Esq.
GATTEY BARANIC LLP

RE: Union Initiated Grievance Pursuant to Article 33.F(1) Requirement of Payment of FLSA
Suffer of Permit Pay

FAX No. Sending to: (760) 352-3127

FAX No. Sending from: (619) 234-4553

Total number of sheets **including** this page:

MESSAGE

- Original being mailed
- Original **NOT** being mailed.
- Please confirm receipt by calling (619) 232-8142.

WARNING

The information contained in this facsimile message is confidential information (and may be a privileged attorney-client communication) intended only for the use of the individual or entity named above. If the reader of this message is not the intended recipient, you are hereby notified that any dissemination or distribution of this communication to anyone other than the intended recipient is strictly prohibited. If you have received this communication in error, please immediately notify us by telephone and return the original message to us at the above address via the U.S. Postal Service.

Thank you