REGULAR ARBITRATION PANEL

IN the Matter of the Arbitration	) GRIEVANT: Class Action
Between the	) POST OFFICE: San Antonio TX
UNITED STATES POSTAL SERVCE	) CASE No.: G16N-4G-C 19313203
and	) UNION: 42173819
NATIONAL ASSOCIATION OF LETTER CARRIERS	) DRT No.: 10-471307

BEFORE: DONALD J. BARRETT, ARBITRATOR

APPEARANCES:

For the U.S. Postal Service: Mr. Jonathan Kleine, LR Specialist

For the Union: Mr. Richard Gould, President, Branch 421

Place of Hearing: San Antonio, Texas

Date of Hearing: November 19, 2019[1]

AWARD: This grievance is sustained

Date of Award: December 30, 2019

Award Summary

The Union provided clear and convincing evidence that the sought-after remedy is proper and based upon a long-established agreement between the parties.

While Management argued this agreement has become unsustainable, I find no evidence to support this contention. The parties throughout the period 2018-2019 have settled a substantial number of same/similar grievances with this same remedy.

For the reasons set forth within the findings of this award, I find the requested remedy to be fair, reasonable, and justified under the recurring nature of this/these grievances.

Arbitrator

[1] Post-Hearing briefs in Hand on December 11, 2019

STATEMENT OF PROCEEDINGS:

The matter brought forth within this document was from an arbitration hearing held on November 19, 2019 at the postal facility located at 10410 Perrin Beitel, San Antonio, Texas pursuant to those provisions of the 2016-2019 National Agreement between the National Association of Letter Carriers, aka Union, and the U.S. Postal Service, aka Service, or Management.

This matter was presented through the parties' grievance process but the parties were unable to resolve their differences, and the Union then timely appealed this grievance to arbitration.

As a current member of the parties' Regular Arbitration Panel I was selected to hear this matter, and did afford the parties' counsel a full, fair, and objective opportunity to be heard, to present argument, evidence, and witnesses in support of their position(s).

Counsel for each party was well prepared to proceed, articulate, and professional throughout.

Each counsel well represented their client's best interest(s), and I thank them for their presentations.

In the second seat for the Union was Ms. Karrie Kimbrell, Regional Administrative Assistant for Region 10.[1]

At the conclusion of this hearing, the parties stated their intention to provide Post-Hearing Briefs. The process for such was explained to counsel, and it was agreed that each was to be postmarked no later than December 6, 2019. I had both Briefs in hand on December 12, 2019, and I again thank counsel for their efforts in providing such insightful products.

The parties stated their intention to call witnesses on their behalf and requested that each be duly sworn an oath prior to being examined. This request was so honored.

[1] Without objection RAA Kimbrell also provided witness testimony. She did so and then resumed her second seat.

The Union called the following witnesses:

Mr. Dennis Alltop, Union Steward (Steward of Record)

Ms. Kimbrell, RAA (Extensive Background/Experience)

Mr. Rigoberto Hidalgo, (Alternate) Chief Steward (Past Experience)

Mr. Lesley Scott Ketchum, City Letter Carrier (Past Experience)

Mr. Kevin Benjamin Welch, City Letter Carrier (Veteran)

The Service called the following witness:

Mr. Michael R. Moreno, Manager, Customer Services, Beacon Hill Station Formal Step A Representative (Extensive Experience)

The parties presented written and oral OPENING STATEMENTS.[2]

JOINT EXHIBITS:

Joint 1, The National Agreement, aka Agreement or Contract, inclusive of the parties Joint Contract Administrative Manual (JCAM)

Joint 2, Moving Papers, Pages 1-107

STIPULATED FACTS NOT IN DISPUTE BY THE PARTIES:

"Step B acknowledged a formal violation, and payment was made to Overtime Desired List (OTDL) letter carriers."

[2] As stated, Post Hearing Briefs were submitted, and in hand on December 12, 2019

ISSUE TO BE DECIDED:

There is a differing issue presented at hearing by each counsel. The Service presents that the remedy requested by the Union is contractually inappropriate, i.e. the payment of an additional fifty (50) percent to the non-Overtime Desired List carriers who were acknowledged to have been forced to work during the cited period, while the Union presents that this is a remedy only matter that also involves the past practice of paying carriers this fifty (50) percent remedy to which they are also entitled to in the case at hand.

The arbitrator agrees that this is a remedy only matter before me, and therefore finds that the issue is the following:

Is the non-OTDL letter carriers forced to work during the week of June 15-21, 2019 entitled to an additional fifty (50) percent payment at the straight time rate of pay?

BACKGROUND:

There is no apparent dispute by the parties that during the week of June 15-21, 2019 city letter carriers who were not on the OTDL were forced to work overtime prior to City Carrier Assistants (CCA's) or those carriers who were on the OTDL.

There is no apparent dispute that the parties at Step B acknowledged this violation and did pay the Overtime Desired List carriers who did not receive the overtime for which they were entitled.

However, those who were forced to work this overtime that were not on the OTDL were not paid, as the Union requested an additional fifty (50) percent at the straight time rate of pay for being forced to perform this work.

The Service offers such payment is tantamount to an "inconvenience tax, or fee" imposed on Management not from the Agreement, while the Union offers that there is a past practice of doing this exact thing which Management is now attempting to end without notice.

RELEVANT CONTRACUAL PROVISIONS:

Memorandum of Understanding Between The United States Postal Service And The National Association Of Letter Carriers, AFL-CIO:

4. "It is further agreed that the agreement dated July 12, 1976, signed by Assistant Postmaster General James C. Gildea and NALC President James H. Rademacher, is not in effect. In cases where management violates the letter carrier paragraph by failing to utilize an available letter carrier on the ODL to provide auxiliary assistance, the letter carrier on the ODL will receive as a remedy compensation for the lost work opportunity at the overtime rate."

5. "There is normally no monetary remedy for a carrier improperly required to work overtime on his own route. However, on a one-time, nonprecedential basis, the Postal Service will pay $7 for each hour of overtime worked to each carrier who has a timely grievance pending at Step 2 or 3 as of the date of this agreement. In order to recover, the grievant must establish that he/she was not on the ODL or work assignment list and was required to work overtime in violation of the principles set forth above."[3]

Article 8.4 Overtime Work

"A. Overtime pay is to be paid at the rate of one and one-half (1 ½) times the base hourly straight time rate.

B. Overtime shall be paid to employees for work performed only after eight (8) hours on duty in any one service day or forty (40) hours in any one service week. Nothing in this Section shall be construed by the parties or any reviewing authority to deny the payment of overtime to employees for time worked outside of their regularly scheduled work week at the request of the Employer."[4]

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[3] See Agreement, Pages 167-168 for full text
[4] See Agreement, Pages 19-22 for full text

POSITION OF THE PARTIES IN THIS MATTER:

The Union

The Union maintains that there is a precedent long established for ten years that letter carriers not on their work assignment, or on the OTDL who were forced to work overtime were to be paid fifty (50) percent additional at the straight time rate for those hours they were involuntarily forced to work.

The Union maintains further that there remains, up to the instant matter a stipulated agreement between the parties to do so.[5]

That the instant case is same/similar to the other grievances settled in this way but unknown to the Union is Management's attempt to now ignore such previous payments without raising this issue during the grievance procedure.

That such a remedy is in actuality the "status quo" for these past violations and as such represents a past practice between the parties that Management is now, without warning attempting to eliminate.

The Union argues that carriers have been compensated in the past for being forced to work overtime when they have explicitly informed Management, they do not want to work beyond their regular eight (8) hour tour of duty.

That the very same Management grievance representative in the past has awarded this remedy, yet now argues, without merit that such a remedy is inappropriate.

That Management has fully acknowledged through previous settlements, and the 2009 cited agreement that such carriers would in fact, be paid at the fifty (50) percent rate above the overtime rate of pay.

In the instant case, Management is attempting to negate this past agreement with no notice.

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[5] See U-1, Page 125

The Union argues further that despite Management's contention(s) that this grievance is not the result of any willful, or malicious intent the fact that such grievance(s) continue despite settlements ordering Management to cease and desist from such same/similar violations underscores Management's willfulness to violate Article 8, and the past settlements/agreements.

The Union requests this grievance be sustained in their favor, that Management again be ordered to cease and desist violating the provisions of Article 8.5, that the so named carriers be provided administrative leave or payment at 50 percent the straight time rate of pay, and whatever remedy the arbitrator deems appropriate.

The Service

The Service acknowledges that a violation of Article 8 of the Agreement did take place in the instant matter, and that the harmed employees who were on the OTDL were then paid accordingly, thus restoring the status quo ante required under the Agreement, and National arbitral awards.

The Service acknowledges further that on occasion a fifty (50) percent remedy such as the Union is now seeking has been granted, however on those occasions Management did not also acknowledge a practice existed such as the Union presents only at hearing, and not during the grievance procedure.

That the Union, who has the burden to prove a violation of the Agreement is unable to do so and is now therefore attempting to gain that which they did not gain in the collective bargaining arena.

That the Union has argued for the first time at arbitration the existence of a "past practice" yet made no such previous arguments, nor filed an Article 5, Prohibition of Unilateral Action....

.... grievance thereby reinforcing Management's position that no such practice existed with any consistency or regularity.

That Management's need for working those employees not on the OTDL during the period of June 15-21st was only due to the circumstances giving rise during that period, and allowed by Article 3, Management Rights.

That Management's witness testified there was no malicious intent, or willful disregard of the Agreement during this period when working the cited carriers but only the unforeseen circumstances which deteriorated unexpectedly during that time, and the unexpected need for their use in this manner.

The Service argues that the Union has failed to demonstrate a violation of Article 8, and that this very Article so states that such employees may be required to work overtime on occasion.

That any past settlements of 50 percent were not an established practice but only an amicable act of generosity and good will between the parties that was as often contradicted as followed.

That any allowance at arbitration of this issue, with its requested remedy could potentially place the Postal Service on a slippery slope, and may cause an even greater escalation of unsubstantiated remedies in the future.

The Service requests this grievance be denied in its entirety.

FINDINGS & OPINION OF THIS ARBITRATOR:

There is an old Irish proverb that states, "There are two sides to every story and twelve versions of a song."

Such are the stories (or songs) before me in this matter that both have to their personal perspective the elements of fact that require a finding for their position.

There truly are two sides, if not more to every story, yet as in this matter there can be only one outcome based on the facts that lead to this grievance, and support such a finding.

First, the merits of this grievance have been decided so there is no need for this arbitrator to further articulate the issue(s) discussed within the grievance case file.

The merits are important to this matter only as they relate to the continuation of same/similar grievances, and the Union's argument that due to such repeated violations Management has demonstrated a willful and malicious intention to violate the National Agreement.

In that regard I find much validity to the Union's contention.

When the same action repeats itself with the same outcome each time, and that action is a violation(s) of the Agreement, with the outcome being the same/similar payout of a monetary award yet the same/similar continues to repeat itself with no discernable difference of cause than there can be no other reasonable conclusion than the perpetrator(s) of the action is doing such willfully, and with little to no concern for the ultimate outcome of such repeated action(s).

In the instant matter there are two issues of paramount relevance to this finding. The first is the overwhelming number of same/similar grievances since 2008 that all resulted in a payout to non-overtime desired list letter carriers (and others).

Of interest to the matter before me are the no less than five (5) same/similar grievances filed and settled in 2018, and the no less than eighteen (18) same/similar grievances filed and settled in 2019 preceding this grievance.[6]

Secondly is the number of grievances settled for the same fifty (50) percent remedy being sought in this grievance.[7]

The Union's exhibit cited numerous grievances filed after the filing of this grievance...

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[6] See Union Exhibit 1. Of note, the Service objected to the Union's inclusion of this exhibit as new evidence/argument, however when an argument, or evidence does not substantially deviate from the core issue, or may serve to add to the arbitrator's awareness of the facts it is permissible.

[7] See U-1, Pages 41, 52, 55, 58, 61, 64, 81, 84 & 87.

.... however, I gave no consideration to those that came after the matter before me.

Further, while Management argues that the Union failed to raise the fifty percent remedy in this grievance, I do find such evidence in the case file.[8]

Management also argues throughout their contentions that punitive damages paid exceed the authority of an arbitrator, and to award a fifty percent payment beyond that which the cited letter carrier(s) have already been paid for the work performed is, in fact punitive.

That to now award a punitive remedy sets the Postal Service on a slippery slope toward ever increasing remedies.

I must respectfully disagree on two counts. First, the arbitrator has such authority pursuant to contractual mandate to fashion an award that is fair, just and reasonable given the totality of the record before him.

Second, and most importantly for this matter is the fact that Management themselves have previously agreed to such fifty percent settlement payments to non-OTDL letter carriers (See above).

Management maintains that such previous payments were simply an "amicable act of generosity and good will between the parties that was contradicted as often as it was followed."[9]

While I do not question the previous good intentions of local Management the simple fact is that once employed, with repetition and some consistency there remains a somewhat silent expectation that, without notice given, if not local negotiation, such a practice or remedy is applicable in those same/similar circumstances.

To add to this conclusion is the 2009 agreement between the parties that remains at the center of this remedy request grievance.

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[8] See J-1, Pages 5-6

[9] See Service Post-Hearing Brief, Page 11

Of particular note in this e mail transmission between the (then) National Business Agent and Area Labor Manager is found in the first paragraph. "Yes, we have an agreement to pay 50% at the straight time rate to the non-volunteers as a remedy *in an overtime contractual violation."*

This statement does not appear to be specific to one grievance but to "fix the problem" of Article 8 grievances.

The record before me demonstrates a reliance on this 2009 agreement as it has resulted in the above cited settlements for the 50 % payments original to this agreement.

While Management is correct to state that the National Agreement is silent regarding a 50 % payment calculation such as this, it nonetheless has become an existing factor employed by the parties since 2009 as a means to settlement of the numerous Article 8 violations.

Management is also correct that the Union did not file an Article 5 grievance for an alleged violation of a "past practice" yet seemingly argue past practice throughout this hearing.

Management's very capable counsel argues that this is tantamount to raising a prohibited new argument at hearing for the first time but I must respectfully disagree.

As stated above, the case file, J-2 does make mention of this 50 % payment (see page 6).

Management further argues that awarding the Union such a 50 % additional payment would be "punitive damages" prohibited by law and arbitral precedent. I must also respectfully disagree with this position.

There is an overwhelming body of law and arbitral history recognizing not only the arbitrator's right to fashion a remedy that is fair, reasonable, and to make whole for the harm caused the subject individual(s). The Union's experienced, and articulate counsel cites numerous awards in support of this position in his Brief.

Punitive damages, also known as "vindictive" damages is an award based on punishing the violative party, and setting an example by doing so while compensatory damages serve to compensate the injured party for the harm incurred, to make good or replace the loss caused by the wrong.[10]

In the instant matter the parties have demonstrated their desire to settle such recognized "wrongs", or violations by the payment of an additional 50 % to those "harmed" carriers over the past decade.

Management cannot now state that this "status quo post arrangement...has now deemed to be incorrect and unsustainable."[11]

The Union need not argue that the 50% payment is a past practice for it remains an "agreement" reached by the parties that has been honored with relative consistency during the past decade that cannot unilaterally be discontinued because it is now found to be "unsustainable." One reasonable response to such a position would likely be to cease the violations of the Agreement and there would no longer be cause for such previously agreed upon payments.

It is obvious that the parties recognized the need for a reasonable resolution of the many past grievances for this same issue when they voluntarily entered into this 2009 agreement, and the more recent parties continued such recognition in their settlements of many of these continuing violations. While not every same/similar grievance was specifically settled for a 50% payment, there is no doubt to this arbitrator that the sufficient number of such settlements during 2018 – 2019 period substantiates the continuing validity of this agreement.

The very credible, unrefuted testimony offered by RAA Kimbrell demonstrated the Union's clear position that while the 50% remedy is not a part of the Agreement, many other remedies sought, and received also do not come from the exact wording of the National Agreement.

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[10] See Black's Law, 6th ed.
[11] Service counsel's brief

I am in agreement. When the parties are unable to resolve their differences in the grievance process, and the Union appeals to arbitration either party is free to seek the remedy they desire with the arbitrator, within established boundaries free to determine the remedy most fair, reasonable and just be it a denial in its entirety, or what the Union seeks, or the arbitrator finds to be appropriate.

As stated in the very beginning of this opinion, there are (at least) two sides to every story as there is in the instant case.

Management has the lawful obligation to deliver the mails to its customers timely and efficiently. There are recognizable circumstances where Management must utilize employees not on the OTDL to accomplish this mission. However, their position is diminished greatly when those circumstances appear to be more the norm, and not the exception. Such is the case before me.

While the merits are not before me, based on those established facts of this violation, and the established history of such 50% remedies, I find the Union has demonstrated with clear and convincing evidence the validity of such a remedy in this case.

AWARD:

This grievance is sustained in favor of the Union.

Management is ordered to fully cease and desist from further violations of Article 8 of the Agreement.

The named letter carriers shall be awarded either administrative leave for the time cited, or payment at the 50% straight time rate of pay as they so choose.

The Union shall be awarded the sum of $250.00 toward their costs of pursuing this grievance.

The arbitrator shall retain jurisdiction over this matter for a period of 60 days.

Nothing follows this December 30, 2019 @ Manatee County, Florida by DjB