REGULAR ARBITRATION PANEL

In the Matter of the Arbitration	*	
between:	*	Grievant: Class Action
United States Postal Service	*	Post Office: Toledo, OH
and	*	USPS Case No: C16N-4C-C 18267277
National Association of Letter Carriers, AFL,CIO	*	NALC Case No: 570-C-18

BEFORE: Lawrence Roberts, Arbitrator

APPEARANCES:

For the U.S. Postal Service: Steven Tremaine

For the Union: Jeff Fauver

Place of Hearing: Postal Facility, Toledo, OH

Date of Hearing: February 7, 2019

Date of Award: March 6, 2019

Relevant Contract Provision: Article 15

Contract Year: 2016

Type of Grievance: Contract

Award Summary:

In this matter, the issue was one of remedy only. While the Union claims a serial non-compliance of various dispute settlements, the Employer insists the Union's only interest is monetary and self-serving in nature. The facts of this case have established Management at this Toledo Installation have not only habitually delayed the monetary disbursements of many Awards and Settlements but also defied previous cease and desist orders. For that reasoning, the remedy defined below is hereby ordered.

Lawrence Roberts

Lawrence Roberts, Panel Arbitrator

SUBMISSION:

This matter came to be Arbitrated pursuant to the terms of the Wage Agreement between United States Postal Service and the National Association of Letter Carriers Union, AFL-CIO, the Parties having failed to resolve this matter prior to the arbitral proceedings. The hearing in this cause was conducted on 7 February 2019 at the postal facility located in Toledo, OH. Testimony and evidence were received from both parties. A transcriber was not used. The Arbitrator made a record of the hearing by use of a digital recorder and personal notes. The Arbitrator is assigned to the Regular Regional Arbitration Panel in accordance with the Wage Agreement.

OPINION

BACKGROUND AND FACTS:

This is a class action grievance filed on behalf of Letter Carriers working at a Toledo, OH Postal facility, the Reynolds Corners Delivery Unit.

The Union and the Employer entered into an Informal A Grievance Settlement on or about 13 July 2018 and documented their agreed upon language on an **"Informal A Joint Resolution Form."** In pertinent part, that **Form** labeled **454-CI-18, 455-CI-18, 456-CI-18,** reads as follows:

> **The parties have met and agree that the reviewing/posting of the equitability list for overtime is not being correctly handled.**
>
> > **No posting for the week of 03/17 thru 03/23**
> > **Posted on Thurs for week of 03/24 thru 03/30**
> > **Posted on Thurs. and no union signature for week 03/31 thru 04/06.**

The following OTDL carriers will be paid a lump sum of $20 each. (The document goes on to list some 22 Letter Carriers)

In the future management will ensure compliance to the LMOU and previous resolutions regarding the handling of the equitability list.

The above was signed by the Parties respective Representatives. According to the Union, Management failed to comply with the above agreement resulting in the instant grievance. The Employer contends there was no agreement to make payment within two (2) pay periods.

The instant grievance was filed when payments did not occur within 2 pay periods. The Union contends this is a continuing violation of non-compliance at the Toledo Installation and a direct violation of Article 15. The Employer insists that extenuating circumstances resulted in the delay, no malice was intended and therefore, there was no violation of the Parties Agreement.

Obviously, the Parties were unable to resolve this dispute during the prior steps of the Parties Grievance-Arbitration Procedure of Article 15. The Step B Team declared an impasse on 27 September 2018 and the matter was referred to arbitration.

It was found the matter was properly processed through the prior steps of the grievance procedure. Therefore, the dispute is now before this arbitrator for final determination.

At the hearing, the Parties were afforded a fair and full opportunity to present evidence, examine and cross examine witnesses. The record was closed following the presentation of oral closing arguments by the respective Advocates.

JOINT EXHIBITS:

1. Agreement between the National Association of Letter Carriers Union, AFL-CIO and the US Postal Service.

1.A. Joint Contract Administration Manual (in pertinent part)

2. Grievance Package

UNION'S POSITION:

In the Union's opinion, this instant case once again concerns the Toledo Installation's serial non-compliance with signed grievance resolutions. According to the Union, it is undisputed that the Parties signed an Informal A resolution on 04/14/2018 which agreed to compensate 22 Carriers a lump sum of $20 each for an overtime equitability posting violation. The Union insists that, as has become the norm in the Toledo Installation, Management failed to comply with making the payment to these carriers and this instant case had to be filed.

The Union predicts the Employer will attempt to make this case strictly about how the Letter Carriers were eventually paid and that the Letter Carriers weren't affected. The Union warns, don't be fooled, the issue is not as simple as payments being made. Instead, according to the Union, the issue is about the Toledo Installation habitually ignoring signed agreements and the harm done to the employees and to the Union. The Union claims they will prove how the employer has banned the bargaining unit and the Union by requiring the Union to file

second, third and even fourth generation grievances to get settlements complied with.

The Union asserts that evidence will be provided which has established that two pay periods is the "generally accepted" length of time to finalize a grievance settlement. The Union also insists evidence and testimony will be provided that the agreed to payments were not made within this two pay period time frame. The Union insists the evidence will show that the Supervisor that signed the Informal A resolution on 04/14 met on this instant case on 05/08 and still refused to pay what he agreed to. The Union further argues the evidence will show Management ultimately entered in the payment on 06/18/2018, 65 days after the agreement was made. And finally, the Union indicates the evidence will further prove that the Carriers were actually paid on 06/29/18; two and a half months after Management originally signed the agreement.

It is the Union's view that all of those facts are undisputed. The Union believes that any attempt to dispute them now at Arbitration would be new argument. As explained by the Union, the instant case is a simple matter that, once again, should never have made it to Arbitration; it should have been settled without the Union having to file an additional grievance for non-compliance. The Union notes that Management is well aware of their obligation to comply with their settlements, but again they choose to ignore that obligation in the hopes that an Arbitrator will give them an Award that will give them free reign to continue to violate the Contract.

The Union adds this is not the first time that the issue of non-compliance has reared its ugly head; serial non-compliance has become the norm here in the Toledo Installation. The Union claims this Arbitrator has stated that there is literally a plethora of non-compliance settlements at the Toledo Installation. The Union maintains the evidence will prove that Management has already been put on notice that non-compliance with grievance settlements is not optional. The Union insists it has had to arbitrate numerous cases in recent years about non-compliance and has received Awards in our favor, but Management deliberately, egregiously and flagrantly thumbs their nose at the local Union by refusing to comply.

The Union projects that Management will, more than likely, make the same arguments as every other case that has gone before the Arbitrators; they contend that the Union is seeking some kind of unjust enrichment. The Union believes nothing can be further from the truth. Instead, as explained by the Union, we seek compliance with agreed upon Settlements and an Award that will ensure contract compliance in the future. The Union

mentions there have been numerous escalated corrective remedies to both the Grievants and the Union. According to the Union's argument, being here at Arbitration today shows that those remedies have been insufficient in forcing Management to comply with their signed Agreements. The Union insists this is not about money or abuse of any system or any other excuse Management may put forth; it is basically a case of Management not complying with signed resolutions. The Union asserts that Management simply has to do what they agreed to do.

The Union anticipates the Employer is going to attempt to convince the Arbitrator that the payments were eventually made so there is no harm and no foul. The Union maintains this cannot be further from the truth. The Union contends the Grievants suffer harm as well as the Union. The Union is confident the evidence will prove its members lose faith in the Union and the Union's ability to enforce the bargaining agreement and their rights.

The Union indicates the Steward is criticized by the Members when the Employer fails to live up to their Agreements. From the Union's perspective, the union and its Members suffer extreme cost due to the serial non-compliance. The Union explains that at the Informal A, the Union requested a remedy in hopes this case would not have to be taken all the way to arbitration.

And the Union indicates now that this case has reached Arbitration, the Union has suffered the additional cost of the arbitration hearing, the wages of the Advocate and the Technical Assistant, and the two full time Officers that have dedicated many hours to prepare this case. The Union believes this wastes the Member's dues and wastes the Union Officers' time that they could be dedicating to their member's needs.

The Union is confident that once this Arbitrator has heard the testimony and viewed the evidence, the Union requests the Arbitrator sustain this grievance and issue an appropriate remedy that protects the Parties' collective bargaining agreement and protects the Union from the additional cost suffered due to Non-Compliance. The Union adds they have made prior offers of settlement in this case based on the grievance step the case was at and the cost incurred up to that point. The Union suggests that prior offers of settlement should not be considered as it would hinder the Parties ability to resolve at the lowest level in the future. The Union seeks a remedy at arbitration today that compensates the aggrieved employees and compensates the Union for the additional cost incurred. The Union respectfully requests the arbitrator grant the appropriate remedy that follows:

1. Order the employer to cease and desist failing to comply with grievance settlements and arbitration awards.

2. Put the employer on notice that failing to comply with signed agreements, grievance settlements and arbitration awards shall result in an escalated remedy/award.

3. Compensate each letter carrier listed in the grievance resolution the escalated sum of $500 each due to the unnecessary delay of the payments.

4. Compensate the union the sum of $7,500 for the harm the Union has suffered and the damage to the Union's image due to members losing faith.

5. Or otherwise make the parties whole.

COMPANY'S POSITION:

It is projected by the Employer Advocate that the Union will argue today that Management is once again non-compliant when payment was not made on Informal A settlement, 454/455/456-C1-18 within 2 pay periods. Management argues no time frame was agreed upon in the Informal A settlement.

The Agency also predicts Toledo's past will be brought up yet again by the Union to cast Toledo in a bad light. Management will not deny Toledo's past, but will show today through testimony and evidence that Toledo has already paid for its past. The Service asks how many more times will Toledo pay for the past it cannot change. Instead, according to the Employer, Toledo can only move forward into the future, taking steps along the way to make positive changes and this will not happen overnight.

It is the opinion of the Employer that, in an attempt to cast Toledo in a bad light, the Union has padded the case file with past resolutions which contain the term "without prejudice." The Agency cites Black's Law Dictionary definition of without prejudice to say: "The use of the phrase in the Joint Resolution Form is not a prohibition against citing the resolution, but rather an acknowledgement that the parties are reaching an agreement on the grievance without admitting wrong doing or yielding their ability to assert the same positions in a future grievance."

It is Management's view that grievances are settled for many reasons, even those that do not involve a violation. In the opinion of the Service, the Union is just using these resolutions as filler to pad the case file and give the appearance of non-compliance when in fact a lot of these resolutions are not for non-compliance nor is a violation agreed upon.

Management suggests they will show today through testimony that the Union's request to obtain money for themselves does not lend itself to bargaining in good faith so these grievances may be settled at the lowest level.

The Agency cites Arbitrator Stanton, in Case K16N-4K-C 17664487, when dealing with a Union requesting monetary remedy to themselves:

"The third remedy request may be the easiest one to deal with in this case. The Union's request for money to be paid to the labor organization as part of the grievance settlement is asking for a purely punitive remedy. There is no harm to Local 496 in this matter—either monetary or non-monetary. Arbitration precedent for decades has established that purely punitive damages are rarely awarded in arbitration. Awarding punitive damages to a Local Union as opposed to an employee overlays a problem on top of a problem… The law is poorly defined and the exact extent of its reach unknown. Even if such payments to a union are not unlawful, it still represents the kind of activity the law seeks to prevent and are therefore undesirable"

Management points out, this being a contractual case, the burden of proof lies with the Union. Management adds that the Union must prove a violation of the National Agreement with a preponderance of evidence.

The Employer also references the following 2001 National Award of Professor Carlton Snow, which states:

"The Unions had the affirmative of the issue and needed to show by at least a preponderance of the evidence that there is a direct causal connection between the conflicting data and a violation of the parties' labor contract."(pg. 18) "While the evidence in this case was sufficient to raise suspicions, the Unions did not present evidence that demonstrated a specific contractual violation." (pg. 19)

And additionally, the Service mentions the following excerpt from a 2003 National Award of Arbitrator Dana Edward Eischen:

"The charging party in a grievance over interpretation and application of a contract bears the burden of proving, by a preponderance of the record evidence, that the responding party violated the agreement in some fashion. Since the issue for determination is one of contract interpretation, the Union has the burden of proof. Certaineed Corp., 88 L.A. 995, 998 (Nicholas, Arb. 1987); Entex, Inc., 73 L.A. 330, 333 (Fox, Arb. 1979); Portec, Inc., 73 L.A. 56, 58 (Jason, Arb. 1979); City of Cincinnati, 69 L.A. 682, 685 (Bell, Arb. 1977)."

And according to the Agency, in the end, the Informal A settlement 454/455/456-CI-18 was complied with and payment was made. Management submits the Grievants were restored to the status quo ante and the Union was not harmed in any way. The Agency predicts the Union will not show with a preponderance of evidence the Postal Service violated the National Agreement.

THE ISSUE:

Did the Postal Service violate the National Agreement including, but not limited to, Article 15, previous resolutions, and Arbitration decisions, when they failed to comply with signed grievance resolution 454/455/456-CI-18? If so, what is the proper remedy?

PERTINENT CONTRACT PROVISIONS:

ARTICLE 15
GRIEVANCE-ARBITRATION PROCEDURE

DISCUSSION AND FINDINGS:

Regarding the several objections that I overruled, as I have stated in many past Decisions, at the time of the hearing, and especially at the onset, I offer both Parties a very broad spectrum in which evidence can be introduced and accepted into the record. During the process of any arbitration hearing, my focused goal is to gain as much information regarding the

dispute as possible, then compare the relevancy of all of that to the language of the particular Agreement.

Through the course of any hearing, I do not have, at any given moment, a full and complete understanding of all the facts, relevant evidence and arguments until the hearing has concluded. With that reasoning, my acceptance of evidence, into the record is broad. Unless it is obvious at the onset that certain evidence, argument or documentation be excluded, the same is generally accepted and its probative value considered and weighed accordingly. To exclude evidence from either party, prior to my full and complete understanding of the dispute would simply be a disservice to both of the Parties. But with that being said, the documentation in dispute at the onset of this hearing had absolutely no impact on my decision in this matter.

In addition I do not intend to discourage anyone from making an objection to something he or she feels is inappropriate or should not be allowed.

The issue in this case is one of remedy, a matter that seems to be familiar to both Parties. And specifically in this case, the disagreement involves the payment of an agreed upon monetary Award of an Informal A settlement.

The foundation for this case was first explained via my Discussion and Findings from a previous May 2018 case, between these same two Parties labeled **C11N-4C-C 17603805:**

> "The Union argument in this matter is supported by a case file of documentation. It is summarized in a September 2016 Discussion and Analysis by Arbitrator Tobie Braverman (C11N-4C-C 16104433) where:
>
> "There seems to be little doubt that timely compliance with settlement and arbitration awards in general, and with payment of monies due in particular, has been an ongoing problem in the Toledo installation since at least 2015. While the Union contends that the delays in this case were intentional and malicious, there was no evidence that this was the case. Rather, the evidence demonstrated that the delays were caused by a combination of factors which included the submission of paper work to the Area which was not complete, the need for multiple meetings by Area and District personnel due to the size of the payments, and the desire of the Employer to insure that all related grievances were resolved prior to authorizing the payment. These actions were motivated by legitimate concerns for care and accuracy. There was simply no demonstration that the delay was caused by any malice or intention to harm either the Union or the carriers…
>
> … While these issues are understandable and the purposes served are appropriate, the reality is that the requirements put in place by the Employer delayed payment on these two arbitration awards for an inordinate length of time. If the Employer wishes to put procedures in place which must be followed prior to payments on grievance settlements and awards it certainly may do so. These procedures, however, must be such that they do not violate the requirement that payments be made within two pay periods subsequent to the agreement of the parties as to the details of the payment. While it may be necessary on occasion to process payment slower than the two pay period standard, delays of

two and four months are so long that they cannot be considered to be timely, and are unacceptable."

I agree in principle with that analysis above. In fact, in a Frederick MD case styled K11N-4K-C 17183206, I wrote in my June 2017 Discussion and Findings that:

And in my considered opinion, any monetary settlement to any grievance should be made no later than the second pay period following settlement. It lacks any well founded reasoning that such an administrative process could not be processed in such a time frame. In my view, there must be a management process in place to assure that such timely payments take place. While I understand there may be exceptions, any extension beyond that time frame should be rare in occurrence.

In my view, there is no logical explanation given to indicate any valid reasoning that the Employer would be unable to process and execute any grievance settlement within two pay periods. And even following that 2015 Award mentioned above, it appears the Employer at this location continues, on a consistent basis, to miss that two pay period mandate.

If that management process takes longer than two (2) pay periods to effectuate and finalize any grievance settlement, then the Employer needs to re-visit that archaic process. Regardless of circumstance, there should be no grievance settlement, monetary or otherwise that should take longer than two (2) pay periods to finalize."

It appears not much progress has been made by and between the Parties since that case. Management insists the Union is seeking unjust enrichment. In their opening statement, Management insisted "the Union's request to obtain money for themselves does not lend itself to bargaining in good faith so these grievance may be settled at the lowest level."

This particular case was settled at the Informal A level. There was, in fact a settlement at a lower level. And the record indicates the negotiated monetary remedy was not distributed in a timely manner.

Highlighted by Arbitrator Braverman in the above quotation is the fact that timely compliance with grievance settlements and arbitration awards has been an ongoing issue at this Toledo Installation. And in that previous May 2018 case mentioned above, my Award included the following:

> **"1. The Employer is ordered to cease and desist failing to comply with grievance settlement and arbitration awards at the Toledo Installation. Unless by mutual agreement with the Union, any future delay of any monetary payment beyond that two (2) pay period window will be doubled.**
>
> **2. Failure to comply with signed agreements, grievance settlements and arbitration awards shall result in an escalated damage award to the Union."**

In the Service's Step B Contentions, they argue that **"Contrary to the Union's Formal A contentions, there was not an agreement to pay the Grievant's within 2 pay periods. Therefore, this cannot be a failure to comply grievance."**

While that particular agreement did not include specific time frame language regarding payment, prior arbitral authority is unambiguous in this case.

There may have not been an agreement made by and between the Parties regarding a specific time frame of payment at that Informal Step A meeting, however, the cease and desist order cited above is certainly applicable herein. This particular case was certainly a "**future delay**" of a monetary payment. The order is unambiguous. And specific reasoning is set forth in that particular Discussion and Findings. But in summation, that language included "**If that management process takes longer than two (2) pay periods to effectuate and finalize any grievance settlement, then the Employer needs to re-visit that archaic process. Regardless of circumstance, there should be no grievance settlement, monetary or otherwise that should take longer than two (2) pay periods to finalize.**" The defiance in this case is virtually a mirror image as that matter I decided in May 2018.

In my considered opinion, it's a common sense approach. A monetary grievance settlement to any grievant is a make whole remedy. Had the violation not occurred, the Grievant's paycheck would not have been shorted in the first place. In my considered opinion, it is the Employer's obligation to make that Employee

whole as soon as possible. And that two pay period window is certainly reasonable. There is absolutely no reason to forego, overlook or disregard the previously issued cease and desist order as it pertains to the completion of settlement payments.

Cease and desist means what is says. There are no variations to a cease and desist order. It was issued in the first place to ensure future compliance. And when that does not happen, there are other consequences. And the only way to prevent future violations is an escalating remedy.

The Agency insisted that escalating awards are punitive in nature and extend beyond the four corners of the Parties Agreement. However, when a cease and desist order is defied, a monetary award is the only method to enforce a matter of non-compliance.

The verbatim below was again extracted from my **May 2018** Decision previously referenced:

> **"The Agency insisted that escalating remedies and punitive awards violate the Parties Agreement. Several precedent setting Awards to that end were introduced, however, none were specifically on point to this specific issue. In a 1989 National Award, (H1C-NA-C 97/123/124), Arbitrator Richard Mittenthal stated:**
>
> **"... the 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."
>
> And in 1994, Arbitrator Mittenthal provided a similar message in another National Award styled H7C-NA-C 36/132, HOC-NA-C 28:
>
> "It is generally accepted in labor arbitration that a damage award, arising from a violation of the collective bargaining agreement, should be limited to the amount necessary to make the injured employees whole. Those deprived of a contractual benefit are made whole for their loss. They receive compensatory damages to the extent required, no more and no less."
>
> I agree with Arbitrator Mittenthal that a remedy serves to restore the status quo ante. In the second Award, Arbitrator Mittenthal stops short of making that "status quo ante" mandatory by the use of wording such as "generally accepted" and "should be limited." Such mandatory dialogue indicates the intent of Arbitrator Mittenthal was not to eliminate the use of punitive awards in certain situations. And in my view, this is certainly one of those cases."

While I generally agree with the logic recited by Arbitrator Stanton cited by the Employer in their opening statement, I'm not certain the parameters of that September 25, 2018 case align with the habitual disregard evidenced in this case. And I am of the considered opinion that Arbitrator Mittenthal's National Award did not forbid the utilization of escalating remedies in certain cases.

And with that in mind, I will not continue to issue cease and desist orders that are simply ignored. That single order issued in May 2018 is sufficient. However, future violations, as

in this instant case, will result in escalating remedies. And with that reasoning, I find the remedy requested by the Union, to be an equitable remedy in this case.

AWARD

The grievance is sustained and I find the following remedy, as requested by the Union, to be an equitable remedy in this case.

1. The Employer is placed on notice that failing to comply with signed agreements, grievance settlements and arbitration awards shall result in an escalated remedy/award.

2. Management shall compensate each Letter Carrier listed in the grievance resolution (Joint Exhibit 2, Page 9) the escalated sum of $500 each due to the unnecessary delay of the payments.

3. Management must compensate the Union the sum of $7,500 for the harm the Union has suffered and the damage to the Union's image due to members losing faith.

It is so ordered. I will retain jurisdiction for a period of forty five (45) days from the date of this Award for the purpose of ensuring compliance only.

Dated: March 6, 2019
Fayette County PA