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 18291916
National Association of Letter Carriers, AFL,CIO	*	NALC Case No: 236-C-18

BEFORE: Lawrence Roberts, Arbitrator

APPEARANCES:

For the U.S. Postal Service: Barbara Cook

For the Union: Brent Harbaugh

Place of Hearing: Postal Facility, Toledo, OH

Date of Hearing: December 14, 2018

Date of Award: March 5, 2019

Relevant Contract Provision: Article 8

Contract Year: 2016

Type of Grievance: Contract

Award Summary:

This is a matter of remedy only. The record shows the Employer has failed to meet the overtime posting requirements set forth in the Parties Local Memorandum of Understanding. The record identifies an habitual violation by the Employer as well as their disregard to cease and desist language. The Union's requested remedy is therefore granted as outlined below.

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 14 December 2018 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 issue in this matter involves the following language found in Item 14 of the 2016-2019 Memorandum of Understanding between the Toledo Ohio Post Office and National Association of Letter Carriers, AFL-CIO, Branch 100, Toledo, Ohio providing:

> "In accordance with Article 8, Section 5, of the National Agreement, a chart shall be posted and updated each quarter in each work location indicating each employee's accumulated overtime. In order to insure equitable opportunities for overtime, overtime hours worked and opportunities offered will be posted and updated weekly. The weekly posting will be posted the Wednesday after the service week has ended.
>
> An employee who has been contacted to work overtime and is excused by management and thus does

> not work overtime shall be credited on the chart, in red numbers periodically, as if he/she did work overtime."

And according to the Step B Decision, labeled "Explanation: Undisputed fact as agreed upon by the Formal A parties" provides:

> "It is undisputed between the parties that the weekly equitability at RC, (Reynolds Corners) for the week ending February 02, 2018, was not posted until February 10, 2018. Per the LMOU the posting was required to have been posted no later than Wednesday February 07, 2018."

The Parties disagreement regards the appropriate remedy to be applied in this case.

The Union's position is that local Management is well informed and aware of their obligation to provide the posting every Wednesday and all previous attempts to end this violation have not been successful. The Union asks the Grievants be made whole and, in addition, a remedy be fashioned to encourage the Employer to abide by the National Agreement.

Conversely, the Employer contends the Union has the burden to prove Management did not post the overtime tracking in a willful, intentional, or deliberate matter. The Employer insists no harm has been identified when Management posted the overtime tracking sheet just three days late. It is the Employer's

argument that posting the tracking sheet late does not have a direct effect on overtime equitability.

It was found the matter was properly processed through the prior steps of the Parties Grievance-Arbitration Procedure of Article 15, without resolve. The Step B Team then reached an impasse on 5 July 2018. Therefore, the matter 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 receipt of written closing briefs from the respective Advocates on 06 February 2019.

JOINT EXHIBITS:

1. Agreement between the National Association of Letter Carriers Union, AFL-CIO and the US Postal Service.
2. Grievance Package
3. Local Memorandum of Understanding, 2016-1019

UNION'S POSITION:

The Union first mentions this is a remedy case only. It is the Union's opinion that the Parties have agreed to undisputed facts that the Postal Service violated the National Agreement including the Local Memorandum of Understanding and several agreements they signed by not posting the overtime equitability chart by the Wednesday after the service week ended.

According to the Union, it is no secret Toledo Installation Management bargains in bad faith by signing agreements they have no intention to honor. And in the opinion of the Union, this case file is riddled with Toledo Installation arbitration decisions due to Toledo management's nonfulfillment of the agreement they sign.

The Union forecasts the opening statement of the Service will defame the Union and blame the Union for their failure to comply. Additionally, the Union predicts the Employer will defame and smear the Union's reputation simply because the Union has the audacity to request remedies that will force compliance with signed agreements.

The Union claims the Employer is once again forcing the Union to incur additional expense by taking a known violation to arbitration to get a remedy sufficient enough to end the violations.

The Union insists their arguments will be supported with a plethora of signed agreements showing that the overtime equitability is to be posted by Wednesday after the service week has ended. And the Union asserts it is undisputed in this case the Agency did not comply with these agreements.

Even though escalated remedies for repeated non-compliance has been addressed many time in the Toledo Installation arbitration awards, the Union is of the opinion that Management wants to take another bite at the apple.

The Union foresees the Employer will once again stand before an arbitrator and argue escalated corrective remedies are forbidden, with the same arguments that have already been dismissed in binding Toledo arbitration cases. And the Union anticipates Management will deploy the same arguments, such as; escalation of remedies to ensure compliance is not allowed by the National Agreement, arbitrators don't have the authority to grant escalated corrective remedies and they will even attempt to make a new argument stating it is against the law for the arbitrator to grant an escalated corrective remedy.

As projected by the Union, the Employer will make all of these arguments knowing that the doctrine of res judicata applies and knowing they have not sought to vacate any of the previous Awards granting escalated corrective remedies. And the Union insists they will be forced to incur this additional cost knowing escalated corrective remedies have been upheld in Toledo by the arbitrator presiding over this instant case.

The Union mentions they will provide the arbitrator evidence that the Union has been proactive in providing assistance to the Service to help them comply with their signed agreements. As claimed by the Union, the evidence will show they have provided assistance with equitability charting. The Union claims that after talks with the Postmaster, an email was sent on 15 November 2017 to all his staff notifying them of the requirement to post the equitability weekly and it must be posted by the Wednesday after the service week.

The Union mentions the evidence will also show the Union assisted Management in knowing the consequences for further non-compliance and documentation will show the Union placed Management on notice that escalated corrective remedies may result for non-compliance.

And as asserted by the Union, even though the Agency is here today arguing escalated corrective remedies are improper, agreements were signed allowing them. The Union claims the evidence will also show that Management signed agreements stating that "Failure to comply may result in increased remedies." According to the Union, the Service ignores and fails to honor this agreement also.

The Union also speculates that Management cites National Arbitrator Mittenthal but fails to understand the portion of the award which states, "Arbitrators have an extremely large measure of discretion how contract violations should be remedied." The Union believes the Service also looks past the National Arbitrator stating "… contract remedies, with only a few exceptions, are limited to 'make whole' remedies." In the opinion of the Union, Arbitrator Mittenthal understood that there are exceptions to the 'make whole' remedy which has also been addressed by this arbitrator in past awards.

From the perspective of the Union, the repeated non-compliance of the Service falls into the exception as it is not common to have a Party continue to disregard the agreements they sign.

In the opinion of the Union, the only reason we are here today incurring this extra expense and loss of time is the Service is hoping to find an arbitrator that will issue a remedy small enough that will allow them to continue ignoring agreements they have made with the Union.

The Union believes that Management is willing to pay the cost of this arbitration, along with all their other grievance processing costs up the entire chain, in the hopes of a remedy that will make it affordable to continue not complying.

The Union requests a proper remedy that will put an end to the bad faith non-compliance with signed agreements and is asking you to compensate each affected Carrier $100 and the Union $5000 for having to arbitrate repeat non-compliance issues over and over again.

COMPANY'S POSITION:

According to the Agency, the matter today involves an alleged contractual violation when Management failed to post the weekly overtime equitability by three days. Management adds it was not posted by that Wednesday and has been stipulated in the moving papers.

Management further stipulates that per a Pre-Arbitration settlement signed 27 September 2018, the Postmaster and the NALC Union President, on this exact issue, Management is going to compensate each Carrier on the OTDL List at the time of this grievance a lump sum payment of $20.00.

In Management's opinion, the case today will only need to be heard on the escalated remedy of Branch 100.

And according to the Service, Formal B agreed to the following issue statement: Did the Postal Service violate the National Agreement including, but not limited to, Article 8, 15, 17, 19, 30 and the LMOU when it failed to post the weekly overtime equitability? If so, what is the proper remedy?

In the opinion of the Employer, we are here again to advocate on yet another alleged non-compliance grievance. Management charges that Branch 100 is primarily filing 'non-compliance' grievances instead of grievances on the actual Article or Handbook violations because of a couple of arbitration awards which put money in their pockets.

The Agency argues this is an Arbitration about money.

Management forecasts the Union will try and say we are just bashing them. From their perspective, this does not make anyone in Management happy to advocate on the processes in Toledo currently.

The Agency projects there will be no name calling at the hearing. Instead, the Employer promises there will only be testimony under oath on the truth that exists in the Toledo grievance process currently.

The Agency speculates testimony will show how Toledo Branch 100's greed has altered how Article 15 is handled in Toledo now. Management mentions there has been Joint Article 15 refresher training twice, an Intervention requested by Management and Toledo Management/Branch 100 was selected by a Joint Headquarters NALC and USPS Team to be involved in the Joint Workplace Improvement Program to try and improve the Article 15 and the Dispute Resolution Team process in Toledo. But, in the Agency's opinion, currently the process is still severely broken.

Management believes Branch 100 still does it the way they want to do it, by flooding the grievance process with grievances to try and corner Management into violations, adding additional burden to Management by language added to the National Agreement or Handbooks and Manuals, mudding the waters and painting Toledo with a broad brush of non-compliance because it gave them money, and once you get a taste of money you want more regardless of how you have to get it.

Again, the Service predicts testimony will demonstrate how Branch 100 is trying to 'get it' by flooding the grievance system with specific grievances hoping to pigeon hole Management into such a fine corner that anything Management does could be considered non-compliance.

The Employer also anticipates testimony today will illustrate processes the new Postmaster has put into place in Toledo with the NALC Branch 100 President for the purpose of eliminating old non-compliance grievances, to clean up and resolve any past issues, and to educate his Management Team and hold them accountable. In Management's opinion, the Postmaster continues trying to make Toledo better for everyone moving forward.

According to the Service, Branch 100 abuses a couple arbitration decisions and you will hear testimony today on how they are being used. Management believes the arbitration awards, which have nothing to do with this case file, are being used for everything from Opting to Special Office Counts to Overtime to the newly ratified National Agreement Article 8.5.C.2 which brings us to Arbitration today trying to put a tourniquet on the extreme financial loss to our company by their escalation remedy requests. From Management's perspective, they are being used under the guise of "Non-Compliance."

The Employer charges that by Branch 100 using these Arbitration decisions in every grievance it is holding us back

from moving forward. Management claims we are in a continual round-a-bout going in circles with no end in sight. In the Employer's opinion, it is stagnant and cannot progress to a more positive future between us.

The Agency predicts Branch 100 will probably state, "Management must think it's more cost effective to go to Arbitration than to comply." as they have previously. But the Employer claims that is not the case. Due to the abuse of some arbitration decisions and the remedy requested at the lowest level of the grievance process, plus their extreme filing of grievances, it is Management's opinion their hand has been tied and cannot possibly resolve any issues due to the escalation requests made by Branch 100 and that will be presented in testimony today.

Management agrees that in the past Toledo Management had a rough time with compliance, but, under new leadership, in the past year and a half, this has turned around and testimony will show the results.

Again in the opinion of the Employer, Branch 100's greed is hurting Toledo and the positive growth that has been achieved with the new Postmaster; their greed is impacting the entire grievance process.

From the Agency's standpoint, Branch 100 is all about "Gotcha" and Management finds out about years old dusty non-precedent settlements and Arbitrations in the grievance procedure not by the Union working with Management as you should per the Joint Statement of Expectations, which reads as follows:

USPS-NALC JOINT STATEMENT OF EXPECTATIONS

The Parties at the National Level commit to the following principles of conduct when addressing disputes under Article 15 of the National Agreement. We believe these principles are essential to the effectiveness of any dispute resolution process as well as effective working relationships between the union and management. Our expectation is that these principles will guide union and management representatives at all levels of the organization.

• We will do our best to understand and respect each other's roles, responsibilities, interests, and challenges.

• We will make every effort to establish and maintain a more constructive, and cooperative working relationship between union and management at all levels of the organization by promoting integrity, professionalism, and fairness in our dealings with each other.

• We are committed to honoring our labor contract and the specific rights and responsibilities of the parties set forth therein.

• We will work together to prevent contract violations through communication, training, and good faith efforts to anticipate workplace problems and resolve disputes in a timely manner.

• We are committed to eliminating abuses of our grievance-arbitration procedure, such as the filing of unwarranted grievances to clog the system or a refusal to resolve grievances even where there are no legitimate differences of opinion between the parties.

• We are committed to mutual and joint efforts to improve the workplace environment and to improve the overall performance of the Postal Service.

.. We will make every effort to resolve our disputes in a professional manner and to avoid any unnecessary escalation of disputes which may adversely impact adherence to the above principles or adversely influence union-management relationships at other levels of the organization.

The Employer forecasts the Union will paint a picture of the non-compliance history in Toledo. Management will show that most of the resolutions in the case file doesn't have Management Contentions at all, state 'will not be cited in any forum', or have nothing in common with the instant case before you today. The Employer recognizes that while some of the Formal A resolutions contain language such as in the future, many of them do not.

The Service argues the Formal A resolutions in the case file contain the term "without prejudice." Citing Arbitrator Braverman to that end.

Management reasons they settle grievances for many reasons, even those that do not involve a violation. The Union, in the opinion of the Employer, 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.

The Employer Advocate assures that the testimony today is not to bash the Union, and all Advocates have expressed their concern regarding any harm to the Formal A relationship, but, as we have remained silent so far, that we must speak out to finally put a stop to it.

The Employer Advocate projects the testimony today will suggest that the grievance process seems to be orchestrated by

the 'Hall'. By that, the Employer Advocate suggests, it appears that the President and Vice President are directing the decisions of the Formal A Representatives, swapping out Representatives after meetings, and just plain interfering in the Formal A process.

Management references Article 15.2 (c).

As stated earlier, Management claims the evidence 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.

Furthermore, Management suggests this goes against the USPS-NALC Joint Statement of Expectations which states in part:

"We are committed to eliminating abuses of our grievance-arbitration procedure, such as the filing of unwarranted grievances to clog the system or a refusal to resolve grievances even where there are no legitimate differences of opinion between the parties."

The Employer goes on to cite 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 Labor Management Relations Act was enacted in 1947. The purpose of the Act was to make unlawful undesirable labor relations practices including employers making payoffs to Unions or Unions demanding payments from employers. Section 302 of the Act makes it unlawful for an employer to "pay, lend, or deliver money or any "other thing of value" to a labor union or official, or for a union to "request, demand, receive or accept" the same from an employer. Financially, employers and unions are to be kept at arms-length to avoid the possibility of misconduct by either party. 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.

The Employer stresses the essential facts of the case today are:

- The weekly overtime equitability posting was not posted on February 7, 2018, it was posted February 10, 2018.

Management suggests that, reasonably, if you just look at how this case is put together by the Union you will see that they are trying to smear the arbitrator's thinking on how Toledo is NOW versus how Toledo was THEN. The Services queries "how long is Toledo going to be punished for the issues in the past?"

The Agency queries by asking when is the current leadership and the positive changes that are being implemented going to finally be rewarded instead of punished punitively?

And the Employer asks how much time has to pass before someone states, "Oh, they had a violation. Well, 2 years have passed, this is now just a grievance, not a non-compliance issue." And the Agency wonders when can Toledo move forward?

It is the argument of the Service that, in the end, it was posted and no harm became to any individual and definitely not to the Union Hall.

Management suggests that, once all the evidence and testimony is entered into the record, the record will show the Union did not prove with a preponderance of evidence that any harm befell the Union Hall. The Agency requests this escalated remedy be denied in its entirety.

THE ISSUE:

Did the Postal Service violate the National Agreement including, but not limited to, Article 8, 15, 17, 19, 30 and the LMOU when it failed to post the weekly overtime equitability? If so, what is the proper remedy?

PERTINENT CONTRACT PROVISIONS:

ARTICLE 15
GRIEVANCE-ARBITRATION PROCEDURE

DISCUSSION AND FINDINGS:

At the onset of the hearing, the Parties stipulated that a violation of the Local Memorandum of Understanding had occurred and the remaining issue was one of remedy.

There was literally a plethora of arguments and testimony received from both Parties in this case regarding their respective position. Little of that, in my view, pertained to the actual logistics of this case.

In their closing brief, the Employer Advocate stated:

> "The Union is solely using Arbitration awards and have thus removed Management's ability to resolve any grievances at any other level of the grievance procedure. By removing this ability, the Arbitrators have removed Managements ability to abide by Article 15 of the National Agreement and to the Joint Statement of Expectations.
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> The Union continually files non-compliance. Management has been placed in a Catch 22 situation with regard to escalated remedies. We get an arbitration decision. We try to put measures in place to comply with arbitration decisions. Prior to implementing a decision, we are arbitrate cases with incident dates and appeals prior to the decision date of the previous arbitration. Since we have not had an opportunity to implement the process we are receiving another decision with escalated remedies. This has an inherent adverse snowball effect on management's ability to manage. Cases continue to up with larger and larger money mandates. How long will we be punished for something we are trying to make right?"

Despite Management's arguments to that end, little of that pertained directly to the issue at hand, that being, one of remedy. At face value, the Employer's position that the Union did not suffer any harm would resonate in such a case. The Postal Service argues the issue of escalated remedies places the Employer in a "Catch 22" situation. However, in reality, instead of escalation, the issue is really one of compliance.

The Employer insists that compliance has vastly improved in the last year and a half. However, the applicable language of the Local Memorandum of Understanding in this case is absolute and is certainly not dependent on local management assignments or whether it suites the needs of a particular supervisor or manager. The language is absolute, unambiguous and without exception. This particular contract language requires compliance, not merely improvement in doing so.

I understand there are exceptions to any rule, regulation, article or section. And if this particular occurrence were that single exception, the matter would more likely than not be dismissed. However, that is not the case. There have been multiple instances of the Employer's failure to meet that Wednesday posting requirement. And the Employer's same failure has resulted in settlements including cease and desist orders.

That last word should never be used in the plural sense. As I have stated in previous Awards, I believe a clear explanation as to the meaning and intent of a cease desist order would be beneficial. It means stop. It means immediately. It means to cease from the same action hereinafter into the future, without excuse. Compliance is mandatory. It's not an option or whenever one simply decides to do so.

The issue in this case is similar to a previous case I decided at this same installation labeled C11N-4C-C 17603805:

> "This case file identifies literally a plethora of non-compliance settlements at the Toledo Installation. Management correctly argued that many of those were non-precedent setting. And to that end, I agree, but only to the merits of the dispute. The mere quantity cannot be set aside, as it certainly identifies a serious pattern of non-compliance regarding various issues. The issues may have been resolved without precedence and carry absolutely no weight in my findings. However, any "without precedence" settlement does not simply provide a non-compliance bypass. The number of non-compliance settlements found in this case file cannot be set aside…
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> And in 1994, Arbitrator Mittenthal provided a similar message in another National Award styled H7C-NA-C 36/132, HOC-NA-C 28:
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> "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."

As previously stated, the Employer argues the Union is attempting to "cash in" on every non-compliance opportunity. I disagree as the facts of this case have not led me to such a conclusion. Instead, I am of the considered opinion the Union is on point in concluding the Employer has developed and maintained a pattern of non-compliance as it relates to the matter of Wednesday overtime postings.

The record identifies some ten or more settlements directly relating to Wednesday posting delays since the inception of that language into their 2016-2019 Local Memorandum of Understanding. Numerous settlements have included cease and desist orders. Paramount is the fact the Employer was unable to show any foundation for their non-compliance to this negotiated language. And with that reasoning, I am of the considered opinion the Union's requested remedy only be the next step in enforcing this particular language of the Parties Local Memorandum of Understanding.

Each affected Letter Carrier will be awarded $100. And the Union is granted $5000 as a result of local Management's continued defiance of this unambiguous language found in the 2016-2019 Local Memorandum of Understanding.

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.

AWARD

The grievance is sustained in accord with the above.

Dated: March 5, 2019
Fayette County PA