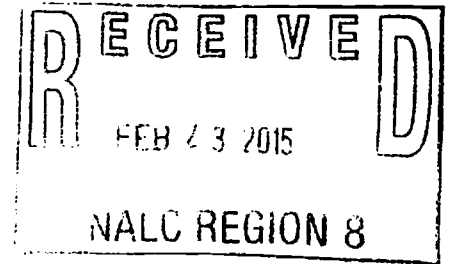


REGULAR ARBITRATION

In the Matter of the Arbitration)	USPS Case #G11N-4G-C 14200245
)	
Between)	Branch Case #EP050114
)	
UNITED STATES POSTAL SERVICE)	DRT #08-317381
)	
And)	Grievant: Class Action
)	
NATIONAL ASSOCIATION OF LETTER CARRIERS, AFL-CIO)	



BEFORE: TOM MAIER, ARBITRATOR

APPEARANCES:

For the U.S. Postal Service: Scott Ward

For the Union: Corey Walton

Place of Hearing: Tuscaloosa, AL

Date of Hearing: January 22, 2015

Date of Award: February 21, 2015

AWARD: Sustained in part.

PANEL: Southern Area Region 8

AWARD SUMMARY

The Union's claim for relief for a violation of LMOU Item 14 as provided herein is proper.

RECEIVED

Thos F. Maier

MAR 2 - 2015

_____, February 21, 2015

**VICE PRESIDENT'S
OFFICE
NALC HEADQUARTERS**

INTRODUCTION

The instant case is submitted to the Arbitrator pursuant to the terms of the grievance arbitration provisions set forth in the Collective Bargaining Agreement of the parties. Hearing was held in Tuscaloosa, AL on January 22, 2015. The parties closed orally and the record was closed at the conclusion of the hearing. There were no substantive or procedural questions of arbitrability. All witnesses were sworn or affirmed. The parties stipulated that the matter is properly before the Arbitrator.

ISSUE:

The Step B representatives framed the issue as follows:

Did Management violate Articles 5, 15, 19, 30 of the National Agreement via the Tuscaloosa LMOU, previous grievance settlements M-03-10-2004, E-01-01-2006, E-01-02-2006, CS-04-02-2001, CS-04-03-2011, CS-08-09-2012, TR-09-01-2012, CS-12-03-2012, CMS-01-01-2014, CS-01-01-2014, CS-01-02-2014, CS-01-03-2014 and CS-04-01-2014 and DRT Decisions 917, 2895, 3682, 3683, 3707, 3708, 3760, 3761 by not providing the Overtime Recap for the week ending April 18, 2014, in a timely manner, by not following through on previous grievance settlements/DRT decisions and by unilaterally changing the grievance not authorizing settlement of the grievances at the lowest possible step? If so, what should the remedy be?

Management:

Given the Employer acknowledges a violation of the National Agreement, is further remedy beyond a cease and desist order appropriate? If not, what is an appropriate remedy?

Based on the presentation of the parties in this hearing the Arbitrator has determined the issue to be:

What is the appropriate remedy for G11N-4G-C 14200245/EP050114?

BACKGROUND

The facts in the case at bar are not in dispute. The Tuscaloosa LMOU has a provision under Item 14 that requires Management to furnish the Union a weekly overtime report (hereinafter

referred to as the OT Recap report) containing an accumulative total overtime work hours by category for the week. The report, by grievance settlement and by management instruction is to be provided to the Union on the Monday following the Friday of the work week. The OT Recap for the week ending April 18, 2014 was due on April 21, 2014. It was not provided to the Union until May 16, 2014, thus making it 22 days late. The Union filed a grievance protesting the late submission and requested the following as the remedy to the grievance:

Unions Requested Remedy (Revised at Formal Step A)

- 1. Management will pay Shop Steward Eddie Pratt a lump sum of \$1,150.00. This sum is \$50.00 a day for each day that the OT Recap was late (22 days). A lump sum of \$50.00 is included in the payment for the continual violation of Article 15. The payment will be processed within 5 days of the settlement of this grievance with proof of payment provided to the Union at that time.**
- 2. Management will cease and desist from violating Article 5, Article 15 and Article 30 via the Tuscaloosa LMOU. Management will comply with all previous grievance settlements, DRT decisions and Arbitration awards.**
- 3. Management will do away with its Alabama District Policy regarding how they approach grievance settlements. Local Management will have the authority to settle grievances at the lowest possible step as outlined in Article 15 of the National Agreement. Local Management will have the authority to follow through on grievance settlements, including payments that are locally negotiated, no matter the amount. Local Management will not adhere to an Alabama District Policy that restricts or prohibits them from settling grievances to include payment of remedies. Management will not unilaterally change the grievance procedure as it is outlined in Article 15 of the National Agreement at the local level, the Area level or the District level.**
- 4. Whatever the DRT/Arbitrator deems fair and equitable.**

Management agreed that they violated the LMOU provision but would not agree to the Union's remedy. Management offered to pay for 6 days of the 22-day late period. The remedy is now before the Arbitrator for final and binding resolution.

POSITION OF THE PARTIES

Union:

The Union contends that the grievance meets the test of a continuing violation as provided under 15-2 and 15-3 of the JCAM.

The union contends that its remedy is proper and in accordance with standards set in non-precedent setting and precedent setting local, as well as DRT decisions.

The Union contends that Management has arbitrarily and unilaterally developed a formula to pay only a maximum of 6 days when they are late in providing the Union with the OT Recap report.

The Union contends that higher level management has issued instructions to the field that local managers are prohibited from paying more than \$500.00 in resolving grievances.

Management:

Management contends that the burden of proof is on the Union to prove a violation in a contract dispute and the Union failed to meet its burden.

Management contends that delays in providing the OT Recap report are for legitimate business reasons.

Management contends that the parties should be allowed to revisit Item 14 of the LMOU to renegotiate its terms.

Management contends that Informal Step A and Formal Step A grievance settlements are not precedent setting and should not be considered in the case at bar. Further, the Step B decisions cited in this matter have no contractual basis.

Management contends that the Union's remedy is punitive and a more appropriate remedy should be ordered. There is absolutely no contractual basis or justification for awarding punitive damages.

Management contends that it is improper and an unjust enrichment to pay a steward for violations of the LMOU provision at bar. Moreover, union stewards can only be paid under the provisions provided for in Article 17 Section 4. Further, there was no testimony during the hearing why the steward should be paid.

RELEVANT CONTRACT PROVISIONS

LMOU, Item 14

Article 5. Prohibition of Unilateral Action

Article 15.2. Grievance Procedure

JCAM 15

JCAM Page 41-17

DISCUSSION AND FINDINGS

There are virtually dozens of grievance settlements in the record over the same or related disputes during the past 10 years. The parties have resolved these matters time and time again with the same end result. I will not review each of these settlements herein; however, it is important to examine some of these resolutions in order to respond to the parties' positions and arguments made during the course of the hearing.

Management argued that the dispute leading to the filing of the grievance is a contract matter and the burden of proof is on the Union to prove the violation. This is true. However, in this case Management has already admitted the contract violation thereby leaving only the matter of remedy to be decided. Management shares an equal burden with the Union in convincing the Arbitrator of the proper solution to the dispute.

Management argues there are legitimate business reasons for their delay in providing the report. Moreover, they have attempted to negotiate a more appropriate penalty for the instant case as well as future violations, if any. I reject these arguments. Both Management witnesses testified that they are short staffed and they are exceedingly busy in managing the work force. In fact, witness Blanding testified that upper level management positions have been little more than a revolving door of temporary appointments. I sympathize with the poor working conditions supervisors are forced to manage under in Tuscaloosa but this dispute has been ongoing for a decade and it has been resolved time and time again. Further, both Management witnesses testified that it takes about an hour to complete the Overtime Recap

report. I find it difficult to accept that the report cannot be completed between the close of business on Friday and the close of business on Monday.

The Overtime Recap report is a product of the Tuscaloosa Local Memorandum of Understanding. The parties have reached a mutual understanding of the meaning of the language as well as how and when it will be applied. The record is devoid of any evidence that the matter was brought up or impassed during any local negotiations period. The Arbitrator would indeed exceed his authority to direct the parties to reopen local negotiations and allow Management to attempt to renegotiate Item 14.

I am in agreement with Management that Step A and Formal Step A settlements are not precedent setting. However, settlements made at these levels are binding and enforceable. For example, Postmaster Milton Jacobs issued a memorandum to all Tuscaloosa managers and carrier supervisors in resolution to grievance M-03-10-2004, June 17, 2004. In relevant part it reads,

As settlement of a recent grievance, I agreed to issue instructions to you regarding your providing the union an overtime recap on the Monday following the Friday at the end of each week. This is a requirement of the LMOU, a previous DRT decision and the Collective Bargaining Agreement.

You are hereby instructed to provide to your respective union representative a weekly recap of the previous weeks overtime. This recap is to be provided to the union no later than the close of business on the Monday following the Friday of the previous week.

(Joint Exhibit 2, p. 63)

Another example can be found in the record as follows,

This Cease and Desist Letter given as Settlement for Grievances E-O 1-01-2006 and E-O 1-02-2006

On April 16, 2003 a DRT decision was issued on a class action grievance regarding Article 15. The decision addressed the fact that Tuscaloosa Management failed to provide an overtime recap on Monday following the week ending on Friday. The decision states "The B Team agrees Management should abide by the agreement made

to provide the OT recap on the Monday following the week ending on Friday. A verbal agreement has been made and accepted by Management and the Union. As such it is binding. This decision serves as a written notice the overtime recap will provided to the Union in accordance with the agreement. Any exceptions to that must be mutually agreed to at the local level. Additionally, each Manager at the station level, shall receive a copy of this decision to insure the decision is adhered to."

Management of the Tuscaloosa Post office has a moral and legal obligation to abide by the respective bargaining agreements. We are representatives of an organization who has entered into the agreement in good faith. As such, we should be good technicians of compliance in all matters relative to the contract. The expectation for Management in Tuscaloosa is that repetitive and unnecessary violations of the agreements or acts of non-compliance will not be a part of our work life. The minimum expectation from each management representative is that we will protect the Postal Service's assets but will also comply with the collective bargaining agreements. Non-compliance with furnishing overtime recaps will not be acceptable.

This commitment should be included in the supervisors' SOP and shared with all management representatives interacting with union representatives.

(Joint Exhibit 2, OIC Welch, 2.15.2006, p.64)

There are other examples in the record. While the simple fact that Step A and Formal Step A settlements are not precedent setting the resulting letters issued by competent authority are not only precedent setting they are binding and enforceable as well.

The Arbitrator rejects the argument that the Step B decisions in this matter have no contractual basis. These decisions are issued jointly by competent authority. They are binding and precedent setting.

A Step B decision establishes precedent only in the installation from which the grievance arose. For this purpose, precedent means that the decision is relied upon in dealing with subsequent similar cases to avoid the repetition of disputes on similar issues that have been previously decided in that installation.

(JCAM, p. 15-8)

A review of the numerous Step B decisions in this record finds them grounded in the contract with explanations of how and why their decisions were reached. Some examples of this in relevant part are,

DECISION:

The DRT has agreed to resolve the grievance. Issue 1.) Management violated Article 5 when they unilaterally changed the Overtime Recap Sheet to a DOIS printout. Management is directed to use the Overtime Recap Sheet agreed to at the March 1, 2001 meeting. Issue 2.) Management violated Article 15.3 of the National Agreement when they failed to supply the Overtime Recap for the week ending 5/11/2007 in a timely manner. Management is directed to pay Branch 1096 the sum of \$180.00 within 10 calendar days of this resolve. Management is again reminded that adherence to previous DRT decisions and settlements is required. Item 3.) Management violated Article 15.3 of the National Agreement when they failed to adhere to the cited settlements. Management is again being issued a cease and desist and reminded that future violations will result in a monetary remedy.

EXPLANATION

....A National Labor Relations Board Settlement Agreement Poster signed by Former Postmaster Milton Jacobs on 08/04/03 states in part that: "We will not refuse to bargain collectively with the Union by ...refusing to implement grievance arbitration /DRT decisions in a timely manner.

Because management at all three stations were not maintaining the Overtime Recap, furnishing it to the Union President and because some of the supervisors did not have a good grasp of Article 8 Overtime, the Union filed Grievance S-001-2001. See NALC Exhibit #5, for the 8190 for that grievance, emails between former HR Manager Wendy Hankins and former PM Milton Jacobs Re: Pete Marcous, then head of AL District Labor Relations, and Jim Mayfield, former NALC DRT B team member, coming to Tuscaloosa and teaching a class on Article 8 and maintaining a proper overtime Recap.

It was decided during the training that: 1. The OT Recap would be furnished to the Union on the Monday following the work week end the previous Friday. 2. Tuscaloosa would

adopt the Birmingham formIn that manner there were two sets of eyes looking at the numbers and any discrepancies, errors could be caught and corrected. Since that form was adopted, and all carriers can see who was working OT on their own route, who refused OT, there have been no quarterly overtime grievances filed.... (Joint Exhibit 2, Step B Decision H01N-4H-C 07169565, 6/27/2007, pp. 66-67)

DECISION:

The Dispute Resolution Team has agreed to resolve the grievance. Management again violated the cited contractual provisions. Management is again being issued a cease and desist. DRT decisions establish precedent from which a grievance arose. (Article 15 Step B (c)). The claim of different shop stewards does not relieve the requirements of supplying the union with the overtime recap. Following the lead shown by prior decisions the DRT agrees management shall pay the local union \$450.00 (8 days times \$50.00) for the December 12, 2008 violation and \$650.00.00 (12 days times \$50.00) for the December 5, 2008 violation. This payment includes \$50.00 in each violation for the continued violation of Article 15.3. This payment to Branch 1096 shall be within 10 days of the date of this resolve.

(Joint Exhibit 2, Step B Decision 3707 – 3708, 2/9/2009. p. 81) (Emphasis not added)

The same language and utilizing the same formula appears again in DRT Decision 3760, 3/31/2009, Joint Exhibit 2, p. 85; DRT Decision 3761, 3/31/2009, pp. 90-91; and, DRT Decision 4324, 2/16/2010, Joint Exhibit 2, p. 97.

The grievance settlements related to this matter continued. However, according to the record, sometime in early 2011 Management informed the Union that they could no longer pay the Branch with a money order and that GATS (Grievance Arbitration Tracking System) would not allow them to pay the Branch. The parties agreed that the payment for OT Recap grievances would be to a shop steward and that payment would be made within 5 days.

At this point two findings are in order.

1. There is a long history of repeated violations for failing to provide the Overtime Recap report.

2. The parties found a mutually acceptable means of addressing the violations until the case at bar arose.

REMEDY

Management argues that the Union's remedy is punitive; that it unjustly enriches a Union Steward by awarding him monetary compensation for something beyond what is contractually provided for under Article 17. Management additionally argues that no harm is committed in failing to provide the Overtime Recap report timely.

The principle of unjust enrichment provides that one shall not unjustly enrich himself at the expense of another. Put another way, "no one should be benefited at another's expense".

Management quoted National Arbitrator Richard Mittenthal in its opening statement as follows:

Fourth, perhaps most important, 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.Such a remedy would go far beyond the notion of a status quo ante. It would reward employees for Management's procedural error by freeing them of any responsibility for their alleged misconduct.

Richard Mittenthal, H1C-NA-C 97, February 3, 1989, pp. 5-6
(Emphasis not added)

Management Witness Blanding testified that monetary compensation is overly severe for the infraction and that Union representatives, who are the sole beneficiaries in the settlements rather than the bargaining unit as a whole, are the only individuals who profit. She testified that, albeit late on occasion, the Union always gets the report and there is no harm done to the bargaining unit whenever the report is late. In closing Management argued that there was no testimony why the Union or its stewards should be paid.

These arguments fly in the face of the evidence of record. The Mittenthal decision is not on point with the issue in this case. Arbitrator Mittenthal rendered a decision in a case regarding a management initiated program on attendance control. The program resulted in numerous disciplinary actions. The Union grieved the program seeking to eliminate it. They additionally

sought to expunge the discipline issued resulting from the implementation of the program. Arbitrator Mittenthal determined that it was the employee's misconduct that led to the discipline and not the implementation of the program. The program did not diminish the existence of the misconduct. The employees would be awaiting a judgment on the alleged misconduct regardless of whether or not the program existed. He reasoned that eliminating the program and expunging the discipline would go far beyond the notion of a status quo ante. It would reward employees for Management's procedural error by freeing them of any responsibility for their alleged misconduct.

There is no correlation with the case at bar. The Item 14 provision in this matter was jointly negotiated. The jointly developed penalty for violating the provision began as a cease and desist and after repeated violations evolved into an escalating remedy. I give considerable weight to the fact that the escalating remedy was mutually developed by the parties and is consistent with the language regarding remedies found at page 41-17 of the JCAM.

Similarly, the theory of unjust enrichment is not applicable here. I again give considerable weight to the fact that the parties jointly developed a solution to the remedy issue after Management notified the Union that they could no longer pay the Branch with a money order and GATS would not allow them to pay the Branch. I suspect there are other US Postal Service accounting methods or programs that would allow Management to pay the Branch but I make no findings in this regard as there is nothing in evidence or testimony that the parties desire such a finding.

The remedy is not punitive. The DRT decisions cited herein clearly show their rationale as well as the extraordinary efforts made in attempting to correct the repeated contract violation that included cease and desist, higher authority instruction and training before resorting to a monetary compensation formula.

There is insufficient evidence to issue a finding directing Management to rescind the District Manager's June 26, 2013 letter, Subject: Authorization for Grievance Settlements Informal A, Formal A, Step 1 and Step 2. The letter contains a directive requiring subordinate levels of Management to, "Obtain approval from the next higher level manager for any grievance (class action or individual) pay-out totaling more than \$500.00." It further directs subordinate levels of Management, "For any grievance totaling over \$1,000.00, you must contact the Manager, Labor Relations." (Joint Exhibit 2, p. 290) The Union interprets this letter to be a violation of Article 15 Section 2 Informal Step A (b) and Formal Step A (c).

Both Management witnesses testified that the District policy does not do away with their authority to settle grievances. Conversely, the record contains evidence in the form of an Investigative

Interview with Management representative LaTorry Wallace along with statements presumably issued by Ms. Wallace which clearly point out her belief that she is not authorized to resolve grievances exceeding \$500.00 pursuant to District policy. (Joint Exhibit 2, pp. 291-293) However, Ms. Wallace did not appear to testify at the hearing.

There is a clause at the bottom of the District policy letter that reads, "This requirement is not intended to limit the authority of the immediate supervisor to settle grievances at their level; it is simply a method of ensuring fiduciary responsibility." Further, in the undisputed facts of the case there is a stipulation that, "...Local Management admitted that there was an Alabama District Policy that would not allow them to settle grievances that were over \$500.00 without labor relations and MPOO review." (Joint Exhibit 2, p. 20) Combined, these facts coupled with Management's witness testimony show that District level Management has implemented a review process only. Local managers are advised, however, that denying grievances based on the mistaken belief that they lack the authority to settle a given matter could be cause to sustain a grievance on procedural grounds. Based on these facts Item 3 of the Union's requested remedy is denied.

AWARD

Items one and two of the Union's requested remedy is granted.

Management will pay Shop Steward Eddie Pratt a lump sum of \$1,150.00. This sum is \$50.00 a day for each day that the OT Recap was late (22 days). A lump sum of \$50.00 is included in the payment for the continual violation of Article 15. The payment will be processed within 5 days of the settlement of this grievance with proof of payment provided to the Union at that time.

Management will cease and desist from violating Article 5, Article 15 and Article 30 via the Tuscaloosa LMOU. Management will comply with all previous grievance settlements, DRT decisions and Arbitration awards.