C-30957

REGULAR ARBITRATION PANEL

In the Matter of the Arbitration	*	
between:	*	Grievant: Class Action
United States Postal Service	*	Post Office: Gadsden, AL
and	*	USPS Case No: G06N-4G-C 13035534
National Association of Letter Carriers, AFL,CIO	*	NALC Case No: 4M729

BEFORE: Lawrence Roberts, Arbitrator

APPEARANCES:

For the U.S. Postal Service: Scott Brimer

For the Union: Corey Walton

Place of Hearing: Postal Facility, Gadsden, AL

Date of Hearing: July 30, 2013

Date of Award: August 22, 2013

Relevant Contract Provision: Article 15 - 19

Contract Year: 2006

Type of Grievance: Contract

Award Summary:

This case involves overtime work. The Parties stipulated a violation of the Parties Agreement had occurred. The Union argued that an escalating remedy would represent a proper award. However, the Employer introduced controlling language to the contrary. The penalty overtime rate defined by the Parties Agreement will remain intact. However, at this Gadsden facility only, any work involving penalty overtime cannot be forced on any bargaining unit Employee. Any bargaining unit Employee, except in cases of Postmaster General declared emergencies, shall be worked at the sole discretion of the bargaining unit Employee.

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 30 July 2013 at the postal facility located in Gadsden, AL, beginning at 9 AM. 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 class action contract grievance was filed on behalf of Letter Carriers working at a Gadsden AL postal facility, the Main Post Office.

The instant grievance was filed when, on 23 November 2012, some ten (10) full time regular letter carriers, eight (8) Part Time Flexible Employees and two (2) Transitional Employees worked more hours than the Parties Agreement allows per Article 8. This resulted in the filing of the instant grievance in protest.

The Parties stipulated that a violation of Article 8 had occurred and the issue to be resolved in this matter is limited to one of remedy.

The record in this matter shows there have been over seventy (70) previous settlements at this location regarding this same issue. Some of those settlements resulted in cease and desist orders as well as a progressive scale of monetary compensation.

In this instant matter, the Union is requesting as settlement a monetary penalty of $4.25 per tick. Conversely, the Employer insists the Grievants in this matter have already been reimbursed for that work on 23 November at the penalty rate described in the Parties Agreement.

Obviously, the Parties were unable to resolve the remedy portion of this dispute during the prior steps of the Parties Grievance-Arbitration Procedure of Article 15. The Step B Team declared an impasse on 20 December 2012 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 the undersigned 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.

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

2. Grievance Package

UNION'S POSITION:

The Union contends the instant grievance is a contract case and that both Parties have mutually agreed that the only issue being heard is that of remedy. It is the belief of the Union that the requested remedy in this case is appropriate.

The Union insists this case is dealing with Management's continued violation of the Employee and Labor Relations Manual, Section 432.32, which provides that employees may not work more than twelve hours per day.

Through an astonishing number of cease and desists, monetary awards and escalated remedies, the Union concludes that Management at the Gadsden installation has no intention of following either sides demands to stop violating the ELM provision mentioned above through past Formal Step A and B Team rulings.

The Union insists this case file will show that Management at the Gadsden Installation has continually and egregiously worked Full time, Part time flexible and Transitional employees over the 12 hour limit.

The Union relies on the language of the JCAM in support of their requested remedy in this matter. It is the claim of the Union that the Formal Step A and Step B Teams have issued over seventy cease and desists and over seventy monetary remedies with thirty of those being escalated to try to emphasize to Management at the Gadsden installation the commitment of the Parties to contract compliance.

However, the Union argues that there has been no compliance on the part of the Service.

It is the claim of the Union that the limited monetary awards to an additional premium of 50 percent of the base hourly straight time rate for those hours worked beyond the 12 or 60 hour limit only applies to full time Carriers per Article 8.5.G.

The Union insists that part Time Flexible and Transitional Employees do not fall under the provisions of Article 8.5.g and are not limited to the fifty percent rule. Instead the Union argues that the language of M-01485 is prevailing in this instant case.

The Union points out the evidence will show the Step A and Step B Teams have already paid $3.25 per click for Managements violations of ELM 432.32. And since Management at Gadsden have failed to comply with those decisions an award in this case of $4.25 per click is only appropriate.

COMPANY'S POSITION:

The Employer concurs with the Union in this matter, in that the only issue to be resolved is that of remedy.

According to the Employer, the Union is requesting inappropriate additional compensation for each employee, over and above the amount they have already been properly paid to perform.

The Agency insists this undue enrichment identified by the Union is being masked under the improper theory of an escalating remedy, which relates to an employee getting paid an additional $425.00 per hour.

Management points out that when Employees work more than daily and/or weekly limits, they are already being paid at the penalty rate, or double their hourly wage.

The Employer goes on to cite via an example, how such an extreme remedy would become.

The Agency claims the escalating remedies paid by the Management in those past cases were improper and cannot be considered a past practice.

It is the position of the Employer that the method of improper payment of and additional $425.00 per hour is in conflict with numerous USPS financial handbooks and guidelines, is in stark contrast to a national Level arbitration written by

Arbitrator Carlton Snow and is direct violation of Article 41 of the National Agreement.

The Employer restates that the only issue here today is that of escalating remedy; not the amount or type of work performed.

Management requests the Union's requested remedy be denied in its entirety.

THE ISSUE:

1. Did Management violate Article 15, numerous citable grievance settlements and ELM 432.32 via Article 19 of the National Agreement when on 11/23/2012 they again ordered PTF carriers Phillips, Traylor, Seamons, Mitchell, Sullivan, Billingsley, Brooks, Sole and TE carriers Powe and Allison to work over their contractually hourly limits, and if so, what is the proper remedy?

2. Did management again violate DRT 2146 (H01N-4H-C 05146786), DRT# 1967 and 2018, Article 8 and 15 via Article 19 when they ordered full time carriers Cushing, Hughes, Durby, and Conner to work over their contractual limits on 11/23/2012, and if so, what is the proper remedy?

PERTINENT CONTRACT PROVISIONS:

ARTICLE 7
EMPLOYEE CLASSIFICATIONS

ARTICLE 8
HOURS OF WORK

DISCUSSION AND FINDINGS:

As previously mentioned, at the onset of this hearing, the Parties stipulated the issue to only include one of remedy. The Employer agreed with the Union via recognition that a violation of Article 8 had occurred.

This matter is presented with a history of Letter Carriers working beyond the maximums defined by the Parties Agreement. And accordingly, the record shows over some seventy settlements with more than thirty of those including cease and desist orders as well as an escalating monetary award in those cases.

The Union contends the monetary award in this case should be extended to the next level, that of some $4.25 per tick. The Union relies upon a **29 August 2002 Step 4** settlement labeled **M-01485** which states that:

> **"The Parties agree that Step B Teams have the authority to formulate a remedy when resolving disputes after finding a violation of the National Agreement, including cases where part-time flexibles were required to work beyond the 12 hour limit established in Part 432.32 of the Employee and Labor Relations Manual."**

And the **Employee and Labor Relations Manual, Section 432.32** states that:

> **"Except as designated in labor agreements for bargaining unit employees or in emergency situations as determined by the postmaster general (or designee), employees may not be required to work more than 12 hours in 1 service day. In addition, the total hours of daily service, including scheduled work hours, overtime, and mealtime, may not be extended over a period longer than 12 consecutive hours. Postmasters and exempt employees are excluded from these provisions."**

Additionally, the Parties Agreement via Article 8.5.G.2 provides that **"excluding December, shall be limited to no more than twelve (12) hours of work in a day and no more than sixty (60) hours of work in a service week."**

And Article 8.4.E states that **"Excluding December, part-time flexible employees will receive penalty overtime pay for all work in excess of ten (10) hours in a service day or fifty-six (56) hours in a service week."** This language also includes transitional Employees.

With all of that being said, the Parties Agreement, Article 8.4.C unambiguously provides that **"Penalty overtime pay is to be paid at the rate of two (2) times the base hourly straight time rate. Penalty overtime pay will not be paid for any hours worked in the month of December."**

And that particular language becomes the crux of my decision in this matter. Since the Parties, via negotiation, have already provided a rate for penalty overtime, the undersigned is left without authority to modify that language. Furthermore, I have no jurisdiction over any of the settlements reached previously by the Parties.

However, one comment regarding those past settlements is worth mentioning. It is quite obvious that escalating

settlements of past cases have not deterred the Employer from violating that particular language.

My reasoning coincides with the directive of **Arbitrator Carlton J. Snow** brought forward in his precedent setting decision of 30 **November 1998**, styled **A90N-4A-C 94042668/A90N-4A-C 94048740:**

> **"Had the parties intended to set a uniform remedy for only a certain number of violations, it would have been simpler to have said so explicitly. In any number of ways, they could have used clearer language to achieve that substantive effect. Perhaps the strongest argument against the Union's reading of the language is what is not stated in the provision. If the parties had intended to set up a uniform remedy for only some violations, surely they would have said something about the other violations, that is, some reference to the fact that "unlimited" violations would be remedied on a case-by-case basis."**

And later on in that same decision, Arbitrator Snow went on to conclude that:

> **"It is reasonable to conclude that the Union gave up its right to arbitrate for harsher penalties in exchange for a consistent penalty and a reduced need to arbitrate for it. If a problem with excessive Employer violations is emerging, it is an issue about which there is a need to negotiate. The Memorandum of Understanding as drafted does not support the Union's theory of the case and does not empower the arbitrator to insert a new remedy…"**

In this case the Union insisted the above Award was only applicable to Full Time Regular Letter Carriers arguing the overtime limits in Article 8.5.G apply only to full-time regular

and full-time flexible Employees. The Union is absolutely correct in that assertion. Article 8.5.G only applies to full-time Employees.

However, the Union's argument in that regard overlooks the language found in Article 8.4.C which states that **"Penalty overtime pay is to be paid at the rate of two (2) times the base hourly straight time rate."** While language does include transitional Employees, others, such as Part Time Flexibles or, any other class for that matter, are not excluded. Without any further specifics found in this language, it is clear that a standard penalty overtime rate of two (2) times the base rate becomes the standard for all Employees.

And furthermore, Article 8.4.F eliminates the pyramiding of overtime. This supports the rationale expressed in the previously cited decision. In my view, it was clear the negotiated language set the standard to a fifty percent premium.

The two issues in this case involve full time as well as part time flexible and transitional letter carriers. Even though the issues have been resolved by the Parties, the remedies seek resolution.

Again, the Snow decision, as discussed above, is controlling in the instant case. That premium rate cannot be changed, regardless of any Union argument. While I fully understand the merit of the Union argument, the language of the Agreement and its accompanying precedent restrict the authority of the undersigned.

I understand there exists literally a plethora of prior written settlements, by and between the Parties, involving issues that could be described as res judicata. In fact, that is very much part and parcel to the Union's very argument in this instant case.

However, even though there exists many written agreements by and between the Parties herein, it simply fails to make any of their prior settlements valid moving forward. For the fact of the matter is, any settlement exceeding the premium rules set forth in the National Agreement cannot be considered as a valid past practice.

While I cannot change any of those prior settlements, there is a limited authority for the undersigned regarding the movement forward regarding this issue.

It is clear to me this is an ongoing issue at this Gadsden facility. And based on prior settlements, even though the previously mentioned fifty percent rule has been exceeded on more than one occasion, makes it clear that a monetary settlement will not eliminate this continuing violation of the Parties Agreement.

And in that regard, I agree with the reasoning set forth by **Arbitrator Thomas F. Levak**, in a case styled **F01N-4F-C 04208743** where he wrote:

> **"The Arbitrator concludes that the Union failed to establish that, in this case, the Arbitrator has the authority to render an award directing a monetary remedy over and above the 50% premium established for cases of this nature by the 1998 MOU, the Snow Award and the 2005 Settlement. Accordingly, the grievance will be denied in part. However, the Union did establish grounds for the rendition of a non-monetary remedy concerning the obligation of Upland management and the rights of Upland Carriers.**
>
> ...
>
> **"On the other side of the coin, there certainly is nothing in the 1997 MOU, the Snow Award or the 2005 Settlement that infringes upon the Arbitrator's inherent authority to direct a nonmonetary remedy aimed at correcting a repetitive, continuing, and therefore egregious violation of the National Agreement and incorporated ELM."**

And I certainly agree to that "other side of the coin" remedy suggested by Arbitrator Levak. This arbitrator's authority is clearly limited monetarily in sustaining the Union's requested remedy in this case. However, based on past

settlements, it is quite clear that even escalating settlements, have failed to deter this ongoing issue at this Gadsden facility.

A full time regular, based on the unambiguous language of Article 8.5.G.2 may be assigned to "Excluding December, no more than twelve (12) hours of work in a day and no more than sixty (60) hours of work in a service week" and according to Article 8.4.E "Excluding December, part-time flexible employees will receive penalty overtime pay for all work in excess of ten (10) hours in a service day or fifty-six (56) hours in a service week. The same holds true for transitional Employees.

And with that language, it is clear the chief negotiators clearly set limits on the time to be worked by those respective classifications. And based on that language, my award in this case will reflect the insight of Arbitrator Levak and a non-monetary award structured to provide a final resolution to an ongoing issue.

The remedy is quite simple. Should any bargaining unit Employee chose not to work beyond those contractually mandated time limits, it becomes their personal right not to do so, albeit that of immediate direct refusal, without any management repercussion whatsoever. The **only** exception to this order is

under "**emergency situations as determined by the postmaster general (or designee).**" That language, extracted from the Employee and Labor Relations Manual, Section 432.32 is the only exception to this order.

The Union did make it clear, via the plethora of prior settlements, which even though penalty overtime was escalated at the local level in excess of that fifty (50) percent bargained for standard, Management was not deterred from forcing letter carriers to continually work beyond the lengths of times afforded by the Parties Agreement.

And it's clear that Management's actions were clearly to the detriment of certain bargaining unit Employees. This award will now allow those bargaining unit Employees to exercise that bargained for right to refuse overtime requirements that do not fall within the confines of the Parties Agreement, without <u>any</u> Management repercussion.

This is not meant by any means to deter any bargaining unit employee from working beyond the time limits mentioned above. But any such overtime work, unless designated by the Postmaster General or designee as being an emergency, shall be at the sole **option** of the bargaining unit Employee. And any bargaining unit Employee shall maintain the exclusive right to immediately

refuse any work which exceeds these parameters which include penalty overtime as described in Article 8 for the respective classifications.

And with that being said, any time worked in excess of that mentioned above will be at the sole discretion and option of the Employee. Furthermore, all Gadsden Letter Carriers shall be duly informed of this decision, each verbally, and this Decision shall be posted on a bulletin board at this facility for a period of not less than sixty (60) days.

AWARD

The grievance is resolved in accord with the above.

Dated: August 22, 2013
Fayette County PA