C-33461

REGIONAL ARBITRATION PANEL

In the Matter of Arbitration	Grievant:	Phimmasone
Between	Post Office:	San Diego, CA 92128
United States Postal Service	USPS No.:	F16N-4F-C 17585970
And	Union No.:	17C479
National Association of Letter Carriers,		

BEFORE: Glenda M. August, Arbitrator

APPEARANCES:

For the U.S. Postal Service — Darlene Cue

For the National Association of Letter Carriers — Charlie Miller

Place of Hearing:	1900 W. Redlands Blvd., San Bernardino, CA 92423
Date of Hearing:	May 31, 2018
Briefs Rec'd:	July 5, 2018
Date of Award:	August 3, 2018
Relevant Contract Provision:	Articles 3, 10, 12, 14 and 19
Contract Year:	2016 - 2019
Type of Grievance:	Contract

AWARD: The grievance is sustained. Management violated the National Agreement when they denied the Grievant's request to transfer to Sun City, CA. The Grievant shall be transferred to the Sun City, CA installation with a seniority date retroactive to the date his original request should have been approved (Approximately May 8, 2017), plus the ninety-days allowed by the Memo for the losing office to seek a replacement.

Glenda M. August
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Arbitrator

I. ISSUE

Did Management violate Articles 3, 10, 12, 14 and/or 19 of the National Agreement (NA) when they denied the Grievant's request for transfer to Sun City, CA? If so, what is the appropriate remedy?

II. RELEVANT CONTRACT PROVISIONS

ARTICLE 19
HANDBOOKS AND MANUALS

Those parts of all handbooks, manuals and published regulations of the Postal Service, that directly relate to wages, hours or working conditions, as they apply to employees covered by this Agreement, shall contain nothing that conflicts with this Agreement, and shall be continued in effect except that the Employer shall have the right to make changes that are not inconsistent with this Agreement and that are fair, reasonable, and equitable. This includes, but is not limited to, the Postal Service Manual and the F-21, Timekeeper's Instructions.

III. FACTS

The Grievant in this case submitted a request for transfer to Sun City, CA on April 7, 2016. On May 8, 2017 the Grievant was told verbally that his transfer request was denied based on his Safety and Attendance records. A letter dated, May 18, 2017 was mailed to the Grievant The Union filed the instant grievance alleging that Management violated the National Agreement when they failed to give the Grievant's request for mutual exchange full consideration and unreasonably denied the request.

IV. UNION'S CONTENTIONS

The Union contended that they have met their burden in this case. According to the Union, the Service violated the National Agreement and related Memorandum of Understanding (MOU) by unreasonably denying the Grievant transfer request. The Union further contended that the National Agreement at Article 12 Section 6 and the related MOU obligates the employer to accept transfer requests based on the following considerations; acceptable work, attendance and safety records. In this case, stated the Union, Management claimed the transfer request was denied due to attendance and safety records.

The Union argued that the provisions require that the Service's representatives in the gaining and losing installations be fair in their evaluations based on valid documented work records. In the instant case, the Union states that they are challenging the fairness of the

evaluation and the reasonableness of the rejection. They contended that Management testified that the Decision Analysis Tool (DAT) was Management's requirements under the National Agreement and MOU (JX-2 Pages 46-48). The Union further contended that at Formal A, Management's representative stated that the DAT was based on the MOU.

According to the Union, the Postmaster at Sun City, where the Grievant was requesting transfer, testified at Hearing that his determination for safety was based on the Grievant's safety record. The Union noted that upon cross examination the Sun City Postmaster admitted that there was nothing in the record that determined that the Grievant committed an unsafe act. Additionally, according to the Union, the Postmaster was unable to articulate how a dog bite and Tendonitis was caused by an unsafe act. The Union noted that the Grievant testified that he was taken by surprise by the dog that bit him and the Tendonitis was caused by overuse of his arm; the Union contended that the Grievant's testimony was not only creditable but it was consistent with injuries that occur within the Postal Service through no fault of the injured employee. The Union held that without any evidence, the Postmaster of Sun City gave a prejudicial view to the two annotations on the Grievant's safety record disregarding whether or not an unsafe act was committed. The Union maintained that to hold a view that all injuries are the fault of those who are injured is an unreasonable standard and in the instant case, the Postmaster used a standard which was inconsistent with the National Agreement.

The Union contended that there is no dispute that the Grievant used sick leave between 2015 and 2017; however The Grievant provided creditable testimony that was consistent with his sick leave record. According to the Union, the Grievant testified that he had been suffering from bouts of tendonitis during those periods and there were no disputes that he provided the employer with medical certification explaining the absences (JX-2 Pages 94-96). The Union further contended that the Grievant's Supervisor and Station Manager were both interviewed regarding the Grievant's attendance (JX-2 Pages 68-69) and neither considered the Grievant to have an attendance problem. They added that there is also no dispute that the Grievant has no attendance related discipline on file.

The Union stated that the Postmaster at Sun City was interviewed by the Union Steward and when asked what an acceptable level of sick leave usage was, he responded "zero; anything else is unsatisfactory" (JX-2 Page 71). The Union noted that there was no dispute from

Management and the Postmaster never denied making that statement during his testimony at Hearing. According to the Union, the Postmaster position on the sick leave is in direct conflict with Management's instructions on the DAT and with the National Agreement; they added that fundamentally, a zero-usage policy is not reasonable and therefore in violation of the National Agreement and DAT requirements. The Union argued that on cross examination the Postmaster admitted that he had no evidence that the Grievant was abusing his sick leave and they contended that as such, the Postmaster failed to meet the standards used to deny a transfer and instead used a standard which was inconsistent with the National Agreement.

Regarding the higher level review and concurrence on the Grievant's request for transfer, the Union argued that this process was little more than a rubber stamp of the Postmaster's decision to deny the transfer request. They further argued that the Manager, Labor Relations' testimony fell short of a reasonable definition of a full and fair review and added that on cross examination, she was initially evasive but finally admitted that there was no evidence that the Grievant committed an unsafe act or abused his sick leave. The Union noted that the DAT requires review and concurrence from the Safety Manager, and without that review a serious misperception was allowed to stand and lead to the transfer request being denied. According to the Union, Management's failure to adhere to their own procedures prejudiced the Grievant's transfer opportunity.

Finally, the Union contended that Management's failure to comply with the National Agreement resulted in the denial of the Grievant's transfer request. The Union further contended that the denial impacted the Grievant's family life and added the burden and extra expense of an approximately 100-mile round trip every day. The Union argued that the Grievant cannot be made whole for time loss with his family but he can be made whole for his monetary losses and relative standing. The Union requested that based on the evidence of record and testimony provided that the instant grievance is sustained and the Grievant's transfer be granted retroactive to May 8, 2017. The Union further requested that the Grievant be made whole for any additional time spent commuting and mileage expense incurred retroactive to the same time period.

IV. MANAGEMENT'S CONTENTIONS

Management in this case maintained that there were no violations of Articles 3, 10, 12, 14 or 19. Management contended that the Postmaster at Sun City followed the guidelines to review the Grievant's transfer package by using the Decision Analysis Tool (DAT) and all documents with the Transfer Packet. Management further contended that the DAT is based on the MOU so therefore it was unnecessary for the Postmaster to review the MOU. Management stated that the Postmaster reviewed the Grievant's attendance record for the past three (3) years and his accident records for the past five (5) years. They added that the Grievant did not have an approved FMLA case to support his unscheduled sick leave usage. Management maintained that they believe that they have fulfilled their obligations under Article 12 of the National Agreement (NA) regarding the Grievant's requested transfer to the Sun City Post Office; they contended that Managers are obligated to give full consideration to the work, attendance, and safety records of all employees who are considered for reassignment.

The Service argued that the Transfer Memo at Section 1.D specifically provides that an employee requesting transfer **MUST** have an acceptable work, attendance and safety record; and instructs the installation heads of both the gaining and losing facilities to conduct a fair evaluation of the requester's record. The Service further argued that the word "acceptable" is subjective in nature, and ultimately the installation head of the gaining installation will review the evaluation provided by the potential losing installation, conduct his own evaluation of the employee information obtained and render a decision as to whether the potential transferee possesses an acceptable work, attendance and safety record. According to Management, this evaluation is purely subjective and is premised on the potential gaining installation head's expectations of any employee who works for him; what he deems is acceptable.

Management contended that the Transfer Memo does not define the standards of performance to be used; they stated that instead, the Memo gives the installation head the latitude of determining if the transferee has an acceptable record. Management added that the Transfer Memo contains no provisions for "hardships", and the Union's arguments regarding such should be rejected. The Service argued that the Sun City Postmaster's testimony revealed that his review of the Grievant's attendance record revealed several unacceptable incidents of

his conclusions in support of their arguments. Arbitrator Fogel opined that the "governing Memorandum allows a receiving area for a transfer to establish reasonable standards for judging the qualification of prospective transferees.

According to Management, the Grievant testified that Management's decision to deny his transfer request impacted him and his family since he needed to buy a car since he drives 50 miles each way to work and spends less time with his family. Management contended the Grievant's testimony regarding arguments with his wife and reduced family time are all new arguments put forth by the Union since these issues were not raised at Step 1 and 2 of the grievance process. They argued that the Grievant's job with the Postal Service allows him to provide a quality life for his family which includes many other benefits like Medical and Dental plus paid leave. Management asserted that it was the Grievant' choice to work for the Postal Service, including the location; they noted that the Grievant accepted a postal job in his current facility knowing full well where lived.

It was Management's position that even if this Arbitrator found that Management improperly denied the Grievant a request for transfer, the arbitrator has no authority to render a decision outside the bounds of the National Agreement. Management contended that the most the Arbitrator could rightfully award for such a finding would be to direct the Postal Service to place the Grievant's name in the appropriate order on the transfer roster. Management further contended that the Union's requested remedy is punitive in nature and would certainly not be an appropriate remedy even if the Arbitrator found that Management violated the National Agreement. The Service held that many arbitrators have denied grievances at arbitration, even when it determined that Management committed contractual violations, purely because the Union's requested remedy was inappropriate for varying reasons. They offered several arbitral opinions including that of Arbitrator Foster in case no. S1N-3U-C 4651, where he stated:

> After careful consideration of the evidence and arguments of the parties, and based on the reasons set out above, the award is that management violated the national Agreement by instructing grievant to drive the vehicle in question. The Arbitrator is not, however, empowered under the National Agreement to grant the specific remedy requested by the Union.

Management offered several other opinions, including that of National Arbitrator Carlton Snow in case number W1C-5F-C 4734, where he concluded that the Employer had violated the

contract and stated:

> In fashioning remedies, however, arbitrators generally have adhered to the principle that damages should correspond to the harm suffered. A deeply rooted principle of measuring contract damages is that such damages must be based on the injured party's expectation. The expectation interest of the party in contract cases generally has been measured by the actual worth that performance of the agreement would have had for the individual, and in this case the Union has not demonstrated that any employee was harmed...
>
> It is recognized that some arbitrators have awarded punitive damages when a party's violation of an agreement has been constant and repeated or malicious. That approach, however, has not been consistent with the common law which has taught that no matter how reprehensible a breach, punitive damages which were in excess of an injured party's lost expectation generally have not been awarded for a breach of contract...
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> Even if one accepted the teaching of some arbitrators that punitive damages should be awarded when a party's violation has been malicious and persistent, the principle would not be applicable in this particular case...The arbitrator, however, has received evidence only with regard to one violation of Article VIII. Nor has the arbitrator received any evidence to demonstrate malice on the Employer's part. In other words, no circumstances showed a basis for awarding punitive damages even if that arbitral principle were followed.

Finally, Management concluded, based on the well-reasoned foundation of arbitral authority, they maintained that to grant the Union's requested remedy would be inappropriate. Management contended that they committed no violations and even if a violation occurred, the requested remedy is for punitive damages. They averred that the Union did not support their request with proof that the Grievant was harmed. Management requested that the instant grievance be denied in its entirety.

VII. DISCUSSION AND OPINION

JCAM Section 15. Voluntary Transfers

> 12.6 Section 6. Transfers A. Installation heads will consider requests for transfers submitted by employees from other installations.
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> B. Providing a written request for a voluntary transfer has been submitted, a written acknowledgment shall be given in a timely manner.
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> (Additional reassignment and probationary period provisions regarding City Carrier Assistant Employees are found in Appendix B.) [see Memos, pages 188-193]

National Agreement must satisfy those lock-ins prior to being reassigned to other installations. Local transfers are included in the 1 out of 4 ratio.
The term "Local Reassignments" means reassignments to the same district or to adjacent districts. An important difference between local reassignments and reassignments to other geographical areas concerns the mandatory lock-in periods. The lock-in period for local reassignments is eighteen months (unless released by the installation head earlier) except in the case of an employee who requests to return to the installation where he/she previously worked. In contrast, the lock-in period for transfers to other geographical areas is one year. This "lock-in" provision is not the same as a "craft lock-in." There are no "craft lock-ins" in the letter carrier craft. Thus, the requirement concerning "employees serving under craft lock-in periods" is not applicable to letter carriers. Whether a CCA must serve a "lock-in" when they are converted to career status is addressed by the parties' joint Questions and Answers 2011 USPS/NALC National Agreement, dated March 6, 2014. The complete joint Q&As are found on JCAM pages 7-20 through 7-30.

QUESTIONS AND ANSWERS 2011 USPS/NALC NATIONAL AGREEMENT
28. After a CCA becomes a career employee does he/she serve a lock-in period for transfers as defined by the Memorandum of Understanding, Re: Transfers?
Yes.

Transfer Memo 2.B

B. The provisions of Section 1, paragraphs A, C, E, F, G, H and I are applicable to local reassignments.

C. In those instances where an employee can substantially increase the number of hours (8 hours or more per week) by transferring to another installation and the employee meets the other criteria the lock-in period will be 12 months. Date: July 21, 1987

The Grievant in the case at bar filed a request for transfer to the Sun City, California Post Office. His request was denied by the Postmaster at Sun City which he stated was based on the Grievant's attendance and safety records.

Management contended that the Sun City Postmaster reviewed the Grievant's attendance record for the past three years and it included 5 unscheduled absences in 2015, 7 unscheduled absences in 2016 and 3 unscheduled absences through March, 2017. Management further contended that the Postmaster considered Grievant's accident record for the past 5 years and his record included two (2) accidents.

The Union and the Grievant through the evidence of record and testimony argued that Management did not "fully consider" the Grievant for transfer since the Postmaster at Sun City failed to even inquire about the information he reviewed in the transfer packet. According to the Union and the Grievant, his supervisor also conducted an evaluation which demonstrated that he was a good employee and that his attendance record was up to par. The Union argued that while it was correct that the Grievant's accident record demonstrated two (2) accidents in the past 5 years, neither of those accidents were a result of any unsafe act on the part of the Grievant. They noted that one accident involved a dog bite from a dog that came "out of the blue" and surprised the Grievant and the other "accident" was a result of the Grievant filing a Worker's Compensation Claim based on a work-related condition of tendonitis in both hands.

In fact, according to the Union, the tendonitis that the Grievant filed the claim for is the very reason for the unscheduled sick leave used by the Grievant over the past three (3) years. They argued that if the Postmaster at Sun City had given the Grievant's request for transfer "full consideration" he would have contacted Management at the Grievant's office to inquire about the reasons for the absences since there was no discipline issued. It was the Union's position that the Decision Analysis Tool (DAT) used by the gaining Postmaster to evaluate the Grievant's request clearly showed that the Grievant's work performance was graded as satisfactory for transfer and the only reasons listed as not satisfactory was that of attendance and safety. They argued that based on the reasons leading to the attendance and safety records (an unavoidable dog bite and a work-related occupational injury) Management at Sun City should have approved the Grievant's request.

The Memorandum of Understanding between the parties Re: Transfers provided the guidance required for the consideration of transfer requests. Section 2 of the Memo specifically addresses local reassignments such as the one in the case at bar. The JCAM further analyzes the parties' intent in the National Agreement at Article 12 and the accompanying Memo and states at Page 12-47:

> In evaluating transfer requests managers will give full consideration to the work, attendance, and safety records of all employees who are considered for reassignment. However, local managers may not add additional criteria for accepting transfer requests. For example, a policy of only accepting transfer requests from within the district would be a violation of the memorandum.

> Evaluations must be fair, valid and to the point, with unsatisfactory work records accurately documented. They must be based upon an examination of the totality of an employee's individual work record. **Evaluations based on the application of arbitrary standards such as a defined minimum sick leave balance do not meet this standard.**

Although Management argued that the Sun City Postmaster's statement that his idea of acceptable sick leave usage was "Zero", was only meant as a standard for himself, the question asked by the Union Steward was. "What do you consider a satisfactory sick leave usage?"; And, the Postmaster's answer was, "ZERO-Anything else is unsatisfactory. The ELM says must be regular in attendance. Based on this arbitrary standard, it would be hard to approve any requests since most postal employees miss work at some stage of their career. I may be wrong but I would have to believe that, especially in the Letter Carrier craft, where the work is strenuous, and the employees are subject to the elements every day and there is the additional stress of constant customer interaction, attendance statistics may demonstrate more use of sick leave than in other crafts or as opposed to non-bargaining Administrative positions, such as the Postmaster's. In positions such as those, Zero usage of sick leave would be easier to achieve.

However, realistically speaking, zero usage is not a realistic standard; and when you examine the "totality of an employee's work record", in this case you would find that the Grievant had no discipline in his record for abusing sick leave or for unsafe practices associated with the accidents on record. One could hardly convince a reasonable person that an employee was unsafe just because there were 2 accidents on file, when the first accident was being attacked by a dog, and the second accident was only on file because it documented an occupational injury likely caused by his employment. Add to this the reason for the unscheduled absences being the occupational injury-Tendonitis.

Management averred that the evaluation process was utilized by the Postmaster at Sun City through the Decision Analysis Tool and from his testimony it was obvious that a review was completed. However the review fell short of that required by the National Agreement via the Transfer Memo. The Memo requires that "full consideration" be given and provides for "an examination of the totality of an employee's individual work record." This means when there are questions, research must be done to find out if there are mitigating circumstances

surrounding the accidents and absences in this case, especially when there was no corresponding Discipline on file. The National Agreement as clarified by the parties in the JCAM goes on to state that any "Evaluations based on the application of arbitrary standards such as a defined minimum sick leave balance do not meet this standard." An arbitrary standard applied to a transfer request, such as the Sun City Postmaster's arbitrary standard of Zero sick leave usage being the only satisfactory standard clearly would not meet the standard set by the parties in the Memo.

In case number C06N-4C-C 08247600, Arbitrator Tobie Braverman reviewed the denial of a Request for Transfer and concluded:

> Even if it is accepted that Postmaster Link's conclusion that the presence of accidents alone is sufficient to deny the transfer, it is important to note Link's evaluation does not comport with the requirement of the MOU. Although the Grievant has never been disciplined for either her attendance or either of the two accidents, Postmaster Link's evaluation indicates "Yes" in response to question 4 regarding attendance which asks "Is discipline current...?". In fact there was no evidence presented to demonstrate that the Grievant has ever been disciplined for her attendance. As with the attendance issue, Postmaster Link responded in response to question 3 under the evaluation document's safety record category that discipline was current. As with the attendance, however, there was no extant discipline, current or otherwise. The MOU, quoted at length above, specifically provides that "[e]valuations (sic) must be valid and to the point, with unsatisfactory work records accurately documented." Although Link's evaluation indicates in response to questions under all three categories covered by the evaluation that discipline is current, there is no discipline in existence. Under such circumstances, the Arbitrator is hard pressed to conclude that the evaluation is based on accurately documented work records. The evaluation itself is therefore faulty and cannot be accepted as a basis for denying the transfer. The evaluations do not comply with the dictates of the MOU requiring accurate documentation of unsatisfactory work records.
>
> The Union has requested that the Grievant be compensated for both her additional time and mileage expense as a result of the longer commute to which she was subject as a result of being denied the requested transfer. The testimony presented at hearing demonstrated that the commute from the Grievant's home to the Chester post office is approximately forty-five miles and takes between forty-five minutes to one hour depending on traffic. The commute to Wheeling is approximately thirteen miles and takes between twenty minutes and one half hour. Since the Grievant was wrongly denied the transfer, she is entitled to compensation for her lost time and mileage. There are, however, two unknowns which affect the compensation to be awarded. First, while the Grievant routinely

> worked six days per week at Chester, there is no evidence to demonstrate that she would have worked a sixth day at the much larger Wheeling office. Further, according to the terms of the MOU, the actual transfer would be completed only after the Chester office was given up to ninety days to complete a replacement. The Grievant would not be entitled to compensation until such time as the transfer might reasonably have taken place had it been approved in the first instance. She is therefore not entitled to compensation for the period of ninety days after the date on which her transfer request should have been approved.

In the instant case, the Postmaster at Sun City denied the Grievant's request based on the ***presence*** of accidents and unscheduled absences. There was no indication that there was any further investigation into the employee's work record; which was a requirement of the Transfer Memo based on "the totality of an employee's individual work record". A closer look at the Grievant's record would have provided mitigating circumstances for the absences and a clearer look at the documented accidents. Additionally the transfer Memo, while purposely not providing definitive standards, did provide that any arbitrary standards set, such as ZERO sick leave usage set by the Postmaster in this case, would not meet the standards required by the Memo.

Management violated the National Agreement and the Transfer Memo when they denied the Grievant's request for transfer. Regarding Management's arguments on remedy, although there was a violation of the intent of the Transfer Memo, it was apparent that the requirements of the Memo were utilized through the use of the DAT; however arbitrary standards were applied. There was also, in this Arbitrator's opinion, no finding of a deliberate intent to deny the request, nor was there any evidence provided that demonstrated a recurring issue with Requests for Transfers in either office. For those reasons, the Union's request for out of schedule pay and for time spent commuting as well as mileage reimbursement are not appropriate in this case.

Thus, based on the foregoing reasons, the grievance is sustained. Management shall transfer the Grievant to the Sun City, CA installation with a seniority date retroactive to the date his original request should have been approved (Approximately May 8, 2017) plus the ninety-days allowed by the Memo for the losing office to seek a replacement.

AWARD

The grievance is sustained. Management violated the National Agreement when they denied the Grievant's request to transfer to Sun City, CA. The Grievant shall be transferred to the Sun City, CA installation with a seniority date retroactive to the date his original request should have been approved (Approximately May 8, 2017), plus the ninety-days allowed by the Memo for the losing office to seek a replacement.

Glenda M. August

GLENDA M. AUGUST
Arbitrator

August 3, 2018

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