C-36376

REGULAR ARBITRATION PANEL

	) Grievant: Class Action
In the Matter of the Arbitration Between	) Post Office: Elmira, NY
United States Postal Service	) Case No: 4B- 19N-4B-C 23197346
And	) DRT No: 11-611173
National Association of Letter Carriers, AFL-CIO	) Union No: E-104-2023
	)

BEFORE: ARBITRATOR ALISSA J. SAMMARCO

APPEARANCES:

For the U.S. Postal Service:	Leslie Selice
For the NALC:	Monique Mate
Place of Hearing:	Elmira, NY
Date of Hearing:	October 5, 2023
Breifing Completed:	October 25, 2023
Date of Award:	November 27, 2023
Type of Grievance:	Class Action
Relevant Contract Articles:	Articles 8.5.G, 15.3 & 19
JCAM:	8-16, 15-3
ELM:	432.32
Memo:	M-01517

AWARD SUMMARY

The Grievance is sustained. Management violated Article 15.3.A when it violated 8.5.G. However, the violation does not rise to the level of culpable intent such as warranting damages beyond the exclusive remedy of 50% penalty. The parties did agree to language "abide by" and "refrain from," and Management violated the Step Be Decision. Management is hereby ordered to cease and desist from violating 8.5.G.

Alissa J. Sammarco, Arbitrator

INTRODUCTION

Pursuant to the grievance-arbitration procedures between the United States Postal Service and the National Association of Letter Carriers, AFL-CIO, the undersigned arbitrator was selected to hear and decide the dispute herein and to render a final and binding Opinion and Award. The Union filed this grievance alleging that Management violated Articles 15.3 and 19 of the National Agreement and the M-01517 when Management failed to comply with five (5) Step B Settlements wherein they agreed to "abide by" Article 8, and "refrain from" working full-time carriers beyond their 12/60 limitations. They alleged that Management violated the settlement by subsequent violations of 8.5.G during pay period (PP) 2022-22-2. If Management violated Article 15.3 & 19 via M-01517, what is the remedy?

This grievance is the lead case for 18 other cases of the same circumstances.

Burden of Proof: The Union bears the burden of proof for a contract violation.

The following **exhibits** were offered and received at hearing:

Joint Exhibit 1: Collective Bargaining Agreement / National Agreement (CBA) between the United States Postal Service and the National Association of Letter Carriers, AFL-CIO.

Joint Exhibit 2: Joint Contract Administration Manual (JCAM)

Joint Exhibit 3: The DRT Record of Proceedings

The following witnesses were sworn and testified at the Arbitration Hearing:

For the Union

1. Rodney Stanfield, President, Branch 21
2. Warren Groome, City Letter Carrier
3. Christine Caforio, City Letter Carrier
4. Jeffery Masker, City Letter Carrier

For Management:

5. None

The sworn testimony, submissions, the parties' arguments, and submissions were carefully considered in rendering the following Opinion and Award.

ISSUE I

DID MANAGEMENT VIOLATE ARTICLE 15.3 & 19 VIA M-01517 BY FAILING TO COMPLY WITH LOCAL GRIEVANCE SETTLEMENTS FOR VIOLATION OF ARTICLE 8.5.G?

ISSUE II

IF SO, WHAT IS THE APPROPRIATE REMEDY?

RELEVANT PROVISIONS OF THE COLLECTIVE BARGAINING AGREEMENT, THE JCAM AND POLICIES AND MEMORANDUM

ARTICLE 8.5.G:

Full-time employees not on the "Overtime Desired" list may be required to work overtime only if all available employees on the "Overtime Desired" list have worked up to twelve (12) hours in a day or sixty (60) hours in a service week. Employees on the "Overtime Desired" list: 1. may be required to work up to twelve (12) hours in a day and sixty (60) hours in a service week (subject to payment of penalty overtime pay set forth in Section 4.D for contravention of Section 5.F); and 2. 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. However, the Employer is not required to utilize employees on the "Overtime Desired" list at the penalty overtime rate if qualified employees on the "Overtime Desired" list who are not yet entitled to penalty overtime are available for the overtime assignment.

[see Memos and Letter of Intent, pages 168-175]

MEMO AND LETTER OF INTENT: EXHIBIT J-1, PAGE 170-175, 172:

… In cases where management violates the letter carrier paragraph by failing to utilize an available letter carrier on the ODL to provide auxiliary assistance, the letter carrier on the ODL will receive as a remedy compensation for the lost work opportunity at the overtime rate.

JCAM 8.5.C, Page 8-14 – 1-15:

Implementing Memorandum on Letter Carrier Paragraph. A memorandum of understanding signed December 20, 1988 (M-00884) further explained the requirement to seek to use auxiliary assistance before requiring letter carriers not on the ODL or Work Assignment List to work overtime on their own route on a regularly scheduled day.

CCAs are considered as auxiliary assistance. Accordingly, management must seek to use CCAs at either the straight-time or regular overtime rate prior to requiring letter carriers not on the ODL or Work Assignment List to work overtime on their own route on a regularly scheduled day.

Management must seek to use all of the following to provide auxiliary assistance:

- PTFs at the straight-time or regular overtime rate
- CCAs at the straight-time or regular overtime rate
- available full-time regular employees such as unassigned or reserve regulars at the straight-time rate
- full-time carriers from the ODL at the regular overtime rate

However, the memo states that management does not have to use ODL carriers to provide auxiliary assistance if such an assignment would mean that the ODL carriers would be working penalty overtime. In that limited situation—if no auxiliary assistance is available without going into penalty overtime—management can require full-time regular carriers not on the ODL to work overtime on their own routes on a regularly scheduled day. Remember that this limited exception applies only when a full-time non-ODL letter carrier is required to work overtime on his/her own assignment on a regularly scheduled day.

Before requiring a non-ODL carrier to work overtime on a non-scheduled day or off his/her own assignment, management must seek to use a carrier from the ODL, even if the ODL carrier would be working penalty overtime (Article 8.5.D).

The memo goes on to state that "the determination of whether management must use a carrier from the ODL to provide auxiliary assistance must be made on the basis of the rule of reason."

For example, management is not required to use a carrier from the ODL when the travel time would be excessive for the amount of assistance being given. The full text of the memorandum is reprinted at the end of this article.

A Carrier Technician's own route for the purpose of applying Article 8.5.C.2.d and the Letter Carrier Paragraph is the specific route to which properly assigned on a given day. Overtime on any other route on the string is not considered to be on the Carrier Technician's own route and may only be required under the provisions of Article 8.5.D, below (Step 4, E94N-4E-C 98097684, October 2, 1998, M-01322).

JCAM 8-16 through 8-17

Mandatory Overtime. One purpose of the ODL is to excuse full-time carriers not wishing to work overtime from having to work overtime. Before requiring a non-ODL carrier to work overtime on a non-scheduled day or off his/her own assignment on a regularly scheduled day, management must seek to use a carrier from the ODL, even if the ODL carrier would be working penalty overtime. However, if the ODL does not provide sufficient qualified full-time regulars for required overtime, Article 8.5.D permits management to move off the list and require non-ODL carriers to work overtime on a rotating basis starting with the junior employee. This rotation begins with the junior employee at the beginning of each calendar quarter. Absent an LMOU provision to the contrary, employees who are absent on a regularly scheduled day (e.g., sick leave or annual leave) when it is necessary to use non-ODL employees on overtime will be passed over in the rotation until the next time their name comes up in the regular rotation.

JCAM 8-17 through 8-18

Article 8.5.F applies to both full-time regular and full-time flexible employees. The only two exceptions to the work hour limits provided for in this section are for all full-time employees during the penalty overtime exclusion period (December) and for full-time employees on the ODL during any month of the year (Article 8.5.G). Both work and paid leave hours are considered "work" for the purposes of the administration of Article 8.5.F. and 8.5.G. National Arbitrator Mittenthal ruled in H4N-NA-C-21, April 11, 1986 (C-05860), that an employee on the ODL does not have the

option of accepting or refusing work over eight hours on a non-scheduled day, work over six days in a service week or overtime on more than four of the five scheduled days in a service week; instead an employee on the ODL must be required to work up to 12 hours in a day and 60 hours in a week before management may require employees not on the ODL to work overtime. Arbitrator Mittenthal's award does not extend to situations involving a letter carrier working on his or her own route on a regularly scheduled day (See the discussion under 8.5.C.2.d and 8.5.G).

MEMORANDUM OF UNDERSTANDING: M-00859:

In those limited instances where this provision is or has been violated and a timely grievance filed, full-time employees will be compensated at an additional premium of 50 percent of the base hourly straight time rate for those hours worked beyond the 12 and 60 hour limitation. The employment of this remedy shall not be construed as an agreement by the parties that the Employer may exceed the 12 and 60 hour limitation with impunity.

MANAGEMENT DIRECTIVE: M-01517

Compliance with arbitration awards and grievance settlements is not an option. No manager or supervisor has the authority to ignore or override an arbitrator's award or a signed grievance settlement. Steps to comply with arbitration awards and grievance settlements should be taken in a timely manner to avoid the perception of anon-compliance, and those steps should be documented.

STATEMENT OF FACTS

Management argues that Article 8.5.G has an exclusive contractual remedy, payment of an additional 50% premium to the carriers. Therefore, additional damages are not recoverable for the violation of 8.5.G. The Union argues that this grievance is remedial in nature, and that damages are sought for violations of Article 15.3 and M-01517 wherein Management failed to comply with settlement agreements wherein they agreed to cease and desist violating 8.5.G. The Union argues that Management actions were willful and wanton and were so egregious that escalated remedy – money damages – should be awarded.

The Union presented four witnesses. Additional witnesses were listed but not presented. Management stipulated that additional witnesses would testify to having suffered similar harm from excessive overtime (8.5.G violations) as the carriers who were present.

Union President Rodney Standfield testified that grievances were filed for continued and ongoing 8.5.G violations in the Elmira Installation on a week-by-week. Management was scheduling carriers to work in violation of the 12/60 hour work limitations every week. The Overtime Alert Report evidenced daily violations of 8.5.G during the week in question for the Pay Period (PP) 2022-22-2. There are additional eighteen (18) grievances alleging Article 8.5.G & 15.3.A violations and requesting escalated damages for Management's action in subsequent weeks which are held abeyance pending this decision.

On the days when the violations occurred, CCA's were within their 12 hours limitation, and therefore were available to work so that the career carriers did not exceed their 12/60 limitations. Management is required to assign additional work to the auxiliary employees, then to the OTDL employees, then to the non-OTDL carriers. The record, as corroborated by Mr. Stanfield's testimony, shows that Management did not follow this procedure as required by 8.5.G and JCAM 8-16. The excessive overtime was not protected by any exemption to the 12/60 rule under ELM § 432.32 – December or emergency designated by the Postmaster.

The parties have settled multiple grievances at Informal A, requiring the Employer to cease and desist from violation of Article 8.5.G. The additional 50% penalty was also agreed in the settlements. Settlements included a penalty of $100 per individual as an incentive for Management's compliance with 8.5.G and the cease and desist language. The parties agreed to five (5) Step B Settlements which are included in the record. They resolved the 8.5.G violations. They do not include "cease and desist" language, but state that Management will "abide by" Article 8.5.G, and "refrain from" violating the 12/60 limitations. The Step B Decisions are silent on the issue of penalty for violation of the settlement agreement or future violations of 8.5.G.

The Union agrees that the Informal A Settlements in the record are not precedent setting and thus not binding on this case.

Testimony of the Letter Carriers Carriers/ Class Members:

Warren Groome, an eighteen (18) year letter carrier, testified that he was forced to work beyond the 12/60 limit repeatedly. Working over the limits has caused him harm. It was very stressful and negatively impacted both his work and personal life. He has an autistic child. Because of the excessive overtime, Mr. Groome was unable to maintain the regular regulated schedule that his child requires to thrive. His physical health suffered as well, including increased foot, ankle, and hip pain due to the extended hours. Additional symptoms suffered include vertigo, dehydration, and exhaustion. Often, he was working both non-scheduled days, especially in 2021 and 2022.

Christine Caforio, a six (6) year letter carrier, was forced in violation of the 12/60 Rule. Ms. Caforio told her supervisor(s) when she was going to exceed the 12/60 hour limit. She did this by completing a 3996 or calling the office. Management never brought her back or provided assistance. Ms. Caforio's work and personal life suffered. She was unable to attend her children's sporting events. She would go days without seeing her young son because she got home after he was asleep and left for work before he woke up. The excessive overtime caused stress on the marriage and the family. It has taken a toll on her body as well.

Jeffrey Masker, a thirty-two (32) year letter carrier. He was forced to work in violation of the 12/60 limits on a regular basis. He utilized Form 3996 to notify Management when he expected he would exceed 12/60 limits and to request assistance. In addition, Masker called the office if he were going over his 12/60 hours. Management instructed him to continue carrying the mail. They did not call him back to the office. On one occasion, he had worked 60 hours by Wednesday. He called off work for the next two days. The Postmaster called him personally and tried to negotiate a deal for him to come in and work knowing that it was a violation of the 12/60 Rule. The postmaster even offered him additional hours pay if he agreed. Mr. Masker did not agree.

The Employer did not present any witnesses nor evidence beyond the content of Joint Exhibit B, the DRT Record.

DISCUSSION AND FINDINGS

DID MANAGEMENT VIOLATE ARTICLE 15.3 & 19 VIA M-01517 BY FAILING TO COMPLY WITH LOCAL GRIEVANCE SETTLEMENTS FOR VIOLATION OF ARTICLE 8.5.G?

This grievance arises out of Management's constant and continual violations of Article 8.5.G, forcing carriers to work beyond the 12/60 work limitations. There is no dispute that violations of 8.5.G were negotiated in M-00859. The core of the issue here is whether the underlying 8.5.G violations can be a separate violation under Article 15 and 19 via M-01517. If so, is the language in the prior settlements equivalent to a cease and desist order?

1. **Are the continued 8.5.G violations a separate violation under Article 15 & M-01517, and thus the grounds for a new and distinct grievance?**

Settlement agreements entered at Step B establish precedent for 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 15-8. The testimony and record shows that the repeated 8.5.G violations in the Elmira Installation have been dealt with in the past. The Step B decision clearly addresses the issue presented here. Therefore, the decision sets a precedent as to future violations.

Injunctive orders are enforceable. *Elkouri & Elkouri, 6th Ed.,* 18.2, page 1199, *see General Dynamics Crop. V. Marine & Shipbuilding Workers Local 5*, 469 F.2d 848, 81 LRM 2746 (1st Cir. 1972). A cease and desist order is an enforceable injunctive-type order.

As such, wherein there is such additional remedy agreed to, it may be the basis of future grievances. Violation of a settlement agreement is grievable.

2. **Is the "abide by" and "refrain from" language equivalent to a cease and desist order?**

There are many prior Informal A settlements which include cease and desist language. These settlements are not precedent setting and cannot be cited for the purpose of establishing that Management agreed to such language as controlling future disputes. They are, however, evidence that the parties knew the significance of "cease and desist" language, and that they did not use that language in the five (5) Step B Decisions.

The Step B decision contains different language. Rather than "cease and desist," the parties wrote "Management is instructed to ***abide by*** Article 8.5.G and 15.3A of the National Agreement and ***refrain from*** working full time carriers over their 12 and 60 hour contractual limits." We must look to the plain meaning of the language used rather than hold the parties to always utilizing some "magic language" to craft their agreement.

While the term "cease and desist" is a term of art with a well-established meaning, the creation of an agreement to result in the same outcome is not barred simply by not utilizing that "magic language" or "term of art." Contract interpretation must be applied to determine the parties' intention in agreeing to said language.

There are several approaches to contract interpretation. There is the Objective Approach, with its preference for the common meaning of the words. Such an approach promotes predictability, uniformity and stability in contractual relationships and minimizes the need for extended factual inquiry into what the parties may or may not have intended or believed. *Elkouri & Elkouri, 6th Ed.,* Chp. 9.1.B.i. Page 431. This approach is objective and takes nothing of the parties' intent into consideration. Judge Learned Hand commented:

> A contract has, strictly speaking, nothing to do with the personal, or individual, intent of the parties. A contract is an obligation attached by the mere force of law to certain acts of the parties, usually words, which ordinarily accompany and represent a known intent. If, however, it were provided by twenty bishops that either party, when he used the words, intended something else than the usual meaning which the law imposes upon them, he would still be held, unless there were some mutual mistake, or something else of the sort.
>
> *Id.,* quoting *Hotchkiss v. National City Bank,* 200 F. 287, 293 (S.D.N.Y. 1911), *aff'd*, 201 F 664 (2nd Cir. 1912), *aff'd*, 231 U.S. 50 (1913).

The Subjective Approach is much less ridged. This approach defines "interpretation" as the ascertainment of the meaning of an agreement or a term thereof as intended by at least one party. *Id,* at Chp. 9.1.B.ii., page 432. In answering the question of "whose meaning prevails," the *Restatement (Second) of Contracts* states as follows:

> Where the parties have attached different meanings to an agreement or a term thereof, it is interpreted in accordance with the meaning attached by one of them if at the time the agreement was made that party did not know, or had no reason to know, of an different meaning attached by the other, and the other knew, or had reason to know t e meaning attached by the first party.
>
> *Id,* citing *Restatement (Second) of Contracts,* Sect. 201(2).

As such, the starting point in contract interpretation is always the words themselves. Interpretation comes into play only if the terms are ambiguous and susceptible to more than one meaning. The Plain Meaning Rules states "if the words are plain and clear, conveying a distinct idea, there is no occasion to resort to interpretation, and their meaning is to be derived entirely from the nature of the language used." *Id.,* Chp. 9.2.A., page 434. The existence of an ambiguity must be determined from the "four corners of the instrument" without resort to extrinsic evidence of any kind. *Id*.

When reading the Step B language in light of its plain meaning, we look to each term, and then if there is ambiguity, to the settlement in its entirety – the four corners of the contract. The term "abide by" is defined by the Merriam-Webster Dictionary as 1. To conform – abide by the rules. Here, Management and Union agreed that Management will follow the requirements of 8.5.G. This includes complying with terms for violation of 8.5.G, which is to pay a 50% penalty premium to carriers who are forced beyond their 12/60 limitation.

The term "refrain from" is defined as to keep oneself from doing, feeling, or indulging in something and especially from following a passing impulse. The term does not mean "shall never," nor does it mean "cease and desist." Cease and Desist is a legal term is defined by the Oxford Dictionary as denoting a legally enforceable order from a court or government agency directing someone to stop engaging in a particular activity. Merriam-Webster defines the term as "to stop (doing something) immediately." The term "cease and desist" has a specific definition and consequence of which both parties are well aware. They did not use this term of art. They negotiated for and used "refrain from" which has a less ridged use in the English language: "to keep yourself from doing." It is not an absolute preclusion as the term of art. The parties chose not to use the absolute and chose to use the less ridged term.

When one uses "refrain from," one thinks of a self-imposed limitation on future conduct. Clearly, the parties did not agree to the consequences of a "cease and desist" when they entered into the Step B Decisions. However, they did agree to at least try not to work full-time carriers beyond the 12/60 limitations.

The question becomes whether Management failed to use any restraint in their continued violations of 8.5.G, as such to violate the terms of the settlement agreement. The Union presented no evidence as to Management's intent for their violation of 8.5.G. Likewise, Management

presented no evidence explaining their actions. Instead, they rest on their argument that continued 8.5.G violations are not a basis for a new and separate remedy from the exclusive remedy set forth in the Snow Decision (A90N-4A-C 94042668) and M-00859. This Arbitrator agrees that the issues are related, but that the exclusive remedy does not address the issues of ***repeated violations of a settlement agreement*** wherein the Management agreed to try.

The facts are undisputed that Management did violate 8.5.G after the agreement at Step B. The record is devoid of any explanation for the Management's continued violation to show that they made any effort not to work full-time carriers beyond their 12/60 limitations. Therefore, Management violated Article 15.3 and M-01517.

It is the Union's burden to show that management violated the settlement agreement. It is stipulated that they violated 8.5.G. Thereafter, they abided by 8.5.G and paid the 50% penalty. Did Management then refrain from working full time carriers in excess of the 12/60 limitations? The evidence shows that auxiliary help was available when the carries were worked beyond 12/60 on PP 2022-22-2. There is evidence that Management had notice that the carriers were going to exceed their 12/60 limitations, and that Management did not call them back to the office. As such, based on the evidence presented, Management violated the Step B Settlements, and thus Article 15.3.A, by failing to refrain from working full-time carriers beyond the 12/60 limitations.

ISSUE II

WHAT IS THE APPROPRIATE REMEDY?

It is well known that the USPS has had a work force crisis since the COVID pandemic of 2020. This decision cannot be made without recognizing the problem facing the USPS on a national level. This Arbitrator has addressed at least four grievances based on Article 8 violations resulting from post 2020 staffing problems. While this Arbitrator is aware of the challenges facing the letter carriers working beyond their 12/60 limitations, she is also cognizant of Management's challenges in ensuring delivery of the mail and continued operations of the Service. In difficult times, this dance becomes a difficult one, balancing employee contractual and human rights against management's rights, like dancers' pirouettes. This case must balance the settlement agreement and the violation and the harm against the remedy.

There are two main considerations when approaching remedies in an arbitration. First, does the arbitrator have the power to award a specific remedy. Second, if the arbitrator has the power to do so, is the remedy warranted in this case. *Elkouri & Elkouri, 6th Ed.*, 18.1, page 1188.

The Union relies on several arbitration decisions to support their request for monetary damages beyond the 50% penalty for violation of 8.5.G. They rely on Arbitrator August (C16N-4C-C 18352211, October 18, 2019). However, this case was not based on an underlying violation of 8.5.G, and thus the issue of exclusive remedy was not addressed. They site Arbitrator Mittenthal (H7C-NA-C 36, H7C-NA-C 132, H7C-NA-C 28, January 29, 1994) which does not address the issue of 8.5.G or the exclusive remedy. As these decisions were based on failure to comply with settlement agreements that were not married to a violation of 8.5.G violation, they are not applicable to our case.

Likewise, the Union refers to this Arbitrator's decision (B19N-4B-C 23018242, May 14, 2023). This case arose from an overtime violation, however, not a 12/60 limit violation. The May 14th, 2023, case arose from a violation of 8.5.C, which does not have a negotiated exclusive remedy, and is therefore distinct from the present case which arises out of violation of 8.5.G.

The parties have negotiated the remedy for 8.5.G violations, and that negotiated remedy is an exclusive remedy. M-00859; Arbitrator Snow (A90N-4A-C 94042668, November 30, 1998). The underlying 8.5.G violation is married to the violation of 15.3.A in the present case. Absent a showing of culpable intent, rising to the level of "outrageous" or "malicious" conduct, additional remedy cannot be ordered. Where punitive or escalated damages are to be ordered, they must be crafted such that they are not punishment, but rather corrective in nature. *Baltimore Regional Joint Board v. Webster Clothes, Inc.*, 596 F.2d 95, 100 BNA LRRM 3225, 85 CCH LC Para. 11227 (1979, CA4 Md).

Several arbitrators for the NALC/ USPS have held that punitive damages, including monetary damages couched as corrective or make whole, are not supported by the contract. *See* Arbitrator Stephen H. Cook (K16N-4K-C 18483761) (12/26/2019) wherein he agreed with Arbitrator David A. Stanton (K16N-4K-C 18131319) interpreting the contract does not provide for such a remedy. He stated "I believe that if the parties at the National level intended for the type of damages as requested to be awarded in this situation as appropriate, they would specifically negotiate that language…" Page 37.

However, most recently, Arbitrator Roberts (C16-N-4C-C 19079250) August 30, 2019, awarded punitive damages payable both to the NALC Carrier Grievants and to the Union. The Decision was appealed to the US District Court for the District of Columbia which upheld his decision on July 26, 2021. United States Postal Service v. National Association of Letter Carriers, AFL-CIO, US District Court Case No. 19-3685 (July 26, 2021). Honorable Judge Tanya S. Chutkan first addressed whether the USPS was shielded from punitive damages by the doctrine of sovereign immunity, and second the issue of whether Arbitrator Roberts exceeded his authority by awarding a remedy that was not expressly defined by the CBA (Collective Bargaining Agreement or NA as referred to herein).

Judge Chutkan examined the authority of the Arbitrator to award a remedy not specifically authorized by the National Agreement (NA). She reviewed both Arbitration Awards[1] and Case Law.[2] Her ruling on the authority of the arbitrator under the USPS-NALC National Agreement and applying it to Arbitrator Roberts' Decision considered the Supreme Court and DC Circuit opinions which have held that arbitrators may look beyond the explicit text of the agreement in fashioning an appropriate remedy. The NA being silent on remedy provides that authority to so craft one that fits the circumstances. *Id* at 12. Thus, the remedy requested is within the authority of this Arbitrator to consider.

Arbitrators have awarded escalated remedies for continued and repeated violations of settlement agreements and arbitration awards. Arbitrator Mittenthal, (H4N-NA-C-21, 6/26/1986, page 9) contemplates a grant of a monetary remedy:

> [A monetary remedy] for a violation of this commitment would penalize the Postal Service for exercising the discretion it still appears to possess under Section 5C2d. That would be patently unfair result. Instead, the violation of the 'letter carrier paragraph.' Should the postal facility in question ***thereafter fail to comply with such and order, a money remedy might well be appropriate***.

[1] Judge Chutkan cited cases supporting punitive damages by an arbitrator: *Int'l Association of Machinists & Aerospace Workers, AFL-CIO v. Northwest Airlines*, 858 F.2d 427 (8th Cir.) (An award for punitive damages was appropriate without express language because the industry practice was to award punitive damages); *Goss Golden West Sheet Metal, Inc. v. Sheet Metal Workers Int'l Union, Local 104,* 933 F.2d 749, 746 (9th Cir.) (The language of the collective bargaining agreement stated that the "arbitrator may grant any remedy or relief which is just and equitable and within the terms of the agreement of the parties," language which is slightly broader than the NA in this case).

[2] Fourth Circuit case reviewed which held that "absent an express provision in the collective bargaining agreement … an arbitrator [may not] impose a punitive award or punitive damages." *Id,* at 11-12, *citing, Island Creek Coal Co. v. District 28, United Mine Workers of America,* 29 F.3d 126, 129 (4th Cir.).

Id (emphasis added).

Arbitrator Roberts, C16N-4C-C 19079250, 8/30/2019, considered the remedy for violation of a cease and desist order, stating:

> In fact, the Employer even mentioned in their oping statement that "the Union has already been issued and been awarded two cease and desists in the file in the grievance we're hearing today." Simply ignoring such an order is clearly willful and malicious and clearly represents bad faith bargaining.

Id., at page 19.

Punitive damages are only appropriate in situations where the conduct of the party is so egregious as to be shocking and abhorrent. In looking at the facts, there does not seem to be such conduct here. An Enhanced Remedy, likewise, applies where there has been a clear agreement for certain conduct, and on more than one occasion, the party has not complied with either agreement or order. This likewise has not occurred. The request for punitive or escalated damages is denied.

The Step B Decisions do not include the term of art "cease and desist" with known and understood consequences. Rather, the parties negotiated for the language used. It means something more than complying with 8.5.G, but something less than a cease and desist. There is no evidence presented by either side to show what consequences might have been anticipated by the parties by using the "refrain from" language.

Never-the-less, given the evidence presented that 8.5.G violations are repeated both before and after the Step B Settlements of April 2023, Management is ordered to cease and desist from violating Article 18.5.G.

AWARD

The Grievance is sustained. Management violated Article 15.3.A when it violated 8.5.G. However, the violation does not rise to the level of culpable intent such as warranting damages beyond the exclusive remedy of 50% penalty. The parties did agree to language "abide by" and "refrain from," and Management violated the Step Be Decisions. Management is hereby ordered to cease and desist from violating 8.5.G.