C-32635

REGIONAL ARBITRATION AWARD

In the Matter of the Arbitration Between the	) (	Class Action
	)	P.O.: Middletown, OH
United States Postal Service	( )	USPS#: C11N-4C-C 14164991
And	( ) (	DRT#: 11-3661380
National Association of Letter Carriers, AFL-CIO	) ( )	Local Case#: 140420779

BEFORE: Arbitrator Kathryn Durham

APPEARANCES:
For the USPS: Robert C. Belcher, LRS
For the NALC: Ted N. Thompson, Local Business Agent

Place of Hearing: Middletown, OH
Date of Hearing: August 24, 2016
Briefs Received: September 2, 2016
Date of Award: October 7, 2016
PANEL: Regular, Ohio Valley District, Eastern Area

AWARD SUMMARY

Grievance sustained. Based upon the stipulated violations of Article 17, 19and 31 of the National Agreement and the M-39 Handbook, the Union established that a monetary remedy is appropriate. Jurisdiction retained for 120 days to resolve disputes over the award.

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I. ISSUES

(1) Did Management violate the Article 19 of the National Agreement and Step 4 (M-10661) COR decision dealing with route count inspections and adjustments when they unilaterally conducted a full route count and inspection in April of 2014 in the Middletown Post Office and when they made adjustments based on the data from that count and inspection? If so, what is the proper remedy?

(2) Did Management violate Articles 17 and 31 of the National Agreement when they failed to provide the Union with requested documentation necessary to process this grievance? If so, what is the appropriate remedy?

II. BACKGROUND/POSITIONS OF THE PARTIES

In or about April 2014, the Postal Service conducted a formal route adjustment at the Middletown, OH Post Office, which was implemented on May 31, 2014. The Union filed the instant grievance on April 14, 2014, alleging that Management had failed to follow the rules and regulations guiding the conduct of route inspections and adjustments as set forth in the M-39 Handbook. Specifically, the Union complained that Management had failed to conduct a "dry run" unit review and to share the results of the unit review with the Union prior to the route inspection, and that Management distorted the results of the inspection by instructing carriers to do assists at different times, failing to account for Express deliveries, and not sorting SPRs into separate tubs. The Union also alleged that the route adjustments implemented on May 31, 2014 were improper as they did not adjust the routes to as close to 8 hours as possible.

The Union submitted two information requests to Management in relation to this grievance, one at Informal A and one at Formal A. The Union's Formal A contentions identify all of the documentation that was requested and

Management's response to each request. It is undisputed that Management failed to provide much of the information requested by the Union.

In January 13, 2015, the parties executed a settlement of this grievance, stating:

> This grievance pertains to the Route Inspection and Adjustment that took place at the Middletown Post Office in April of 2014. The Formal A parties agree to hold this grievance in abeyance pending the outcome of the evaluations and adjustments during the CDRAAP process. The Formal A parties shall re-meet on this grievance after the final adjustments are made during CDRAAP to determine if the routes were properly adjusted in April of 2014.

The City Delivery Route Alternative Adjustment process ("CDRAAP") at the Middletown Post Office was implemented on October 17, 2015. The results of the CDRAAP showed that seventeen city routes and one vacant city route had been adjusted beyond 8 hours and 15 minutes as a result of the April 2014 formal route adjustment. Overall, the CDRAAP adjustments added just short of 14 hours.

The Union advised at the beginning of the hearing that it projected 3-4 days to cover the violations he intended to demonstrate. In order to prevent an extended hearing, because it knew there were indeed violations, and because the remedy arguments were of major significance, Management ultimately conceded or stipulated to the following violations:

1. The route reviews after the initial 2014 inspections were not completed, which was a violation of the Route Inspection process;
2. After the 2014 inspection and adjustment, 17 city routes and 1 vacant city route were not adjusted to as close to 8 hours and 15 minutes as possible, as determined through the CDRAAP process.
3. The relevant period is May 31, 2014 through October 17, 2015.

Union Argument

- The case file clearly demonstrates that Management violated Article 19 of the National Agreement via Chapter 2 of the M-39 Handbook when they unilaterally failed to adjust routes to as near as eight hours as possible, and when they failed to provide relief when the routes were found to be overburdened.

- Because of this violation the carriers had overburdened routes for an approximately 18 months and suffered many hardships as a result.

- Management's failure to conduct a review was deliberate, as special route inspections were requested by at least six carriers.

- Two arbitrators have previously held (2004 & 2005) that routes were out of adjustment in the Middletown Post Office due to Management's failure to conduct proper reviews and inspections. Management failed to learn from past violations. Accordingly, a remedy for all of the Middletown carriers is necessary.

- Arbitrators Oliver and Tobin set the precedent for remedy for route adjustments in the Middletown installation. Both decisions awarded extra pay to every carrier, including PTFs, who worked in excess of 8 hours. This case warrants a higher remedy because Management did not cease and desist the violations of unilateral route count and inspections in this office. Anything less than the precedent set by these arbitrations would erode the good faith and confidence of the employees in this office in the Union's ability to effectively represent them. Remedies for repeated violations should increase or, at a minimum, maintain the same precedent previously set.

- The appropriate remedy for the route adjustment violations is one hour of overtime pay to each carrier and CCA at the Middletown Post Office for each day he or she worked more than 8 hours during the remedy period.

- Management's argument that the remedy should be limited to carriers on the Overtime Desired List ("OTDL") is not supported by any of the cases cited by either party. Further, Management was unable to provide documentation to show which carriers were and were not on the OTDL at all times during the relevant remedy period.

- The Postal Service failed to provide important information within its control which was requested and rerequested by the Union during the grievance process. The information not provided significantly impacted the Union's ability to document contractual violations for all carriers at the Middletown Post Office prior to the execution of the January 2015 settlement holding this grievance in abeyance pending the outcome of the CDRAAP. Had Management provided the information, the Union could have proved the stipulated violations, and perhaps additional violations, without waiting for the CDRAAP process to be completed. $100 to each carrier who worked at the Middletown Post Office during the remedy period is called for.

Management Argument

- The Union's remedy should be limited to the remedy it requested at Formal A – additional pay for each carrier and CCA who was *forced to work overtime* during the relevant remedy period. Employees who were on the OTDL should not be included in this remedy because they wanted to work overtime and thus were not forced to do so. Carriers on the OTDL actually benefitted from the improper adjustments.

- The Union failed to provide documentation showing the names of carriers who were not on the OTDL and forced to work overtime.

- The remedy should be limited to days when carriers not on the OTDL worked in excess of 8 hours and 15 minutes, as that is the maximum target for route adjustment.

- Carriers whose routes were found to be 8 hours and 15 minutes or less by the CDRAAP should not be included in the award because their routes were properly adjusted.

- CCAs should not be included in the award because, according to the National Agreement, they are a supplemental work force and can be required to work up to 11.5 hours per day, 7 days per week if necessary.

- The remedies provided by Arbitrators Oliver and Tobin were premised upon that Management had failed to honor prior grievance settlements as well as a failure to properly implement a formal route adjustment.

- Other awards cited by the Union similarly based the remedy upon a finding that Management had violated settlement agreements and prior arbitration awards. This case deals strictly with the improper adjustment and does not involve a failure to comply with grievance settlements and/or arbitration awards. Thus, the Oliver, Tobin and Rosen awards should be given very little if any weight.

- If the Arbitrator decides that a monetary award is appropriate, it should be limited to ½ hour of straight time pay to employees that worked over 8 hours and 15 minutes, excluding employees on the OTDL and CCAs.

III. OPINION

Information Denial:

The case file clearly details what information was requested, when it was requested, who requested it, and when the requests were received by Management. The Postal Service has not argued that it actually provided the requested information to the Union. Management failed to give a satisfactory

explanation for not providing the requested information. The information was indeed relevant and important to the Union and the bargaining unit for a timely resolution of the significant overburdened route situation in Middletown. A monetary remedy as requested to each carrier is appropriate.

Out-of-Adjustment Route Remedies:

The parties stipulated that, pursuant to the results of the CDRAAP that was implemented at the Middletown Post Office in October 2015, 17 regular city routes and one vacant route were out of adjustment because they exceeded 8 hours and 15 minutes. The Postal Service agrees that the Union has also established that the results of the CDRAAP show that the formal review and route inspection performed in April 2014 was done improperly and not in accordance with Chapter 2 of the M-39 Handbook.

Remedy for Every Carrier, Even if Route in Adjustment:

At arbitration, the Union requests a monetary remedy for every carrier who worked at the Middletown Post Office during the remedy period, including CCAs, based upon the assertion that the overburdened routes affected all carriers in the office, including those who were not assigned to overburdened routes and who were on the OTDL.

The Union claims that an enhanced remedy is appropriate in light of two prior arbitration awards out of the Middletown installation, on the basis that Management "failed to learn" from those earlier awards. In C98N-4C-C 01123703 (2004), Arbitrator Daniel Oliver held that Management violated the National Agreement and a prior grievance settlement when it failed to adjust five routes that the parties had agreed were out of adjustment. The remedy he awarded was ½ hour of overtime pay to each carrier who worked overtime carrying one of the five routes at issue, including PTFs, during the relevant remedy period. **[1/2 HOUR OVERTIME TO CARRIERS ON 5 AFFECTED ROUTES ONLY WHO WORKED OVERTIME]**

Arbitrator Timothy Tobin decided another route adjustment grievance in this Middletown Post Office in 2005 (C98N-4C-C 01273358). There, the arbitrator held that Management committed multiple, intentional violations of the M-39 with respect to route inspections and adjustments, including distorting the inspections by curtailing some of the mail on the day when the inspections were performed. He explained that his goal in fashioning a remedy was, in part, to "get Management's attention and to ensure that a similar breach will not occur again in the Middletown area." Arbitrator Tobin awarded ½ hour of overtime pay to all carriers at the Middletown Post Office, including PTFs, for each day they worked at that office during the remedy period – excluding those carriers who had already been compensated via the Oliver award. **[1/2 HOUR OT TO ALL CARRIERS AT THE STATION FOR EACH DAY WORKED – NO REQUIREMENT THAT THEY ACTUALLY WORKED OVERTIME]**

The Union urges that any remedy that is not equal to those awarded by Arbitrators Oliver and Tobin would be demoralizing and would set a bad precedent, in light of the fact that Management at the Middletown office has not learned its lesson from these prior awards. This is not clearly the case because the violations seem more egregious in 2004 and 2005 because management was knowingly violating recent agreements. Additionally, it has been 11 years since those cases and Management has turned over. There is not a direct link between those cases and the facts presented here. Therefore, a remedy is not provided to carriers whose routes were adjusted appropriately.

<u>History of Cited Remedies in Comparator Regional Decisions</u>:

The Union relies upon awards by Arbitrators Mark Rosen and Jonathan Klein regarding the same violations at issue here. In C94N-4N-C 99143552 (2003), Arbitrator Rosen awarded one hour of overtime to all carriers and PTFs in the station for each day they performed overtime during the remedy period. As a basis for this remedy, he cited Management's history of refusals to abide by settlement agreements and arbitration awards and its "intentional disregard" of its

obligations under grievance settlements, including an earlier settlement of the same grievance in which it agreed to pay carriers $10 per day and then refused to do so. **[1 HOUR OT TO EVERY CARRIER IN THE STATION FOR EACH DAY THEY PERFORMED OT]**

In C06N-4C-C 12230908 (2015), Arbitrator Jonathan Klein awarded one hour of penalty overtime for all carriers at the station for each day worked during the remedy period – regardless of whether the carrier worked overtime. He explained his rationale, stating, "The remedy reflects the persistent violation by local management of the parties' own settlement agreements, Step B decisions and the National Agreement." **[1 HOUR PENALTY OT FOR ALL CARRIERS IN STATION FOR EACH DAY WORKED – NO REQUIREMENT THAT THEY ACTUALLY WORKED OT]**

However, in two other awards, Arbitrator Klein issued a much more limited remedy for route adjustment violations. In C06N-4C-C 12240382 (2014) and C11N-4C-C 14270750 (2016), Arbitrator Klein fashioned remedies of ½ hour of straight time pay for time worked over 8 hours and 15 minutes for each carrier at the station who averaged over 8 hours and 15 minutes on regularly scheduled days during the remedy period. He did not explain his rationale for either of these awards. **[1/2 STRAIGHT TIME PAY FOR TIME WORKED OVER 8:15 FOR EACH CARRIER IN STATION WHO AVERAGED OVER 8:15 DURING PERIOD]**

Management cites awards by Arbitrators Sherrie Rose Talmadge and Tim Brown. In C11N-4C-C 13210357 (2015), Arbitrator Talmadge awarded a remedy based on Arbitrator Klein's 2014 decision - ½ of straight time pay for time worked over 8 hours and 15 minutes for each carrier at the station who averaged over 8 hours and 15 minutes on regularly scheduled days during the remedy period. She mentioned that the purpose of her award was to compensate carriers for personal time they lost when they were required to work overtime, but did not adjust her award to exclude carriers on the OTDL.

In C11N-4C-C 14152932, et seq., Arbitrator Brown awarded a similar remedy as Arbitrators Talmadge and (the 2014 and 2016 of) Klein. He specifically included utility carriers in his award and he carved out the months of June, July, August and December from the remedy period because he said the summer months and December holiday are normally excluded from route evaluations.

The Union would like a remedy greater than those awarded by most of the arbitrators cited by either party, perhaps in line with Arbitrators Rosen and Klein (2015), who increased the remedy due to what they seemed to perceive were egregious violations. The Union urges that this case is similar to those cases because Management continued to have routes out of adjustment and to perform inadequate reviews and inspections even in light of the Oliver and Tobin awards for the same violations in this facility.

Management, on the other hand, would like a remedy that is much more limited than any of the awards it cited. It asks the undersigned to exempt carriers on the OTDL from the remedy – which was not done in any of the awards cited above. It further requests that CCAs be excluded, that only carriers who carried one of the routes found to be overburdened by the 2015 CDRAAP be included, and that the threshold for eligibility for a remedy be work over 8 hours and 15 minutes per day, not simply carriers who worked overtime. Management did not ask for the summer months and December to be carved out of the remedy, as was done in one of the cited awards with a relatively longer remedy period.

A monetary remedy is appropriate in this case. Management did not cite any precedent for denying a monetary remedy in circumstances such as this. In such cases the station is perpetually using overtime just to keep up with regular work, and carriers are pressured to finish their work in less time than actually afforded to their routes so that they can assist with the excess. It is understandably a particular burden on carriers assigned to the overburdened routes where Management may attempt to hold them accountable to a lower time average than the adjustments ultimately prove to be necessary.

CDRAAP found 18 overburdened routes in a station where there are approximately 40 carriers – meaning that approximately half of the routes were overburdened. There can be no doubt that this discrepancy affected all carriers in the station to some degree. However, the undersigned notes that three routes in particular were overburdened by more than one hour – one route was 9:27, another was 9:45 and a third (which was assigned to a carrier not on the OTDL) was 10:30. A fourth was almost one hour over, at 8:57.

Management argues that carriers on the OTDL were not harmed by these violations because they wanted to work overtime and the overburdened routes provided them more overtime to work. The undersigned is somewhat sympathetic to this argument. However, it is also true that the distinction between carriers on and not on the OTDL is not one that has been recognized by any of the arbitrators cited by the parties in this case. Further, the documentation Management provided regarding who was signed up for overtime was incomplete for the total remedy period, and the Union correctly pointed out that carriers can take themselves off the OTDL at any time. Based on the evidence in our record, and the negative inference due to information not provided to the Union, and the fact that it is improbable that the OTDL for the entire remedy period can be recreated, excluding carriers who were on the OTDL from the remedy would be inconsistent with other arbitrators' awards and probably not feasible. However, the Undersigned is persuaded that those who were usually not on the ODL suffered additional harm.

Another limitation urged by Management is having the remedy triggered by work over 8 hours and 15 minutes, not simply 8 hours. The reason for this is because the routes at issue would have been deemed properly adjusted if they had been evaluated at 8:15 or less. Arbitrators have taken different approaches, but have not explained why they chose one approach or the other. The most recent decisions in this area have used 8:15 as the standard. The undersigned adopts the 8 hour 15 minute as the threshold standard for remedy.

Finally, Management insists that CCAs should not be included in the remedy because they are a supplemental workforce, contractually available to work up to 11 ½ hours per day – they cannot opt in or out of overtime. However, many of the cited awards specifically included utility carriers or PTFs. None of the awards specifically excluded CCAs or PTFs. CCAs do not have a choice regarding whether to work overtime, but they are more likely to be pushed to the extreme when a station is running half of its routes out of adjustment. Like the regular carriers, CCAs would be pressured to finish their assigned work in less than the allotted time in order to assist with the excess work. CCAs are on a career track and, while the contract allows working them 11 ½ hours per day, it is only when such duration is "necessary". Certainly, management should not be allowed to overburden these workers when, but for its own flagrant violations of the National Agreement, such lengthy work days would not be necessary. Therefore, CCAs are to be included in the remedy.

In addition to the arguments put forward by Management, there are compelling reasons to believe that there should be some additional remedy for those carriers whose routes were extremely overburdened, such as Carrier Remillard whose route (#44041) was evaluated at 10:30, and who was not on the OTDL.

IV. AWARD

Grievance sustained. For the flagrant refusal to provide germane information pursuant to clearly articulated requests, each carrier in the Station shall be paid an amount that will yield $100 after taxes (assuming the payment is considered taxable wages).

The remedies to carriers working overburdened routes for the route adjustment violations shall be as follows:

1. Payment of one-half hour at the overtime rate to each carrier at the Middletown Post Office not usually on the ODL for work on his or her

regularly scheduled day in excess of 8 hours 15 minutes between May 31, 2014 and October 17, 2015.

2. Payment of one-half hour at the straight time rate to each carrier usually on the ODL for work on his regularly scheduled day in excess of 9 hours during the relevant time period.

Remedies 1 and 2 are mutually exclusive. CCAs are included in the remedies.

Jurisdiction retained for 120 days to resolve any disputes over the Opinion and Award.

Kathryn Durham
Arbitrator,
Kathryn Durham, J.D.,P.C.