C-35382

IN THE MATTER OF REGULAR PANEL ARBITRATION
BETWEEN

UNITED STATES POSTAL SERVICE
(Employer)

-and-

NATIONAL ASSOCIATION OF LETTER CARRIERS, AFL-CIO
(Union)

Grievant: **Joey Bardney**
Post Office: **Chicago**
Henry McGee Station

USPS No: J16N-4J-C 21087362
NALC No: 2021-0240
DRT No: 03-531794

_____/

BEFORE: **Doyle O'Connor**

APPEARANCES:

For the Service: **Francisco Marte**
For the Union: **Carl Oefelein**, assisted by Tony Hutson

Place of Hearing: Chicago, via video
Date of Hearing: September 16, 2021
Record Closed: October 1, 2021
Date of Award: October 16, 2021

Relevant Provisions: Article 3, 5, 19 (via FECA, ELM 540 & EL-505), 21 and 31

Contract Year: 2019-2023

Type of Grievance: Contract breach & violation of prior settlements

Award Summary: The grievance is granted. Local management is in violation of the Contract regarding the payment of COP and holding of Step A meetings and replying to RFIs and of a prior binding precedent-setting Settlement Agreement entered into for the purpose of attempting to secure basic compliance from the local managers. The relief sought is granted.

_____
Doyle O'Connor
Arbitrator

Issue

In the Step B Decision, the Union offered the following statement of the issues, in which the Service concurred:

> Did Management violate Article 3, 5, 19 (via FECA, ELM 540 & EL-505), 21 and 31 of the National Agreement when they delayed the processing of Form CA1, failed to properly compensate the Grievant with COP following an injury on December 2, 2020, failed to comply with the settlement for Grievance # 2020-0815 by failing to provide requested information and failed to meet at the Formal Step A and if so, what is the remedy?

The DRT was unable to resolve the underlying dispute and the matter advanced to Arbitration.[1]

Contentions

The Union contends: The Union asserts that this case is one a series of cases where local management at the Henry McGee station violated the National Agreement substantively, and then simply ignored the Union's filing of a grievance and the filing of a Request For Information (RFI), compounding its violations by then never scheduling a Step A conference on the underlying grievance.

On the underlying merits, the Union asserts that it is undisputed that the Grievant was injured on the job and that the Employer initially failed to properly tender Continuation of Pay (COP) from the first day off work. Related to that failure to pay, the Union asserts the Employer failed in its duty to timely transmit the necessary documentation, which apparently resulted in the failure to initially pay the claim.

It is factually undisputed that the Union filed a relevant RFI, to which the Employer never responded, even up through the Arbitration hearing. It is further undisputed that the Employer failed in its Contractual obligation to schedule a Step A conference. By both of the latter omissions, it is asserted that the Employer improperly deprived the Union of an opportunity to secure information

[1] The September 16 docket had three cases. The Bardney case was heard and is decided herein; The advocates started

necessary to investigate and process the claims and denied the Union and the Grievant the opportunity to timely and expeditiously settle the underlying claim. The Union seeks financial relief as to the latter two claims, premised on the terms of a prior, and binding, Formal Step A Settlement Agreement arising from the same workplace.

The Postal Service contends: The USPS acknowledges that it failed to ever schedule a Step A conference at which the factual claims of the parties should have been developed, and as a result of that failure, under applicable and mandatory Contract language, the Employer is barred from introducing new evidence and from contesting the facts as alleged. The Service acknowledges that the Henry McGee management never responded to the RFI, and no defense of that failure is available or offered. The Employer suggests that the initial delay in payment of the COP was not improper and may have been because the employee failed to transmit certain forms or had in fact returned to work.

Relevant Rules and Contract Language

The parties variously rely on sections of the National Agreement, the ELM, and binding contract interpretations from the JCAM, as well as a prior Settlement Agreement, as in turn interpreted by several prior Arbitration Awards. Among the salient citations were:

ELM 541.2.d:

> Continuation of pay (COP) — continuation of the employee's regular pay for a period of 45 calendar days. The first COP day is the first day disability begins following the date of injury (except where the injury occurs before the beginning of the workday or shift, in which case the date of injury is charged to COP). COP can be received only if the disability begins within 45 days of the date of the injury or within 45 days from the date the employee first returns to work following the initial period of disability.

ELM 541.11:

> Immediate Supervisor Responsibility. When a notice of traumatic injury or occupational disease is filed, the immediate supervisor is responsible for doing the following: a. Immediately ensuring that appropriate medical care is provided. b. Providing the employee a Form CA-1 or a Form CA-2. c. Completing the receipt attached to Form CA-1 or CA-2 and giving the receipt to the employee or the employee's representative. d. Investigating all reported job-related injuries and/or illnesses. e. Immediately notifying the control office or control point of an injury,

disease, or illness. f. Prompt completion and forwarding of Form CA-1 or CA-2 to the control office or control point on the same day it is received from the employ.

ELM 544.212:

Time Limit. The control office or control point submits to the appropriate OWCP district office within 10 working days after it is received from the employee: a. Completed Form CA-1 or Form CA-2.

National Agreement Article 15.2:

(c) The installation head or designee will meet with the steward or a Formal Step A (c) Union representative as expeditiously as possible, but no later than seven (7) days following receipt of the Joint Step A Grievance Form unless the parties agree upon a later date. In all grievances at Formal Step A, the grievant shall be represented for all purposes by a steward or a Union representative who shall have authority to resolve the grievance as a result of discussions or compromise in this Step. The installation head or designee also shall have authority to resolve the grievance in whole or in part.

(d) At the meeting the Union representative shall make a full and Formal Step A (d) detailed statement of facts relied upon, contractual provisions involved, and remedy sought. The Union representative may also furnish written statements from witnesses or other individuals. The Employer representative shall also make a full and detailed statement of facts and contractual provisions relied upon. The parties' representatives shall cooperate fully in the effort to develop all necessary facts, including the exchange of copies of all relevant papers or documents in accordance with Articles 17 and 31.

The parties' representatives may mutually agree to jointly interview witnesses where desirable to assure full development of all facts and contentions. In addition, in cases involving discharge either party shall have the right to present no more than two witnesses. Such right shall not preclude the parties from jointly agreeing to interview additional witnesses as provided above.

National Agreement Article 31.3

Information. The Employer will make available for inspection by the Union all relevant information necessary for collective bargaining or the enforcement, administration or interpretation of this Agreement, including information necessary to determine whether to file or to continue the processing of a grievance under this Agreement. Upon the request of the Union, the Employer will furnish such information, provided, however, that the Employer may require the Union to reimburse the USPS for any costs reasonably incurred in obtaining the information. Requests for information relating to purely local matters should be submitted by the local Union representative to the installation head or designee. All other requests for information shall be directed by the National President of the Union to the Vice President, Labor Relations. Nothing herein shall waive any rights the Union may have to obtain information under the National Labor Relations Act, as amended.

Henry McGee Station, Formal A Agreement 2020-0815:

To further encourage contractual compliance, management agrees to award grievant(s) a lump sum of $250.00 each time the steward / union is not provided information within a reasonable time period of 72 hours of the request at Henry McGee Station. An additional $25.00 will be awarded to the grievant(s) for each day requested information is not provided to the Union following the 72 hours.

National Agreement Article 15.2.(e):

Any resolution of a grievance in Formal Step A shall be in writing or shall be noted on the Joint Step A Grievance Form, but shall not be a precedent for any purpose, unless the parties specifically so agree or develop an agreement to dispose of future similar or related problems.

Facts

Of procedural necessity, the facts are essentially not subject to challenge, premised on the local management's failure, or refusal, to carry out its duties in scheduling a Step A meeting. There is no allegation that the failure to meet at Step A was caused by the Union's unavailability or refusal to meet. Because there was no Formal Step A meeting, and consequently no written Employer response or contentions, and because of the Employer's unexplained and unexcused failure to respond to several RFIs, the Arbitrator is left with the facts as initially alleged by the Union, and as supported by testimony at hearing.

Grievant Bardney suffered an on the job injury in December 2020 while assigned to the Henry McGee Station. Grievant immediately filed a form CA-1 and requested COP payments during his period of disability. Local management delayed the processing of the CA-1 until December 15, thereby delaying the commencement of COP payments. The ELM 544.212 requires that management process and forward to the OWCP a form CA-1 within *"10 working days"* of the form being received by management from the employee.[2]

[2] The Employer called HR Specialist Jasmine McDowef as a proposed 'expert witness' to testify regarding the normal functioning of such disability claims processing. Her testimony was allowed, over the Union's objection that it constituted 'new evidence'. The admissibility was premised on the witness being offered as an 'expert' and not as a fact witness regarding the present dispute, which would have been contrary to the parties' mutual interpretation of their Contractual obligation to not present 'new evidence' at arbitration. A portion of McDowef's testimony must be addressed and rejected. According to this HR Specialist, the '10 working day' mandate does not begin to run from when the employee submits the form to their supervisor, but rather from whenever the supervisor gets around to forwarding the form up the chain of command. The HR Specialist's assertion on this narrow issue must be rejected as incorrect, and

A timely grievance was filed, accompanied or followed by several Requests For Information (RFIs) that sought facially relevant information. The Employer did not respond to the grievance or schedule an Informal or Formal Step A meeting. As a consequence, the Employer never provided the Union with 'Contentions' contradicting the Union grievance assertions. The Employer never objected to, or responded to, the RFIs. The Employer never challenged the legitimacy of Bardney's injury report, nor did the Employer deny his entitlement to COP payments. The Union provided competent testimony supporting a conclusion that the failure to respond to the RFIs did delay and complicate the efforts to resolve the dispute.

The Union presented competent testimony supporting the claim that Bardney, for a period of several days in December 2020, was categorized as on 'leave without pay' instead of in paid status under COP. Bardney's Form CA-1 was submitted to the Employer on December 4, 2020, but was not forwarded by the Employer to the Department of Labor for processing until December 15, 2020. The evidence further supports a conclusion that the COP payments actually began effective on December 12, 2020.

The Union presented competent evidence of a prior binding Step B Settlement regarding the Henry McGee Station in case # 2020-0815 that provided in relevant part:

> To further encourage contractual compliance, management agrees to award grievant(s) a lump sum of $250.00 each time the steward / union is not provided information within a reasonable time period of 72 hours of the request at Henry McGee Station. An additional $25.00 will be awarded to the grievant(s) for each day requested information is not provided to the Union following the 72 hours.

The Union further presented proofs of the subsequent voluntary compliance by the parties with the above settlement terms in some Step B disputes and the Awards by Arbitrators enforcing the settlement terms in other instances.

---

contrary to the plain language of the ELM, as it would allow management to readily erase its clear and mandatory obligation to timely process claims.

Discussion

A. Role of the Arbitrator in Deciding a Case

As the advocates are of course aware, although individuals whose interests are affected by such decisions often are not aware, an Arbitrator is a mere creature of the Contract and is bound to apply its terms as drafted. As famously noted by Justice Douglas, an arbitrator "*does not sit to dispense his own brand of industrial justice*", or typically to assess the wisdom of actions that were taken, rather the faithful arbitrator applies the rules created by the Contract between the parties. See, *Steelworkers* v *Enterprise Wheel*, 363 US 593 (1960). The task in issuing a Decision is to examine the facts and determine if the disputed action was proper under the applicable language of the CBA, or other binding agreements.

It is the binding agreements between the parties, and not the Arbitrator, which creates the respective rights and obligations. As will be seen below, that understanding is central to the resolution of this dispute.

Consistent with above, the parties should understand that nothing in this Decision and Award is intended to substitute for the Employer's legitimate right and need to lawfully direct and evaluate the conduct of its employees, and address infractions, in accordance with the Contract, and applicable statutes, regulations, and caselaw.

B. Merits of the case

The undisputed facts establish that Grievant timely filed an injury report and sought COP pay to which he was entitled. The Employer improperly, and without explanation, failed to timely advance the paperwork to the DOL for processing. Grievant's receipt of COP to which he was entitled was delayed by Management's inaction and despite a mandatory duty to act. The Union presented competent evidence to establish that Bardney was listed as Sick Without Pay (SWOP) for sixteen (16) hours and as Leave Without Pay (LWOP) for forty (40) hours. Management has never challenged Bardney's entitlement to COP payments nor explained the delay in processing. Violations have therefore been established for the delay in processing and for the failure to pay COP.

The undisputed facts establish that the Union filed several RFIs requesting information under Article 31 that, on the face of it, appeared relevant. Management at Henry McGee Station never objected to the scope of the RFIs or contended that the information did not exist or could not be produced. Management at Henry McGee Station never responded to the RFIs. This is not a case where it is alleged that the information was supplied but late, nor is it a circumstance where some information was provided but the Union asserts that it was incomplete. Rather there has been a complete failure, or refusal, to provide any information. A violation of Article 31 has therefore been established.

The undisputed facts establish that Management at the Henry McGee Statin failed to meet at either the Informal or Formal Step A despite having an undisputed mandatory obligation under Article 15 to meet on grievances. Management has the obligation to schedule the Step A conference and there is no allegation of a failure or refusal by the Union to meet or to cooperate in scheduling a meeting. Because of the failure to meet, no management contentions appear in the file, which limited the facts properly available for review on appeal to Arbitration. A violation of Article 15 has therefore been established, which allowed the Union to advance the grievance to Step B, which is one remedy permitted under Article 15. The Union seeks additional remedies for the Article 15 violation, asserting that the failure to meet is an established pattern at Henry McGee and should be remedied in keeping with the earlier McGee Settlement Agreement, which request will be discussed below in the Remedies section of this Award.

C. Remedies

The multiple remedies requested by the Union appear largely reasonable and tailored to remedy in a practical way the harms caused by the failure, or refusal, of local Management at the Henry McGee Station to comply with the clear mandates of the CBA, and the ELM, and to comply with prior binding settlement agreements arising from the McGee Station.

The local management at Henry McGee must comply with the CBA, and ELM, just as managers at other facilities are obliged to comply. It appears that

upper management has recognized, based on facts not before this Arbitrator, that a substantive and ongoing problem with compliance exists at the McGee Station. The resulting Formal Step A Settlement Agreement is extraordinary in agreeing to, and mandating the imposition of, financial penalties, against the Service itself, including rising daily penalties, for the failure in particular cases of local management to comply with their clear duties. It is obvious that a non-supervisory employee whose conduct similarly and repeatedly resulted in such financial losses to the Service of comparable scale would additionally face severe disciplinary consequences, including facing possible dismissal.

The Employer in this instance makes a cogent and comprehensive argument in support of the general proposition that Labor Arbitrators do not ordinarily award 'punitive' or 'exemplary' damages. Here, the only arguably 'punitive' or 'exemplary' damages sought by the Union is the payment of a $500 penalty for the delay in processing and forwarding to the DOL of the CA-1 claim. While the Union asserts that the ELM "*provides for penalties for delay"* that assertion was not further fleshed out and, on this record, there does not seem to be a specific basis for the $500 sum requested, arising from a brief delay in processing, and therefore that sum will not be awarded.

The real, and understandable, focus of the Employer's concern regarding arguably *'punitive'* relief is the requested award of $25 per day for the RFI related violation. The Employer is correct that an Arbitrator, absent perhaps a very extensive record of non-compliance, which is not directly presented in this case, would likely not create such a remedy. Here, the argument is misplaced for two separate substantive reasons.

First, the financial remedy is not *'punitive'* in nature, even though it clearly exceeds traditional '*compensatory'* grievance awards. Rather than classically *'punitive',* the sums here are instead '*coercive*'. The distinction is essentially similar to the difference in criminal vs civil contempt of a court. Criminal contempt typically yields a sentence or penalty of a specific duration or amount, to punish improper behavior where that behavior has been completed. Civil contempt on the other hand typically involves imprisonment for an indeterminate

duration, or similarly a daily fine, with each designed to coerce compliance, that is, to stop an ongoing improper behavior. As is often said, in civil contempt the 'prisoner' has the keys to the cell in their own hand--comply and the penalty stops. Here too, the Employer had fully within its grasp the control over whether the daily penalties mounted. Simply, the Employer needed to in good faith answer the RFIs.

Second, the Arbitrator is not here in fact being asked to create or impose the $25 per day payment. The parties have agreed that $25 per day is an appropriate remedy where repeated failures of compliance at Henry McGee have delayed and complicated the grievance processing machinery. The obligation of payment of that sum was created by and mandated by express agreement of the parties regarding this particular workplace. The record establishes multiple occasions where the payment was then mandated in resolution of later grievances, either at Step B or by Arbitrators. There is no contrary evidence of a failure to enforce that Formal Step A Settlement Agreement from Case #2020-0815. On this issue, the Arbitrator serves merely as finder of fact, answering the question--Did the event occur? If yes, there is no discretion, the settlement language uses clearly mandatory phrasing that the sums "*will be awarded"*, the Arbitrator is bound to impose the remedy designed and mandated by the parties.

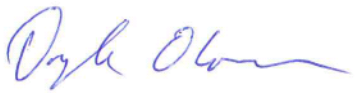
The final dispute between the parties is regarding the ongoing accrual of the daily $25 obligation for the established unwarranted failure to respond to an RFI and when or if there should be a cut-off date on accrual. The record reveals that at least in one instance, the DRT reached agreement, in Grievance # 2020-2916, that the $25 daily accrual should cease as of the date of the Step B resolution of the grievance. A different outcome occurred in the Miles grievance Arbitration DRT# 03-531067, with a Decision issued on July 19, 2021. Arbitrator Obee enforced the $25 per day sum and ordered that it continue to accrue until the date management fully complied with the RFI. In that Award Arbitrator Obee noted that "*It is obvious that Management at Henry McGee has not gotten the message, as it has a continuous pattern of non-compliance."* While it still appears that, inexplicably, *"Management at Henry McGee has not gotten the message",* this

Award will follow the accrual methodology of the referenced DRT resolution rather than that of my esteemed colleague Arbitrator Obee. This Award will direct that the $25 daily accrual cease on the date of issuance of the Award, premised on the analysis above that the payment is intended to be '*coercive'* not punitive. With full substantive relief having been granted today in this binding Award, the Union's need for the information sought in the RFI as to this Grievant ceases, as the grievance itself is now closed. There is no further point to a *'coercive'* payment now that the case is resolved on its merits.

AWARD

The grievance is granted. The Employer must comply with Articles 15, 17, and 31 of the National Agreement. Local management at the Henry McGee Station must comply, now and in the future, with binding Settlement Agreement, 2020-0815, and upper management has the obligation to take such steps as it may deem reasonable and necessary, including training or individual discipline, and as are sufficient to secure such compliance in the future and to deter the unwarranted waste of the parties' respective resources occurring because of the apparent pattern of unexplained non-compliance at the Henry McGee Station. Grievant Bardney will have sixteen (16) hours of Sick Leave without Pay converted to COP and forty (40) hours of Leave Without Pay converted to COP. Grievant Bardney is not, based on these facts, awarded the requested five-hundred dollars ($500.00) in compensation for the improper delay by management in processing the CA-1 and resulting delay in receiving COP. Grievant Bardney shall additionally be paid two-hundred and fifty dollars ($250.00) for the McGee management's improper failure to timely respond to the RFI related to his grievance and an additional twenty-five dollars ($25.00) per day, excluding the first 72-hour period, for the improper delay in providing information, as that payment was mandated, and agreed to by the Employer, in the Settlement Agreement #2020-0815. The daily $25.00 compensation shall cease to accrue as of the date of the issuance of this Award, as upon that date the obligation to provide that information became categorically moot.

Jurisdiction is retained for 120 days for the sole purpose of addressing any disputes regarding the implementation of the remedy provisions of this Award.



Doyle O'Connor, Arbitrator

Dated: October 16, 2021