

REGULAR ARBITRATION PANEL

In the Matter of the Arbitration

GRIEVANT: Class

between

POST OFFICE: Upland CA

UNITED STATES POSTAL SERVICE

USPS CASE NO: F01N-4F-C-04208743

and

NALC CASE NO: 100204-ELM432
DRT # 01-049973

NATIONAL ASSOCIATION OF
LETTER CARRIERS, AFL-CIO

BEFORE: THOMAS F. LEVAK, ARBITRATOR

APPEARANCES:

For the U.S. Postal Service: Wayne Marshall

For the Union: Manuel L. Peralta, Jr.

Place of Hearing: 333 E Arrow Highway, Upland CA

Date of Hearing: March 29, 2005

Date of Award: April 15, 2005

Relevant Contract Provision: 3, 5, 19; ELM 432.32

Contract Year: 2004

Type of Grievance: Contract

Award Summary: The grievance is denied in part and sustained in part.

Arbitrator

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NALC HEADQUARTERS

OPINION

I. THE ISSUE.

This case concerns a grievance initiated at Informal Step A on October 14, 2004, which asserted that Upland management violated ELM § 432.32 when it worked PTF's and an NTE in excess of the ELM's 12-consecutive-hour limitation. On December 14, 2004, the Step B DRT resolved the grievance in part in favor of the Union but declared an impasse on a portion of the remedy sought by it. Specifically, the DRT found that management violated the ELM and directed management to compensate the identified PTF's for an additional 50% of the base hourly straight-time rate for all hours exceeding 12 consecutive hours; however, the DRT imposed on additional remedies sought by the Union, namely: (1) additional paid compensatory time off¹ for all time worked by the affected PTF's in excess of the 12-hour limitation; and (2) additional paid compensatory time off for an OTDL Carrier who, but for management's action, would have worked .95 hours that an NTE was required to work.

The issue to be resolved by the Arbitrator is:

Are the Upland PTF's and the OTDL Carrier entitled to the additional remedy sought by the Union or to any other remedies?

II. THE FACTS.

Background.

This case concerns the Postal Service's Upland, California office. Michael Reading, was the Upland Postmaster and Alex Peralta was the Carrier supervisor. Local Union President Dennis Binder filed the grievance and handled it for the Union through its submission to Step B. The Union called Binder as its sole witness;² the Postal Service did not call any witnesses.

¹The parties stipulated that paid compensatory time off is the functional equivalent of administrative leave.

² The Union decided not to call two of the affected PTF's after the Arbitrator stated that he would take arbitral notice of the fact that requiring the PTF's to work in excess of the 12-hour limitation necessarily affected their personal lives.

Since 2000, the Upland office has lost approximately 20 Carriers due to retirement and other reasons; and although, from time to time, additional Carriers have been hired, only 12 of those 20 Carriers have been replaced.

Previous Violations of the ELM.

On June 9, 2004, Binder initiated an Informal Step A grievance which asserted that management violated National Agreement Article 8.5.G.1 when it worked a number of FTR OTDL Carriers in excess of the 12-hour limitation during the week of May 22, 2004 to May 28, 2004, and paid them for the excess hours worked at the overtime rate. In a pre-Step A settlement, Peralta agreed that the violation had occurred and further agreed to pay the affected Carriers an additional 50% of the base hourly straight-time pay rate for all hours in excess of the 12-hour limitation. He also agreed that management would cease and desist from violating the 12-hour limitation.

On June 14, 2004, Binder initiated another Informal Step A grievance which asserted that management again violated National Agreement Article 8.5.G.1 when it worked a number of FTR OTDL Carriers in excess of the 12-hour limitation during the week of May 29, 2004 to June 4, 2004. Again, in a pre-Step A settlement, Peralta conceded the violation and agreed to pay the affected Carriers an additional 50% of the base hourly straight-time pay rate for all hours in excess of the 12-hour limitation. Peralta also apparently advised Binder that management had no choice to commit the violation because it lacked the necessary personnel to assign the work to other Carriers.

On July 10, 2004, Binder initiated a third Informal Step A grievance which asserted that management again violated National Agreement Article 8.5.G.1 when it worked a number of FTR Carriers in excess of the 12-hour limitation. The grievance was not settled. On September 28, 2004, the Step B DRT resolved the grievance in favor of the Union, stating:

Management has violated Articles 8 and 19 of the National Agreement. Management is to cease and desist further violations of this nature. Management is cautioned that the limits described in Article 8 are absolute and that future violations may result in additional progressive remedies being imposed. Further, the carriers identified below will be compensated an additional premium of 50 percent of the base hourly straight time for the hours worked in excess of 12 hours.

On August 3, 2004, Binder initiated a fourth, a fifth and a sixth Informal Step A grievances covering FTR Carriers. The grievances were settled in part in pre-Informal Step A meetings, with management agreeing to compensate all affected Carriers with additional

pay at the straight-time rate. That part of the grievances concerning whether management had an additional obligation to take further action to insure compliance with the National Agreement was referred to Step A. On October 1, 2004, the three grievances were resolved by the Step B DRT in favor of the Union with a cease and desist order and with the following admonition:

Management is cautioned that the limits described in Article 8 and Chapter 432.32 are absolute and that future violations may result in harsher remedies being imposed.

On January 31, 2005, Raymond Aguiard, Pacific Area Labor Relations Specialist, and David L. Schloer, Local Business Agent, entered into a pre-arbitration settlement agreement covering four FTR Upland grievances: F01N-4F-C 04025267/04205268/04207475/05006862, which provided:

In light of the fact that the DRT has properly compensated the grievants the additional 50% premium for the violations, in accord with the 1988 Memo signed by the National parties, there is no other monetary remedy due. But, management is instructed and reminded that the 12 hours in a day and 60 hours in a service week are bars against working carriers beyond these limits, therefore, they are to cease and desist from doing so.

The Instant Grievance.

At Informal Step A, Peralta agreed that the ELM had been violated and agreed that affected PTF's were entitled to additional pay at 50% of the straight-time rate. At Formal Step A Reading's response to the Step B decisions was words to the effect of, "I don't recognize Step B decisions. They make mistakes."

III. UNION CONTENTIONS.

First, regarding the Postal Service's res judicata argument — that the October 19, 1988 National level Memorandum of Understanding (the "1998 MOU"), together with the National decision of Arbitrator Carlton Snow in A90N-4A-C 94042668/94048740, November 30, 1998 (the "Snow Award"), and the January 31, 2005 Pre-Arbitration Settlement (the "2005 Settlement") placed a maximum 50% premium on work in excess of the 12-hour limitation — that argument has no merit because the 1998 MOU, the Snow Award and the 2005 Settlement addressed only FTR's and National Agreement Article 8.5.G, not PTF's and ELM § 432.32. At Upland, the Union filed separate grievances for

FTR's and PTF's, and the instant case is a PTF case that is unaffected by the 1998 MOU, the Snow Award and the 2005 Settlement. Indeed, the National Settlement in E98N-4E-C 02096819, 8/29/02, which postdates the MOU and the Snow Award, explicitly provides that in ELM § 432.32 cases concerning PTF's, "Step B Teams have the authority to formulate a remedy when resolving disputes***, including cases where part-time flexibles were required to work beyond the 12-hour limit established in Part 432.32 of the [ELM]"

Second, the remedies sought by the Union are merited because the problem of continuing violations is not de minimus, but rather is egregious, continuing unabated to the date of the arbitration hearing. Indeed, there was no rebuttal from management concerning the seriousness of the problem.

Third, the Union is supported by arbitral precedent. The Arbitrator has twice sustained an appropriate award in cases similar to this case. *See*, W8N-5H-C 11311, 10/25/82; W4N-5C-C 42082, 2/23/89, In F98-4F-C 01038775, 1/2/02, Arbitrator Gentile sustained the principle of awarding "progressively greater compensation" for similar repeated contract violations. In B98M-1B-C 01014531, 5/19/02, Arbitrator Wooter awarded a higher remedy for a repeated violation. In C98N-4C-C 00194553, 6/12/02, Arbitrator Duda agreed with the principle of granting a punitive award for "especially egregious *** repeat violations." In G98N-4G-C 01214938, 10/15/02, Arbitrator Johnson awarded administrative leave. In C98N-4C-C 00219027, 12/11/02, Arbitrator Graham, citing Arbitrator Duda, awarded compensatory time off. In C01N-4C-C 03049992, 12/19/02, Arbitrator Graham, in an Article 3 emergency situation, allowed for administrative leave.

IV. POSTAL SERVICE CONTENTIONS.

First, the 1998 MOU, the Snow Award and the 2005 Settlement are res judicata of the issues in the instant grievance.

Second, specifically concerning the remedies sought by the Union, the Snow Award makes it clear at pages 17 to 23 that the sole remedy available to the Union in cases of this nature is the 50% premium. Because PTF's rank below FTR's, one must come to the conclusion that PTF's are to be governed by the 1998 MOU, the Snow Award and the 2005 Settlement, since to conclude otherwise would be to grant PTF's greater contractual benefits than FTR's. Indeed, one might logically argue that because PTF's were not included in the 1998 MOU and the 2005 Settlement, that the parties did not intend that they receive the 50% premium. Further, to now award a remedy in excess of the 50% premium would amount to an unjust enrichment of PTF's and would be punitive. Finally, there was no evidence that Upland management willfully understaffed the office. The fact is that turnover is an ongoing

problem and the hiring of new Carriers to replace those who leave is an ongoing effort.

Third, the Agency is supported by arbitral precedent. *See*, F94N-4F-C 97066083, 12/1/00, in which the Arbitrator dismissed the grievance on the basis of *res judicata*; as well as a similar determination by Arbitrator Bickner in F94M-1F-C 99050535, 12/9/01. In N7N-1K-C 28329, 11/30/90, Arbitrator Liebowitz rejected the concept of damages over and above the amount paid by the Postal Service for the overtime work. In W4N-5G-C 38512, 9/30/88, Arbitrator McCaffree similarly refused to order the payment of monies over the applicable overtime rate. Finally, National Arbitrator Carlton Snow, in W1C-5F-C 4734 (date illegible), rejected the concept of punitive damages in a contract case.

V. ARBITRATOR'S CONCLUSION.

The Arbitrator concludes that the Union failed to establish that, in this case, the Arbitrator has the authority to render an award directing a monetary remedy over and above the 50% premium established for cases of this nature by the 1998 MOU, the Snow Award and the 2005 Settlement. Accordingly, the grievance will be denied in part. However, the Union did establish grounds for the rendition of a non-monetary remedy concerning the obligation of Upland management and the rights of Upland Carriers. Accordingly, the grievance will be sustained in part. The following is the Arbitrator's rationale.

The Arbitrator has spent some considerable time analyzing the exhibits submitted at the arbitration hearing, Binder's unrebutted and unrefuted testimony, and the arbitration decisions submitted the week following the arbitration hearing, and can only conclude that the Postal Service's position on monetary remedy is well taken.

There is no dispute but that the 1998 MOU, the Snow Award and the 2005 Settlement together would bar the requested monetary relief had this case involved FTR's. The Arbitrator believes that he has no choice but to apply the 1998 MOU, the Snow Award and the 2005 Settlement to PTF's. Quite simply, the Arbitrator is of the opinion that a Regional Arbitrator should always attempt to craft an award that best falls in line with the general intent of National awards, with National level memoranda, and with the parties' settlements, rather than attempt to seek ways to craft an inapposite award that relies upon fine distinctions. Accordingly, the Arbitrator must conclude that the monetary award sought by the Union would indeed constitute an arbitrator-directed entitlement for lower-ranked employees that an arbitrator is barred from awarding to higher ranked employees, and would therefore implicitly conflict not only with the mutual intent of the parties as expressed at the National level, as well as the 2005 Settlement, but also with the spirit of those writings.

On the other side of the coin, there certainly is nothing in the 1998 MOU, the Snow Award or the 2005 Settlement that infringes upon the Arbitrator's inherent authority to direct a nonmonetary remedy aimed at correcting a repetitive, continuing, and therefore egregious, violation of the National Agreement and the incorporated ELM. The Arbitrator specifically finds that Upland management's violation of the ELM was egregious, and is therefore deserving of such nonmonetary relief.

The relief that will be awarded by the Arbitrator is set forth in the following Award.

AWARD

The grievance is denied in part and sustained in part.

1) The monetary/compensatory time remedy sought by the Union is denied.

2) Upland management shall immediately cease and desist from any further violations of National Agreement Article 19 and ELM § 432.32.

3) In addition, Upland management shall not, in any non-Article 3 emergency situation, order or otherwise direct any PTF to work in excess of the ELM § 432.32 12-consecutive-hour limit. Any Upland PTF who is ordered or otherwise directed to work in excess of the 12-consecutive-hour limit shall have the right to refuse that order or directive without following the "work, then grieve" rule, and no Upland PTF who refuses such an order or directive shall be disciplined or otherwise deprived of any right or benefit conferred by the National Agreement.

3) Further, in the event that following Upland management's receipt of this Opinion and Award, any Upland PTF who, for any reason other than a bona fide Article 3 emergency situation, does in fact work in excess of the ELM § 432.32 12-consecutive-hour limit, shall not be required to grieve to obtain additional compensation. The Postal Service shall automatically add the additional 50% of the base hourly straight-time rate for all hours exceeding 12 consecutive hours to the PTF's next pay check.

4) Also, Upland management shall immediately post copies of this Opinion and Award on all Union bulletin boards in the Upland office, including any stations or carrier annexes, and shall leave those postings on those bulletin boards for a period of time no less than six consecutive months.

5) Further, immediately following its receipt of this Opinion and Award, and continuing each month thereafter for a period of at least six consecutive months, Upland management shall hold standups with all Carriers to explain the relief awarded in this

Opinion and Award.

6) Any violation of the terms of this Award by Uplands management will, in any grievance initiated to challenge such violation, justify consideration by a Regional Arbitrator of an additional financial remedy for affected PTF's.