Regular Arbitration Panel

In the Matter of Arbitration	)		
	)	Grievant:	Class Action
between	)		
	)	Post Office:	Rockville, Maryland
The United States Postal Service	)		
	)	GATS:	B19N-4B-C 21474192
and	)		
	)	DRT:	13-569000
National Association of Letter Carriers, AFL-CIO	)		
	)	Local:	5521SL35

Before: Arbitrator J M. Sims

Appearances:

For the Postal Service: Dave M. Preston

For the Union: Chuck Clark

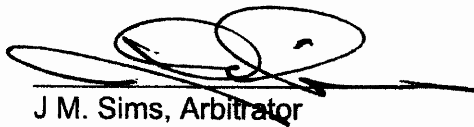
Place of Hearing: 500 N Washington St
Rockville, Maryland

Date of Hearing: 16 February 2024

Date of Award: 26 February 2024

Award

The grievance is sustained. Remedy is awarded at the end of the discussion portion of this finding.



J M. Sims, Arbitrator

Procedural Matters

This matter came for hearing pursuant to a 2019-2023 National Agreement between the parties. The hearing occurred on 16 February 2024 in a conference room of the postal facility located at 500 N Washington St, Rockville, Maryland. Dave Preston, Labor Relations Specialist, represented the United States Postal Service. Chuck Clark, NALC Branch 5521 Vice-President, represented the National Association of Letter Carriers.

The hearing proceeded in an orderly manner. There was a full opportunity for the parties to submit evidence, to examine and cross-examine witnesses, and to argue the matter. All witnesses testified under oath as administered by the arbitrator. The arbitrator recorded the proceeding as an extension of his personal notes. The advocates displayed superb professionalism and fully and fairly represented their respective parties.

The Issue

Did Management violate the provisions of Article 8.5.G/Letter Carrier Paragraph of the National Agreement and pages 8-15 through 8-22 of the 2014 edition of the JCAM in this case? And if so, what is the remedy?

Background

On 22 April 2021 letter carrier Christopher West, hereafter referred to as the grievant, requested 3 hours and 15 minutes of overtime. The grievant is not on the Overtime Desired List (ODL) and works 8 hours per day. On this day, local management denied the grievant's request for overtime but did provide auxiliary assistance from another letter carrier for approximately 2 hours and 15 minutes.

While axillary assistance was provided, the grievant still worked 44 hundredths of overtime. Upon the union's review of the Time and Attendance Collection System (TACS), it was discovered that the grievant had worked overtime and initiated this grievance. The grievance was resolved in part and impassed in part. The parties agreed that a violation occurred on the day in question and agreed to pay letter carrier Opuni 0.44 minutes at the overtime rate because he was on the ODL and was available to do the work instead of the grievant.

The portion of the grievance that was impassed is the union's requested remedy for the grievant to be paid an additional 250% for the 0.44 hours of overtime worked. The issue of the remedy for the non-ODL carrier was appealed to Step B, and the DRT declared an impasse. The parties provided the Step B team with approximately 700 pages of historical data reflecting Arbitration Awards, Formal A settlements and settlement agreements providing escalating remedies for non-ODL carriers required to work overtime in violation of Article 8.5.G. The data showed that from 2009 through 2019, Step B team has awarded 250% to non-ODL employees required to work overtime in violation of 8.5.G. Based on the Step B Impasse, the remedy issue was appealed to arbitration.

Contractual Provisions

> ***Article 8 Hours of Work***
> ***Section 5, Overtime Assignments***
> *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.*

2014 JCAM, page 8-14 (also found in 2021 JCAM, page 8-14)

> *The Letter Carrier Paragraph. For many years Article 8.5.C.2.d also gave management the right to require a letter carrier working on his/her own route on a regularly scheduled day to work mandatory overtime rather than assigning overtime to a carrier from the Overtime Desired List. However, in the Overtime Memorandum first negotiated as part of the 1984 National Agreement, the Postal Service and the NALC added the following qualification, known as the "letter carrier paragraph."*
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>> *In the Letter Carrier Craft, where management determines that overtime or auxiliary assistance is needed on an employee's route on one of the employee's regularly scheduled days and the employee is not on the overtime desired list, the employer will seek to utilize auxiliary assistance, when available, rather than requiring the employee to work mandatory overtime.*

JCAM explanation Pages 15-8 and 15-9 **Article 15.2 Step B (c)**

A Step B decision establishes precedent only in 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.

Position of the Union

This grievance is a case involving the proper remedy for a non-overtime desired Letter Carrier (non-ODL) who was forced to work overtime on 22 April 2021. The parties reached a mutual agreement on 25 January 2022 that there was a violation of Article 8 and the Letter Carrier paragraph when non-ODL carrier Chris West was forced to work 0.44 hours of overtime on 22 April 2021. The local parties agreed that ODL letter carrier F. Opuni would be paid at his overtime rate of pay for the 0.44 hours of overtime work that he was available to work on that date. Opuni had worked 8.00 hours on 22 April 2021.

What the parties were unable to resolve was the issue of a proper remedy for non-ODL carrier West, in this case. In 2006, Arbitrator Mark Rosen in a decision in the Rockville installation, awarded a payment of 125% of their hourly rate of pay to the non-ODL carrier who was forced to work overtime. And still, the Article 8 violations and forced overtime work continued.

For 10 years, from 2009 to 2019, the Step B team settled Article 8 violation cases in Rockville with payment to the non-ODL carriers of an additional payment of 250% of their regular hourly rate and the violations continued.

We are confident that after you read the evidence and hear the testimony presented today, you will sustain this grievance in its entirety and grant the union's requested remedy to pay non-ODL Letter Carrier C. West 250% of his regular hourly rate of pay for this agreed violation of Article 8, or any remedy deemed appropriate by you.

Position of the Agency

This dispute, at least one all but identical, has been before Arbitrator Talmadge recently and that grievance was denied in a finding that management did not violate the NA by "forcing" the grievant to work overtime. In this case, again, one that is all but identical to the one before Arbitrator Talmadge, the Union did not meet its burden of proof to establish a contractual violation.

In this case, the grievant requested 3 hours and 15 minutes of overtime, which was denied. Local management did, however, provide the grievant with over 2 hours of auxiliary assistance, but the grievant took it upon himself to still work an additional 44 minutes of overtime even though his request was denied. To reiterate, the grievant's overtime request was denied. He could have chosen several different options including bringing the mail back to the office, but he did not. He could have requested further instruction had he contacted his supervisor, but there is nothing in the case file to indicate he did so. The grievant has not received any discipline for working the additional 44 minutes and has suffered no consequences, in fact, he was paid for the additional work at the overtime rate consistent with the NA. It should be noted that letter carrier Opuni, whom the union identified as an available ODL carrier that should have been worked, was paid for the 44 minutes at the overtime rate for not working.

Carriers Opuni and the grievant were paid according with the Article 8 provisions of the NA and JCAM, but the union is asking for more – much more. The union is requesting the grievant be paid an additional 250% for the 44 minutes he worked overtime. The NA has no provisions for punitive remedies that the union is requesting. The NA does not contain language that would grant the union monetary benefits when no egregious violation exists. The union argues that there are many Formal Step A settlements, and Step B Resolutions that require a remedy of the additional 250%, but that remedy is not supported by the NA and is inconsistent with the national parties' intent. Many of the settlements the union cites are not the same as this dispute, yet they claim they set precedent. They cannot set precedent if they are not the same.

The union did not prove that management's actions were malicious, willful, flagrant, or blatant. The union provided no evidence that management did not bargain in good faith. Any award or settlement that provides damages greater than the amount of money necessary to make the employee whole is punitive. As such, the Union remedy should not be considered compensatory. Any additional money will not restore the "status quo ante" or correct any injustice done to an employee or ensure contract compliance. As noted by National Arbitrator Mittenthal (HIC-NA-C 97 and H7C-NA-C 36):

The exact purpose of a remedy is to make the injured party whole, no more and no less.

While the arbitrator has discretion to fashion a compensatory remedy, the remedy requested is not compensatory. The Grievant has already been compensated for his overtime work and the enhanced 50%. Management requests that the grievance be denied in its entirety.

Discussion

At issue is the appropriate remedy for the non-ODL grievant who worked 44 hundredths overtime on 22 April 2021 in lieu of a carrier on the ODL who was available, which the parties agreed had been a violation of Article 8.5.G and the *Letter Carrier Paragraph* of the National Agreement. The identified letter carrier, Opuni, who was available and could have worked the 44 hundredths of overtime was paid at the overtime rate and is not at issue. The only remaining question is one of remedy for the grievant at 250% based on prior grievance settlements and Step B resolutions within this installation.

The agency argues this was a technical violation and the grievant was not "forced" to work overtime but chose to, therefore, the union's remedy request is not valid and outside the provisions of the NA. The agency relies heavily on the contemporaneous finding of Arbitrator Talmadge who denied the requested 250% remedy in a similar violation.

Unrebutted testimony in this case indicated the grievant's route is overburdened by approximately 2 hours, and he testified that he received 2 hours of auxiliary overtime assistance regularly. On the day in question, he requested 3 hours and 15 minutes overtime because of a full-coverage *Washington Post* mailing as well as other stated reasons on PS Form 3996. This would effectively be 1 hour and 15 minutes more than his 10-hour route evaluation. Testimony indicated that he was denied authorization for overtime on the Form 3996. The grievant testified that he did, however, receive approximately 2 hours and 15 minutes of auxiliary assistance on that day, but that was not enough to complete the assignment. His testimony was that he regularly calls back to the office or uses his scanner to inquire about what to do with the mail if he is unable to complete his assignment within the limitation of his eight-hour shift. He testified credibly that he could not recall specifically if he called in on that day, since it occurred almost three years ago, but calling back to inquire is his standard practice. The grievant also testified that he doesn't always get a response back from his supervisor about what to do with the mail when he is going to run over eight hours. After he received the 2+ hours of assistance, which according to the grievant was not enough, his choices were to bring the remaining mail back or

to deliver it. It isn't hard to understand that when he requested 3:15 hours and received 2:22 hours help, that left the remainder for him to deliver or bring back to the office.

The agency's argument is that the grievant was not "forced" to work the 44 hundredths of overtime. Instead, the grievant decided on his own to deliver the remaining mail. It was not until it was brought to its attention by the union that management became aware that the grievant had worked overtime. Additionally, the agency argues that when the grievant worked 44 hundredths overtime, it was "unauthorized." Yet the grievant was not issued any discipline for working the "unauthorized" overtime on that day, nor has he previously been disciplined for bringing undelivered mail back to the office, therefore, this is merely a technical violation that should not incur a "punitive" remedy that is prohibited. Since none of the immediate supervisory staff for the day in question testified at hearing, this was unsubstantiated argument on the part of the agency, aside from the stipulated fact that the grievant was not issued discipline.

While I might normally be persuaded that a "technical" violation, as the agency argues, should not be viewed in the same light as a willful or malicious violation, the root of this violation took hold long before the day in question. Again, unrebutted, the grievant's route was overburdened by approximately 2 hours. After testifying that his route was evaluated to be 2 hours long, on redirect examination the grievant was asked to explain what a route inspection was, and he testified that it was when an examiner had gone out on the street with him and evaluated the route as overburdened. Based on this unrebutted testimony, it is clear to this arbitrator that the grievant's route is approximately 10 hours long. This would also be consistent with the grievant's undisputed testimony that he regularly received auxiliary assistance to keep him at 8 hours per day since he is not on the ODL. As such, the agency's argument that the violation was merely "technical" is diminished, although not completely dismissed.

Was this evaluation of the grievant's route properly conducted? Is the evaluation indeed accurate? Is the grievant supervised on the street to ensure he is working efficiently and productively? Unlike the Talmadge[1] finding the agency cites, the grievant did testify in this hearing, and the supervisor(s) who managed the floor on the day in question did not testify. There was no testimony from management that the grievant's route was not overburdened by 2 hours, or that the grievant engaged in "time-wasting practices" when the route was evaluated rending the evaluation flawed. There was no testimony to dispute the facts presented by the

[1] Arbitrator Talmadge - B19N-4B-C 21474185 – Rockville, Maryland

union in this matter. Absent any testimony from management to dispute the grievant's claim that his route is well over 8 hours, it stands as fact that it is overburdened by approximately 2 hours, which is contrary to Postal Service policy requiring that the workload for each route will be as near as possible to an 8-hour workday for the carrier.

There was no testimony from management as to why they denied the grievant the requested 3.15 hours of overtime, nor why they only provided 2.22 hours of auxiliary assistance to the grievant on the day in question when more had been requested. Therefore, when the grievant requested 3 hours and 15 minutes and management provided only 2.22 hours of auxiliary assistance and made no provision of the remaining time, it knew or should have clearly known, that it risked a likely violation of Article 8.5.G. Absent any testimony from management to explain why it believed the grievant's request was inflated, or why it determined only 2.22 hours of auxiliary assistance was sufficient to keep the grievant within 8 hours, or that the grievant was somehow negligent in his duty on this single day, I am not persuaded the violation was merely "technical" as the agency contends. This is precisely on point with the facts in a decision by Arbitrator Rosen[2], which the union relies heavily upon, to demonstrate the history of violations and the beginnings of a remedial payment to the non-ODL grievant that were at 125% at that time.

The violation may not have been willful in the sense that a conscious decision was made to violate Article 8.5.G, but there was apparently a willful ignorance to allow a violation. Perhaps the supervisors have too much to manage that they were unable to adequately monitor the situation. Perhaps the right hand did not know what the left hand was doing. Perhaps, notwithstanding the years of repeated 8.5.G violations, it just wasn't that important to avoid. Perhaps the Rockville installation is completely understaffed, and managers are simply unable to adequately juggle all the operational balls in its charge. However, if management knows that the grievant's route is too long in the first place and that the grievant is not on the ODL, the maintenance of the overburdened route carried by a non-ODL carrier creates the very real potential for an Article 8.5.G violation every day the grievant is on the route and requires managerial due diligence to avoid a violation.

Regardless of the specific reason(s) for the violation, the violation occurred. Notwithstanding Arbitrator Talmadge's very comprehensive finding, upon which the agency relies heavily and that I found very insightful, the parties at the local and Step B levels have agrees to specific

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[2] Arbitrator Rosen – K10N-4K-C 06059255 – Rockville, Maryland – 31 August 2006

language that certainly appears to set precedent. Were these agreements and settlements wise? Do they truly address the issue to halt further Article 8.5.G violations? In my opinion, they are understandable, but not wise. Why, because words mean what they say and words without qualification that are applied with acceptance by both parties become a standard.

The case file is full of prior grievance Formal Step A settlements, and Step B Resolution settlements that provide an additional 250% payment to the non-ODL carrier who was worked overtime when ODL carriers were available and not maximized. From my review of the entire 1005 page case file, a number of these cited resolutions were not on point with the instant case. Many related to working non-ODL carriers overtime off their assignment or on a Non-Scheduled (NS) day. However, while not all the cited settlements were precisely on point, there were still a large number that matched the fact circumstances presented in this grievance. Therefore, I am convinced there is a significant history of similar Article 8.5.G violations and that the parties have entered into a significant number of precedent setting settlements that provide a remedy at the rate of 250% of base pay to the non-ODL carriers who worked when ODL carriers were available.

For example, the Step B *Resolve* for an identical issue (K11N-4K-C 13395100) stated:

> *The case file supported a* ***long, documented history of similar violations****, whereby the Local Parties, at both Informal and Formal Step A, as well as Step B Teams* ***have repeatedly resolved the issue of payments to Non-ODL employees when violations of this nature occur, by granting them an additional 250% compensation*** *for the number of hours worked.* [emphasis added]

Another Step B *Resolve* example for an identical issue (K11N-4K-C 14026130) stated:

> ***In application of the provisions of Article 15, the Team finds that it is appropriate to maintain the 250% payment to the Non-ODL employee who was improperly assigned overtime*** *for the period of time worked in violation of Article 8; and to compensate the available Carriers for a corresponding number of hours, at the appropriate overtime rate.* [emphasis added]

The agency's lone witness was Station Manager Pinthiere who was the Formal A Representative. Pinthiere was not the supervisor who denied the grievant's overtime request or who assigned the 2.22 hours of auxiliary assistance and provided no insight for that decision making process or whether the grievant's route evaluation was accurate. Her testimony centered on her denial of the union's requested remedy payment to the grievant at 250%. When asked why she denied this

remedy request, her response was, "It isn't in the JCAM." She was asked if she was aware of past settlements and Step B resolves that paid the 250%, and she indicated that she did know of these remedy settlements, but had become aware, to her understanding, that they were not appropriate. This was the extent of the agency's testimony in this matter.

Frankly, I am not persuaded that a continued escalation of the remedy amount in such cases has proven successful in preventing future violations because the record clearly shows that escalated remedy from 100% to 125% and eventually to 250% paid have not stopped the demonstrated repeated Article 8 violations. However, based on the facts in evidence and the limited rebuttal testimony to those facts, I find that the union has demonstrated that a remedial precedent of 250% exists for this type of violation. The grievance is sustained. The grievant will be paid for .44 hundredths at 250% of base pay.