REGULAR ARBITRATION PANEL

In the Matter of the Arbitration	*	
	*	
between:	*	Grievant: Class Action
	*	
United States Postal Service	*	Post Office: Toledo, OH
	*	
and	*	USPS Case No: C16N-4C-C 18267277
	*	
National Association of Letter Carriers, AFL,CIO	*	NALC Case No: 570-C-18

BEFORE: Lawrence Roberts, Arbitrator

APPEARANCES:

For the U.S. Postal Service: Steven Tremaine

For the Union: Jeff Fauver

Place of Hearing: Postal Facility, Toledo, OH

Date of Hearing: February 7, 2019

Date of Award: March 6, 2019

Relevant Contract Provision: Article 15

Contract Year: 2016

Type of Grievance: Contract

Award Summary:

In this matter, the issue was one of remedy only. While the Union claims a serial non-compliance of various dispute settlements, the Employer insists the Union's only interest is monetary and self-serving in nature. The facts of this case have established Management at this Toledo Installation have not only habitually delayed the monetary disbursements of many Awards and Settlements but also defied previous cease and desist orders. For that reasoning, the remedy defined below is hereby ordered.

Lawrence Roberts

Lawrence Roberts, Panel Arbitrator

SUBMISSION:

This matter came to be Arbitrated pursuant to the terms of the Wage Agreement between United States Postal Service and the National Association of Letter Carriers Union, AFL-CIO, the Parties having failed to resolve this matter prior to the arbitral proceedings. The hearing in this cause was conducted on 7 February 2019 at the postal facility located in Toledo, OH. Testimony and evidence were received from both parties. A transcriber was not used. The Arbitrator made a record of the hearing by use of a digital recorder and personal notes. The Arbitrator is assigned to the Regular Regional Arbitration Panel in accordance with the Wage Agreement.

OPINION

BACKGROUND AND FACTS:

This is a class action grievance filed on behalf of Letter Carriers working at a Toledo, OH Postal facility, the Reynolds Corners Delivery Unit.

The Union and the Employer entered into an Informal A Grievance Settlement on or about 13 July 2018 and documented their agreed upon language on an **"Informal A Joint Resolution Form."** In pertinent part, that **Form** labeled **454-CI-18, 455-CI-18, 456-CI-18,** reads as follows:

> **The parties have met and agree that the reviewing/posting of the equitability list for overtime is not being correctly handled.**
>
> **No posting for the week of 03/17 thru 03/23**
> **Posted on Thurs for week of 03/24 thru 03/30**
> **Posted on Thurs. and no union signature for week 03/31 thru 04/06.**

The following OTDL carriers will be paid a lump sum of $20 each. (The document goes on to list some 22 Letter Carriers)

In the future management will ensure compliance to the LMOU and previous resolutions regarding the handling of the equitability list.

The above was signed by the Parties respective Representatives. According to the Union, Management failed to comply with the above agreement resulting in the instant grievance. The Employer contends there was no agreement to make payment within two (2) pay periods.

The instant grievance was filed when payments did not occur within 2 pay periods. The Union contends this is a continuing violation of non-compliance at the Toledo Installation and a direct violation of Article 15. The Employer insists that extenuating circumstances resulted in the delay, no malice was intended and therefore, there was no violation of the Parties Agreement.

Obviously, the Parties were unable to resolve this dispute during the prior steps of the Parties Grievance-Arbitration Procedure of Article 15. The Step B Team declared an impasse on 27 September 2018 and the matter was referred to arbitration.

It was found the matter was properly processed through the prior steps of the grievance procedure. Therefore, the dispute is now before this arbitrator for final determination.

At the hearing, the Parties were afforded a fair and full opportunity to present evidence, examine and cross examine witnesses. The record was closed following the presentation of oral closing arguments by the respective Advocates.

JOINT EXHIBITS:

1. Agreement between the National Association of Letter Carriers Union, AFL-CIO and the US Postal Service.

1.A. Joint Contract Administration Manual (in pertinent part)

2. Grievance Package

UNION'S POSITION:

In the Union's opinion, this instant case once again concerns the Toledo Installation's serial non-compliance with signed grievance resolutions. According to the Union, it is undisputed that the Parties signed an Informal A resolution on 04/14/2018 which agreed to compensate 22 Carriers a lump sum of $20 each for an overtime equitability posting violation. The Union insists that, as has become the norm in the Toledo Installation, Management failed to comply with making the payment to these carriers and this instant case had to be filed.

The Union predicts the Employer will attempt to make this case strictly about how the Letter Carriers were eventually paid and that the Letter Carriers weren't affected. The Union warns, don't be fooled, the issue is not as simple as payments being made. Instead, according to the Union, the issue is about the Toledo Installation habitually ignoring signed agreements and the harm done to the employees and to the Union. The Union claims they will prove how the employer has banned the bargaining unit and the Union by requiring the Union to file

second, third and even fourth generation grievances to get settlements complied with.

The Union asserts that evidence will be provided which has established that two pay periods is the "generally accepted" length of time to finalize a grievance settlement. The Union also insists evidence and testimony will be provided that the agreed to payments were not made within this two pay period time frame. The Union insists the evidence will show that the Supervisor that signed the Informal A resolution on 04/14 met on this instant case on 05/08 and still refused to pay what he agreed to. The Union further argues the evidence will show Management ultimately entered in the payment on 06/18/2018, 65 days after the agreement was made. And finally, the Union indicates the evidence will further prove that the Carriers were actually paid on 06/29/18; two and a half months after Management originally signed the agreement.

It is the Union's view that all of those facts are undisputed. The Union believes that any attempt to dispute them now at Arbitration would be new argument. As explained by the Union, the instant case is a simple matter that, once again, should never have made it to Arbitration; it should have been settled without the Union having to file an additional grievance for non-compliance. The Union notes that Management is well aware of their obligation to comply with their settlements, but again they choose to ignore that obligation in the hopes that an Arbitrator will give them an Award that will give them free reign to continue to violate the Contract.

The Union adds this is not the first time that the issue of non-compliance has reared its ugly head; serial non-compliance has become the norm here in the Toledo Installation. The Union claims this Arbitrator has stated that there is literally a plethora of non-compliance settlements at the Toledo Installation. The Union maintains the evidence will prove that Management has already been put on notice that non-compliance with grievance settlements is not optional. The Union insists it has had to arbitrate numerous cases in recent years about non-compliance and has received Awards in our favor, but Management deliberately, egregiously and flagrantly thumbs their nose at the local Union by refusing to comply.

The Union projects that Management will, more than likely, make the same arguments as every other case that has gone before the Arbitrators; they contend that the Union is seeking some kind of unjust enrichment. The Union believes nothing can be further from the truth. Instead, as explained by the Union, we seek compliance with agreed upon Settlements and an Award that will ensure contract compliance in the future. The Union

mentions there have been numerous escalated corrective remedies to both the Grievants and the Union. According to the Union's argument, being here at Arbitration today shows that those remedies have been insufficient in forcing Management to comply with their signed Agreements. The Union insists this is not about money or abuse of any system or any other excuse Management may put forth; it is basically a case of Management not complying with signed resolutions. The Union asserts that Management simply has to do what they agreed to do.

The Union anticipates the Employer is going to attempt to convince the Arbitrator that the payments were eventually made so there is no harm and no foul. The Union maintains this cannot be further from the truth. The Union contends the Grievants suffer harm as well as the Union. The Union is confident the evidence will prove its members lose faith in the Union and the Union's ability to enforce the bargaining agreement and their rights.

The Union indicates the Steward is criticized by the Members when the Employer fails to live up to their Agreements. From the Union's perspective, the union and its Members suffer extreme cost due to the serial non-compliance. The Union explains that at the Informal A, the Union requested a remedy in hopes this case would not have to be taken all the way to arbitration.

And the Union indicates now that this case has reached Arbitration, the Union has suffered the additional cost of the arbitration hearing, the wages of the Advocate and the Technical Assistant, and the two full time Officers that have dedicated many hours to prepare this case. The Union believes this wastes the Member's dues and wastes the Union Officers' time that they could be dedicating to their member's needs.

The Union is confident that once this Arbitrator has heard the testimony and viewed the evidence, the Union requests the Arbitrator sustain this grievance and issue an appropriate remedy that protects the Parties' collective bargaining agreement and protects the Union from the additional cost suffered due to Non-Compliance. The Union adds they have made prior offers of settlement in this case based on the grievance step the case was at and the cost incurred up to that point. The Union suggests that prior offers of settlement should not be considered as it would hinder the Parties ability to resolve at the lowest level in the future. The Union seeks a remedy at arbitration today that compensates the aggrieved employees and compensates the Union for the additional cost incurred. The Union respectfully requests the arbitrator grant the appropriate remedy that follows:

1. Order the employer to cease and desist failing to comply with grievance settlements and arbitration awards.

2. Put the employer on notice that failing to comply with signed agreements, grievance settlements and arbitration awards shall result in an escalated remedy/award.

3. Compensate each letter carrier listed in the grievance resolution the escalated sum of $500 each due to the unnecessary delay of the payments.

4. Compensate the union the sum of $7,500 for the harm the Union has suffered and the damage to the Union's image due to members losing faith.

5. Or otherwise make the parties whole.

COMPANY'S POSITION:

It is projected by the Employer Advocate that the Union will argue today that Management is once again non-compliant when payment was not made on Informal A settlement, 454/455/456-C1-18 within 2 pay periods. Management argues no time frame was agreed upon in the Informal A settlement.

The Agency also predicts Toledo's past will be brought up yet again by the Union to cast Toledo in a bad light. Management will not deny Toledo's past, but will show today through testimony and evidence that Toledo has already paid for its past. The Service asks how many more times will Toledo pay for the past it cannot change. Instead, according to the Employer, Toledo can only move forward into the future, taking steps along the way to make positive changes and this will not happen overnight.

It is the opinion of the Employer that, in an attempt to cast Toledo in a bad light, the Union has padded the case file with past resolutions which contain the term "without prejudice." The Agency cites Black's Law Dictionary definition of without prejudice to say: "The use of the phrase in the Joint Resolution Form is not a prohibition against citing the resolution, but rather an acknowledgement that the parties are reaching an agreement on the grievance without admitting wrong doing or yielding their ability to assert the same positions in a future grievance."

It is Management's view that grievances are settled for many reasons, even those that do not involve a violation. In the opinion of the Service, the Union is just using these resolutions as filler to pad the case file and give the appearance of non-compliance when in fact a lot of these resolutions are not for non-compliance nor is a violation agreed upon.

Management suggests they will show today through testimony that the Union's request to obtain money for themselves does not lend itself to bargaining in good faith so these grievances may be settled at the lowest level.

The Agency cites Arbitrator Stanton, in Case K16N-4K-C 17664487, when dealing with a Union requesting monetary remedy to themselves:

"The third remedy request may be the easiest one to deal with in this case. The Union's request for money to be paid to the labor organization as part of the grievance settlement is asking for a purely punitive remedy. There is no harm to Local 496 in this matter—either monetary or non-monetary. Arbitration precedent for decades has established that purely punitive damages are rarely awarded in arbitration. Awarding punitive damages to a Local Union as opposed to an employee overlays a problem on top of a problem… The law is poorly defined and the exact extent of its reach unknown. Even if such payments to a union are not unlawful, it still represents the kind of activity the law seeks to prevent and are therefore undesirable"

Management points out, this being a contractual case, the burden of proof lies with the Union. Management adds that the Union must prove a violation of the National Agreement with a preponderance of evidence.

The Employer also references the following 2001 National Award of Professor Carlton Snow, which states:

"The Unions had the affirmative of the issue and needed to show by at least a preponderance of the evidence that there is a direct causal connection between the conflicting data and a violation of the parties' labor contract."(pg. 18) "While the evidence in this case was sufficient to raise suspicions, the Unions did not present evidence that demonstrated a specific contractual violation." (pg. 19)

And additionally, the Service mentions the following excerpt from a 2003 National Award of Arbitrator Dana Edward Eischen:

"The charging party in a grievance over interpretation and application of a contract bears the burden of proving, by a preponderance of the record evidence, that the responding party violated the agreement in some fashion. Since the issue for determination is one of contract interpretation, the Union has the burden of proof. Certaineed Corp., 88 L.A. 995, 998 (Nicholas, Arb. 1987); Entex, Inc., 73 L.A. 330, 333 (Fox, Arb. 1979); Portec, Inc., 73 L.A. 56, 58 (Jason, Arb. 1979); City of Cincinnati, 69 L.A. 682, 685 (Bell, Arb. 1977)."

And according to the Agency, in the end, the Informal A settlement 454/455/456-CI-18 was complied with and payment was made. Management submits the Grievants were restored to the status quo ante and the Union was not harmed in any way. The Agency predicts the Union will not show with a preponderance of evidence the Postal Service violated the National Agreement.

THE ISSUE:

Did the Postal Service violate the National Agreement including, but not limited to, Article 15, previous resolutions, and Arbitration decisions, when they failed to comply with signed grievance resolution 454/455/456-CI-18? If so, what is the proper remedy?

PERTINENT CONTRACT PROVISIONS:

ARTICLE 15
GRIEVANCE-ARBITRATION PROCEDURE

DISCUSSION AND FINDINGS:

Regarding the several objections that I overruled, as I have stated in many past Decisions, at the time of the hearing, and especially at the onset, I offer both Parties a very broad spectrum in which evidence can be introduced and accepted into the record. During the process of any arbitration hearing, my focused goal is to gain as much information regarding the

dispute as possible, then compare the relevancy of all of that to the language of the particular Agreement.

Through the course of any hearing, I do not have, at any given moment, a full and complete understanding of all the facts, relevant evidence and arguments until the hearing has concluded. With that reasoning, my acceptance of evidence, into the record is broad. Unless it is obvious at the onset that certain evidence, argument or documentation be excluded, the same is generally accepted and its probative value considered and weighed accordingly. To exclude evidence from either party, prior to my full and complete understanding of the dispute would simply be a disservice to both of the Parties. But with that being said, the documentation in dispute at the onset of this hearing had absolutely no impact on my decision in this matter.

In addition I do not intend to discourage anyone from making an objection to something he or she feels is inappropriate or should not be allowed.

The issue in this case is one of remedy, a matter that seems to be familiar to both Parties. And specifically in this case, the disagreement involves the payment of an agreed upon monetary Award of an Informal A settlement.

The foundation for this case was first explained via my Discussion and Findings from a previous May 2018 case, between these same two Parties labeled **C11N-4C-C 17603805:**

> "The Union argument in this matter is supported by a case file of documentation. It is summarized in a September 2016 Discussion and Analysis by Arbitrator Tobie Braverman (C11N-4C-C 16104433) where:
>
> "There seems to be little doubt that timely compliance with settlement and arbitration awards in general, and with payment of monies due in particular, has been an ongoing problem in the Toledo installation since at least 2015. While the Union contends that the delays in this case were intentional and malicious, there was no evidence that this was the case. Rather, the evidence demonstrated that the delays were caused by a combination of factors which included the submission of paper work to the Area which was not complete, the need for multiple meetings by Area and District personnel due to the size of the payments, and the desire of the Employer to insure that all related grievances were resolved prior to authorizing the payment. These actions were motivated by legitimate concerns for care and accuracy. There was simply no demonstration that the delay was caused by any malice or intention to harm either the Union or the carriers…
>
> … While these issues are understandable and the purposes served are appropriate, the reality is that the requirements put in place by the Employer delayed payment on these two arbitration awards for an inordinate length of time. If the Employer wishes to put procedures in place which must be followed prior to payments on grievance settlements and awards it certainly may do so. These procedures, however, must be such that they do not violate the requirement that payments be made within two pay periods subsequent to the agreement of the parties as to the details of the payment. While it may be necessary on occasion to process payment slower than the two pay period standard, delays of

two and four months are so long that they cannot be considered to be timely, and are unacceptable."

I agree in principle with that analysis above. In fact, in a Frederick MD case styled K11N-4K-C 17183206, I wrote in my June 2017 Discussion and Findings that:

And in my considered opinion, any monetary settlement to any grievance should be made no later than the second pay period following settlement. It lacks any well founded reasoning that such an administrative process could not be processed in such a time frame. In my view, there must be a management process in place to assure that such timely payments take place. While I understand there may be exceptions, any extension beyond that time frame should be rare in occurrence.

In my view, there is no logical explanation given to indicate any valid reasoning that the Employer would be unable to process and execute any grievance settlement within two pay periods. And even following that 2015 Award mentioned above, it appears the Employer at this location continues, on a consistent basis, to miss that two pay period mandate.

If that management process takes longer than two (2) pay periods to effectuate and finalize any grievance settlement, then the Employer needs to re-visit that archaic process. Regardless of circumstance, there should be no grievance settlement, monetary or otherwise that should take longer than two (2) pay periods to finalize."

It appears not much progress has been made by and between the Parties since that case. Management insists the Union is seeking unjust enrichment. In their opening statement, Management insisted "the Union's request to obtain money for themselves does not lend itself to bargaining in good faith so these grievance may be settled at the lowest level."

This particular case was settled at the Informal A level. There was, in fact a settlement at a lower level. And the record indicates the negotiated monetary remedy was not distributed in a timely manner.

Highlighted by Arbitrator Braverman in the above quotation is the fact that timely compliance with grievance settlements and arbitration awards has been an ongoing issue at this Toledo Installation. And in that previous May 2018 case mentioned above, my Award included the following:

> **"1. The Employer is ordered to cease and desist failing to comply with grievance settlement and arbitration awards at the Toledo Installation. Unless by mutual agreement with the Union, any future delay of any monetary payment beyond that two (2) pay period window will be doubled.**
>
> **2. Failure to comply with signed agreements, grievance settlements and arbitration awards shall result in an escalated damage award to the Union."**

In the Service's Step B Contentions, they argue that **"Contrary to the Union's Formal A contentions, there was not an agreement to pay the Grievant's within 2 pay periods. Therefore, this cannot be a failure to comply grievance."**

While that particular agreement did not include specific time frame language regarding payment, prior arbitral authority is unambiguous in this case.

There may have not been an agreement made by and between the Parties regarding a specific time frame of payment at that Informal Step A meeting, however, the cease and desist order cited above is certainly applicable herein. This particular case was certainly a "**future delay**" of a monetary payment. The order is unambiguous. And specific reasoning is set forth in that particular Discussion and Findings. But in summation, that language included "**If that management process takes longer than two (2) pay periods to effectuate and finalize any grievance settlement, then the Employer needs to re-visit that archaic process. Regardless of circumstance, there should be no grievance settlement, monetary or otherwise that should take longer than two (2) pay periods to finalize.**" The defiance in this case is virtually a mirror image as that matter I decided in May 2018.

In my considered opinion, it's a common sense approach. A monetary grievance settlement to any grievant is a make whole remedy. Had the violation not occurred, the Grievant's paycheck would not have been shorted in the first place. In my considered opinion, it is the Employer's obligation to make that Employee

whole as soon as possible. And that two pay period window is certainly reasonable. There is absolutely no reason to forego, overlook or disregard the previously issued cease and desist order as it pertains to the completion of settlement payments.

Cease and desist means what is says. There are no variations to a cease and desist order. It was issued in the first place to ensure future compliance. And when that does not happen, there are other consequences. And the only way to prevent future violations is an escalating remedy.

The Agency insisted that escalating awards are punitive in nature and extend beyond the four corners of the Parties Agreement. However, when a cease and desist order is defied, a monetary award is the only method to enforce a matter of non-compliance.

The verbatim below was again extracted from my **May 2018** Decision previously referenced:

> **"The Agency insisted that escalating remedies and punitive awards violate the Parties Agreement. Several precedent setting Awards to that end were introduced, however, none were specifically on point to this specific issue. In a 1989 National Award, (H1C-NA-C 97/123/124), Arbitrator Richard Mittenthal stated:**
>
> **"… the purpose of a remedy is to place employees (and Management) in the position they would have**

> been in had there been no contract violation. The remedy serves to restore the status quo ante."
>
> And in 1994, Arbitrator Mittenthal provided a similar message in another National Award styled H7C-NA-C 36/132, HOC-NA-C 28:
>
> "It is generally accepted in labor arbitration that a damage award, arising from a violation of the collective bargaining agreement, should be limited to the amount necessary to make the injured employees whole. Those deprived of a contractual benefit are made whole for their loss. They receive compensatory damages to the extent required, no more and no less."
>
> I agree with Arbitrator Mittenthal that a remedy serves to restore the status quo ante. In the second Award, Arbitrator Mittenthal stops short of making that "status quo ante" mandatory by the use of wording such as "generally accepted" and "should be limited." Such mandatory dialogue indicates the intent of Arbitrator Mittenthal was not to eliminate the use of punitive awards in certain situations. And in my view, this is certainly one of those cases."

While I generally agree with the logic recited by Arbitrator Stanton cited by the Employer in their opening statement, I'm not certain the parameters of that September 25, 2018 case align with the habitual disregard evidenced in this case. And I am of the considered opinion that Arbitrator Mittenthal's National Award did not forbid the utilization of escalating remedies in certain cases.

And with that in mind, I will not continue to issue cease and desist orders that are simply ignored. That single order issued in May 2018 is sufficient. However, future violations, as

in this instant case, will result in escalating remedies. And with that reasoning, I find the remedy requested by the Union, to be an equitable remedy in this case.

AWARD

The grievance is sustained and I find the following remedy, as requested by the Union, to be an equitable remedy in this case.

1. The Employer is placed on notice that failing to comply with signed agreements, grievance settlements and arbitration awards shall result in an escalated remedy/award.

2. Management shall compensate each Letter Carrier listed in the grievance resolution (Joint Exhibit 2, Page 9) the escalated sum of $500 each due to the unnecessary delay of the payments.

3. Management must compensate the Union the sum of $7,500 for the harm the Union has suffered and the damage to the Union's image due to members losing faith.

It is so ordered. I will retain jurisdiction for a period of forty five (45) days from the date of this Award for the purpose of ensuring compliance only.

Dated: March 6, 2019
Fayette County PA

REGULAR ARBITRATION PANEL

In the Matter of Arbitration Between UNITED STATES POSTAL SERVICE and THE NATIONAL ASSOCIATION OF LETTER CARRIERS	GRIEVANT: Class Action POST OFFICE: Toledo, Ohio 43601 CASE NO.: C11N-4C-C 17484532 NALC NO.: 610C17

BEFORE: **Glenda M. August, Arbitrator**

APPEARANCES:

For the USPS:	Matthew A. Smith
For the NALC:	Mike Hayden
Place of Hearing:	435 S. Saint Clair St., Toledo, OH 43601
Date (s) of Hearing:	April 10, 218 & September 20, 2018
Briefs Received:	November 13, 2018
Date of Award:	December 27, 2018
Relevant Contract Provision:	Articles 15 & 19
Contract Year:	2016-2019
Type of Grievance:	Contract

AWARD SUMMARY: The grievance is sustained. Management shall cease and desist violating the National Agreement by making collection point assignment changes to collection or carrier routes prior to conducting a unit review and notifying the Union. The changes made to CPMS by Management in Toledo will be rescinded and the collection points returned to the dedicated collection routes. The Service will reimburse the Union a total of $5000.00 towards the cost of processing this grievance.

Glenda M. August

GLENDA M. AUGUST
Arbitrator

I. ISSUE

Did management violate the national Agreement including, Articles 15 and 19, multiple grievance settlements, previous DRT decisions, prior local arbitrations, when it removed collection boxes from collection routes in Toledo without performing route adjustment (collection) inspection per the M-39 section 234.3 and/or when it failed to conduct a unit review prior to making a route adjustment? If so, what is the appropriate remedy?

II. RELEVANT CONTRACT PROVISIONS

ARTICLE 15
GRIEVANCE-ARBITRATION PROCEDURE

Section 1.

Definition A grievance is defined as a dispute, difference, disagreement or complaint between the parties related to wages, hours, and conditions of employment. A grievance shall include, but is not limited to, the complaint of an employee or of the Union which involves the interpretation, application of, or compliance with the provisions of this Agreement or any local Memorandum of Understanding not in conflict with this Agreement.

ARTICLE 19

HANDBOOKS AND MANUALS

Those parts of all handbooks, manuals and published regulations of the Postal Service, that directly relate to wages, hours or working conditions, as they apply to employees covered by this Agreement, shall contain nothing that conflicts with this Agreement, and shall be continued in effect except that the Employer shall have the right to make changes that are not inconsistent with this Agreement and that are fair, reasonable, and equitable. This includes, but is not limited to, the Postal Service Manual and the F-21, Timekeeper's Instructions.

III. FACTS

The instant grievance concerns collection routes in Toledo, Ohio where the Union alleged that Management made a unilateral change to assign collection boxes from dedicated collection routes to regular carrier routes without doing a unit review. An Arbitration Hearing was held on April 10, 2018 and a second Hearing was required on September 20, 2018 where the merits of the case were presented for decision by this Arbitrator pursuant to the 2016-2019 National Agreement between the United States Postal Service and National Association of Letter Carriers.

IV. UNION'S CONTENTIONS

The Union contended that in Toledo, OH, postal management unilaterally assigned collection boxes from the dedicated collection routes to regular carrier routes without ever doing a unit review, sharing the information with the Union and/or Carriers, without giving notice to the Union and/or Carriers, and without performing any type of inspections. Additionally, according to the Union, Management failed to extend this grievance and forfeited their right to put contentions in for this grievance at Formal A; the Union argued that any contentions or arguments from Management should be isolated to the DRT decision and anything else should be considered new argument.

It was the Union's position that Management violated the National Agreement when it improperly reassigned collections boxes from all 5 of the dedicated collection bid assignments within the Toledo Installation to city carrier routes. According to the Union, during the week of April 1, 2017 Management unilaterally changed the assignment of collection boxes; they contended that the impacted collection boxes were previously assigned by zip code followed by the letter P indicating its designation to a collection route. The Union asserted that after the changes went into effect the reports now code the boxes with the letter "C" signifying its new designation to a city carrier assignment.

According to the Union, this is not the first incident of Management improperly making route adjustments in the Toledo Installation; they stated that numerous agreements and Arbitration awards addressing this very issue are included in the moving papers. The Union asserted that Management in the instant case has failed to follow the guidelines set forth in the M-39 pertaining to route adjustments and the requirements which must be fulfilled prior to conducting any adjustment to an existing assignment. The Union offered numerous Formal A Resolutions and Arbitral Awards as well as Step B decisions regarding Management's violation of Article 19 at the Toledo Installation. (Joint Exhibit 2); they argued that Management at Toledo have failed to comply with these prior awards and continue to violate the Collective Bargaining Agreement by unilaterally removing collection boxes from dedicated collection routes without notifying the union, and without performing a unit review or inspection.

It was the position of the Union that Management adjusted routes by removing multiple collection boxes from all 5 of the dedicated collection routes and assigning them to city carrier

routes; all without inspection or unit review. According to the Union, these changes occurred during the first week of April, 2017 (CPMS Scanner History Report). The Union disputed Management's position in Exhibit 22 where the Service held that "HQ does not feel this is a route adjustment". In support of their position, the Union offered M-01624 USPS Internal Memorandum, November 14, 2005 and M-01664 Interpretive Step Settlement, July 7, 2007, Q01N-4Q-C 05022610 which stated:

> **M-01624**
> Other than obvious data entry errors, route-based information may only be changed through a full count and inspection or minor adjustment as defined in Handbook M-39, Chapter 2, Mail Counts and Route Inspections, and Section 141 Minor Adjustments.
>
> **M-01664**
> Other than obvious data entry errors, route based information may only be changed through a full count and inspection or minor route adjustment.

The Union contended that the most recent Formal A settlement states that "in all future situations, [management] will conduct a unit review and share the results with the carriers and the local union president prior to scheduling route inspections." They further contended that the Formal A settlements are always citable to enforce their own terms and Management has an obligation to comply with grievance settlements.

According to the Union M-01517 dated May 31, 2002 further speaks to Management's obligation to comply with arbitration awards and grievance settlements and states in pertinent part:

> M-01517
> Compliance with arbitration awards and grievance settlements is not optional. 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 non-compliance, and those steps should be documented.

The Union disputed Management's contention that the Postal Operations Manual (POM), as it relates to the Collection Point Management System, is not part of the National Agreement via Article 19 as it does not affect the working conditions of craft employees. The Union offered Section 314 Collection Point Management System, Collection Tests, and Density Tests (Volume Reviews which state:

314.1

All collection points are required to be entered in the Collection Point Management System (CPMS) by the responsible District where Internet access is available. No scheduled collection may be excluded from CPMS.

The information recorded in CPMS must be accurate and complete and must be reviewed at least annually by the District for accuracy. All exceptions must be in accordance with 313.3. **CPMS is utilized to electronically verify collections.** Any collection points recorded in these systems and receiving electronic scan data do not require the manual test as specified in 314.2.

Collection points are defined locations where a customer drops off mail for collection by the Postal Service. These can include mail chutes, receiving boxes, firm pickups, Self-Service Kiosk (SSKs) drops, lobby drops, and mail collection racks. Collection boxes are a subset of collection points.

It was the position of the Union that Management unilaterally changed the assignment of the boxes from the collectors to carrier routes and at hearing Management witnesses testified that this was done across the Nation and in those cases the changes made in CPMS initiated the carrier routes to pick up the mail. The Union argued that Arbitrations held regarding this nationwide program have resulted in favorable rulings from Arbitrators (Arbitral Reference 2); and in the first such Award, Management made the same argument as Management in this case, that in the time period involved, the carrier routes were not collecting the boxes, the collectors were still performing the collections. The Union asserted that the decision out of Cincinnati, OH (Arbitral Reference 2A), also references previous arbitrations for that city and even references arbitrations from the Toledo installation-the same ones included in the case file-to prove a contractual violation existed.

The Union asserted that the new assignments of the collection boxes are a route adjustment and as such Management must follow the M-39 and applicable arbitrations and agreements in the Toledo installation. They further asserted that Management in Toledo had numerous violations in regards to not conducting a unit review prior to inspections and route adjustments. The Union offered Formal A Settlements (JX-2 Pages 442-447), a Pre-Arbitration decision (JX-2 Page 448) as well as DRT decisions on the subject (JX2 Pages 449-454). The Union also cited the four most recent Arbitration Awards on the subject and about adjusting routes and eliminating boxes without a

formal inspection (JX-2 Pages 455-497). They noted that the first 3 Arbitral Awards are from three separate collection route inspections.

The Union contended that Exhibit 7 on page 455 of the Joint Exhibit 2, provides the most recent decision in August 2015 where the Arbitration stated all Toledo station/branch collection box pulls will be assigned to the collection routes. The Union further contended that after awarding thousands of dollars, the Arbitrator also states "the employer will "cease and desist" making route adjustments to letter carrier routes that have not been inspected in accordance with the M-41 and M-39. The Union noted language from a regional arbitration decision (K11N-4K-C 17310015) in which the arbitrator stated:

> The Union's requested remedy will be granted in full. Additionally, I believe a clear explanation as to the meaning and intent of a cease and desist order would be beneficial to the Parties. It means stop. It means immediately. It means to cease from the same action hereinafter into the future, without excuse. Compliance with this order is mandatory.

The Union contended that clearly, Management at Toledo is not taking arbitration decisions and "cease and desist" orders seriously. They further contended that the Union should not be required to take the same case to arbitration for the 5th time; they noted that this would be the 4th time specifically involving Toledo collection routes. The Union cited Arbitrator Lalka's use of the term 'endemic' to describe the problem in Toledo, OH concerning the performance of unit reviews and route inspection in a proper manner. The Union asserted that this case and the decision I case number C06N-4C-C 09130076 provide proof that the problem remains almost three (3) years after Arbitrator Lalka issued his award.

The Union argued that the M-39 requires and provides Management guidance to achieve and maintain an appropriate daily workload for all routes and requires Management to do a unit review. According to the Union, the unit review verifies adjustments which need to be made, or if already made, ensures the route has the appropriate daily workload. The Union cited Section 2 of the M-39 Manual in support of this position. They noted that the unit review is a tool that should be used to determine if route adjustments are necessary; according to the Union, this did not happen with the collection routes, which is a clear violation of the M-39. The Union asserted that instead, Management took it upon themselves to change the collection routes by removing boxes from

dedicated collection routes and assigning them to carrier routes without following the M-39 sections 211, 212, 213, and 234.3.3. They further asserted that Management never conducted a unit review as required by section 211.1 of the M-39. Also they never performed a density check (JX-2 Pages 499-584). Additionally, according to the Union, Management never notified the Union on their intentions of doing a density check; they never notified the Union that they were going to make changes to the collection routes. They never did a unit review. The Union maintained that by removing the collection boxes from the dedicated collection routes and assigning them to city carrier routes, harm is not only caused to the collectors but also the carriers who had the boxes added to the street time of the routes.

Finally the Union argued that the only way to make these repeated violations stop is to seek escalated remedies. In a recent arbitration ruling on 10/24/2016 for the Toledo Installation, Arbitrator Brown stated in case number C11N-4C-C 16086245 (JX-2 Page 585):

> The question of just why the Service cannot or will not address this issue in a way that stops the violations from occurring was not litigated here. Whether these lapses occur because of sloppy scheduling or because of a lack of regard for the agreement, or if they occur because of some business need the Service has which it deems more important than contract compliance, the lapses should be made to stop, and absent a court order, **enhanced penalties** are the only means available here to try to make that happen.

The Union contended that they are requesting to be compensated in this case due to spending unnecessary resources to continually prepare, present, appeal and arbitrate this habitual repetitive violation due to the employer's refusal to cease the violations. They further contended that the Union continues to be forced into taking the same cases to arbitration over and over again which can cost several thousands of dollars each time; they noted that this is what Management wants to happen in an attempt to drain all of the branches resources in hopes that we can no longer afford the costs or time to keep going to arbitration. The Union argued that Management is making a mockery of the grievance-arbitration procedure and someone must make the serial non-compliance stop. The Union offered the arbitral opinion of Arbitrator Tobie Braverman (JX-2 Page 594) where she stated:

> ...The Employer's serial non-compliance with contractual obligations clearly harms the Union in two important respects. First, it requires the time and expense involved in processing a grievance to obtain payments to which the Employer has already

> agreed or is obligated. Second generation grievances to enforce prior arbitration awards and grievance settlement should be required in only the rarest of circumstances. In this office, they appear to have become almost routine in recent years, and they unquestionably require a great deal of additional time and expense on the part of the Union. As importantly, the Union's inability to obtain reasonable and timely...

The Union noted that in her Award, Arbitrator Braverman awarded the Union a compensatory remedy in the amount of $500.00. They also offered other more recent Awards which provided more than $100,000.00 in compensatory damages to letter carriers in a non-compliance grievance. The Union lastly cited the final paragraph in Arbitrator Klein's decision involving Toledo collection where he provided:

> The employer will cease and desist making adjustments to letter carrier routes that have not been inspected in accordance with the M-41 and M-39. The employer will further cease and desist having employees other than letter carriers collect mail from collection boxes as this is the third arbitration this arbitrator has presided over in Toledo, Ohio involving similar violations. Future violations concerning Toledo collection routes may result in escalating, corrective monetary awards.

The Union argued that these continuing violations must stop and there must be a definitive remedy to encourage the Postal Service to comply with all resolutions and to stop the egregious and flagrant violations that keep requiring these escalated awards. As remedy, the Union requested that this Arbitrator rescind all route adjustments; Compensate each collector 1 hour of penalty overtime each day from April 7, 2017, until the changes are rescinded; also compensate each carrier whose route had a collection box added to it in the same manner (1 hour of penalty overtime for each day from April 7, 2017 until the changes are rescinded); and compensate the Union $5,000.00 for the noncompliance and for having to take the same case to arbitration numerous times. The Union requested the grievance be sustained and their requested remedy be awarded.

V. MANAGEMENT'S CONTENTIONS

Management contended that the Union in this case failed to meet its' burden of proof that there was a violation of the National Agreement or harm done to any City Letter Carrier at the Toledo Ohio Post Office. According to Management, the Union seeks roughly $700,000.00 in damages based on their request to pay each carrier one hour of penalty overtime pay per day from

April, 2017, until the changes at issue in this grievance are rescinded. Management cited National Arbitrator Carlton Snow in case number H0C-NA-C 12 where he was asked to provide a nationwide monetary remedy in a case involving Article 12. The Service contends that at pages 18, 19 and 20 of his award, where Management states he appropriately entitled the section "A Need for More Evidence" Arbitrator Snow explained:

> ...The Unions had the affirmative of the issue and needed to show by at least a preponderance of the evidence that there is a direct causal connection between the conflicting data and a violation of the parties' labor contract. Facts are stubborn things and must provide the basis for an interpretive decision. Speculation will not suffice. While the evidence in this case was sufficient to raise suspicions, the Unions did not present evidence that demonstrated a specific contractual violation...The totality of the record submitted to the arbitrator was not sufficient to establish that, while there now is uniformity in the parties' understanding of the disputed provisions, it was violated in this particular case. Nor was there sufficient evidence of harm to ascertain damages."

The Service addressed the Union's request by the Arbitrator to abide by the provisions of Article 15 and disallow any evidence submitted by Management outside of the DRT decision as new argument. According to the Union, Management failed to extend the grievance and forfeited their right to put contentions in for this grievance at the Formal A; Management requested that this Arbitrator to decide how she will approach that issue and that whatever approach is chosen by the Arbitrator, the Service simply requests that it be applied equally to both parties. Management argued that the Step B impasse reports that the appeal was received on September 27, 2017, almost a full month after August 29th, the date on which the Formal A meeting should have been held. They further argued that even though Management did not have the opportunity to provide contentions at Formal A, the Union's contentions are just contentions, not evidence and only reflect the Union's conclusions about evidence.

It was the position of Management that whatever information that the record does not demonstrate to have been requested should not now be presumed or otherwise credited to the Union. The Service contended that there is no information in the file which suggests anything other than the fact that the Union had a full and fair opportunity to obtain whatever they wanted to support their contentions. They further contended that where there are a variety of awards, resolutions and

Memoranda in the file to have an influence on the arbitrator's decision about the Union's contentions that information about the contentions would need to justify the influence and should be found in the moving papers. The other papers, stated Management, are a many paged table titled "Collection Point Management System-Scanner History Detail Report by Route" and accompanying a request for information in this grievance, an email from Dean Shroka (management's witness) stating that "No 1840's were completed. HQ does not feel this is a route adjustment."

Management asserted that there is no Request for Information in the moving papers to support that any Management Official provided the CPMS table as an answer to any of the Union's requests (RFI). The Service contends that the Union's contention that the CPMS table which provided the information on the "Belongs to Route" was obtained through another grievance is not supported by the case file. Additionally, the Service contended that the supporting papers contain no information that they or any source of their information either has any postal duty that required them to either be informed about the Belongs To Route field or to utilize it or has had any training about its function. Management further asserted that there is no statement of any kind from any carrier, specifically nothing stating that the pulling of any collection box was added to or removed from his or her duties.

According to Management, were a route adjustment attempted, the only explicit evidence in the supporting papers concerning the topic was the email that "HQ does not feel this is a route adjustment." They noted that there were on supporting papers to provide a framework or understanding to infer an attempted route adjustment. The Service argued that even viewing the Union's evidence in the moving papers as truthful, Management submits:

1. That there is insufficient evidence to find a violation of any cited provision in a handbook or manual which directly relates to wages, hours, or working conditions
2. That even were a violation to be found, there is insufficient evidence to find loss, harm, or any difference having been suffered by any carrier.

The Service further argued that even if a violation and suffering were found, there are national decisions which set the precedent to be followed; they offered the opinion of Arbitrator Richard Mittenthal in case number H1C-NA-C 97 at page 5 which states in part:

> Fourth, perhaps most important, the purpose of a remedy is to place employees (and Management) in the position they would have been in had there been no contract violation. The remedy serves to restore the status quo ante.

The Service also noted Arbitrator Collins National decision where he sustained the grievance and declined to award a monetary remedy stating; "Under contract law relief must be compensatory, and cannot be punitive.

Management provided testimony at hearing to support their position on substantive arbitrability, where they held that the Union had not established Article 19's applicability to the Postal Operations Manual (POM) at Section 314.1. Management held that their expert witness, Dean Shroka testified in support of Management's motion that POM 314.1 is a management-to-management instruction that relates to a management tool, CPMS. They noted he further testified that Headquarters Operations charges District Operations with performing the annual review for accuracy and it is Headquarters' Operations to whom District Operations reports; he noted that Toledo Post Office does not exercise authority over the CPMS information and District Operations does not, through the CPMS information, exercise authority over the Toledo Post Office. Mr. Shroka testified that the instruction in POM 314.1 exists in the relationship between District Operations and Headquarters Operations; he averred that the changes in the "Belongs to Route" column did not constitute a route adjustment, a step in a route adjustment, a trigger for a route adjustment, or a notification that a route adjustment was coming.

The Service cited an excerpt from Arbitrator Johnathan Klein in case number B11N-4B-C 15359325, where the Union argued that Management violated POM Section 313; Arbitrator Klein opined:

> [The] evidence of record presented in this case reveals that management clearly failed to consider the needs of affected customers and the community as required by POM Section 313.4. The arbitrator notes that the Postal Service did not contact any of the affected local business until their purported concerns were brought to management's attention by the Union after the p.m. collections had already been eliminated. Additionally, the arbitrator finds merit to the Union's arguments regarding both the validity and accuracy of the density test results obtained and utilized by management in determining that the volume of mail deposited in the four collection boxes did not warrant afternoon pickups.

> However, the arbitrator finds insufficient proof from which to conclude that the provisions contained in POM Section 313 are directly related to wages, hours or working conditions. The subject matter of those provisions pertains primarily to the scheduling of collections, the location of collection boxes and other relevant factors which management must consider in changing those schedules and/or box locations. The POM provisions do not assign or guarantee letter carriers any hours, nor do they limit or expand employee rights. The cited provisions are a directive to management and at best result in an indirect effect upon the wages, hours and working conditions of letter carriers. Accordingly, the arbitrator concludes any alleged violation of POM Section 313 is not arbitrable as it is not incorporated into the National Agreement by virtue of Article 19.

In the instant case, according to Management, the Union's argument about POM 314.1 is subject to the same arbitrability defects as Arbitrator Klein, applying the national Nolan award, identified in the union's argument about POM 313 above. The Service asserted that a grievance concerning a provision in a handbook or manual is not arbitrable where the Union failed to provide sufficient proof that it directly relates to wages, hours or working conditions. They further asserted that if POM Section 314.1 was directly related to wages, hours, or working conditions, the Union did not provide sufficient proof of that proposition; and, even if the changes in the "Belongs to Route" column was contrary to POM Section 314.1 those changes showed no effect on hours, wages, or working conditions of any letter carrier. Management argued that either the provision in POM Section 314.1 has not been shown to concern the "Belongs to Route" column or the provision has not been shown to directly relate to hours, wages, or working conditions. Management further argued that in a contract case, the Union invoking Article 19 bears the burden of proving that the handbook/manual provision "directly relates to wages, hours, or working conditions"; they contended that the Union's witnesses did not identify any direct relation to wages, hours, or working conditions and the case file is void of any documentation which would develop that argument in the Union's favor. Therefore, according to Management, POM 314.1 is not properly before the Arbitrator and the Service requested that the Arbitrator so find.

Finally Management contended an assessment of the grievance file, only pages 25-436 have any relevancy to the instant grievance. They offered an appraisal of the documentation in support of their position. Management concluded that this case could not warrant a monetary remedy either to the members of the class or the union. The Service reiterated their objection to the Union's request

for a larger remedy at the hearing than it had requested earlier in the grievance procedure and contended that this was "new argument". Management maintained that their position that the instant grievance was not arbitrable and that the Union failed to advance a meritorious grievance since no employee's hours, wages, or working conditions was changed, and no harm to any employee was substantiated by the grievance file or during hearing testimony. Management requested the Arbitrator deny this grievance in its entirety.

VI. DISCUSSION

ARTICLE 19

HANDBOOKS AND MANUALS

> **Those parts of all handbooks, manuals and published regulations of the Postal Service, that directly relate to wages, hours or working conditions, as they apply to employees covered by this Agreement, shall contain nothing that conflicts with this Agreement,** and shall be continued in effect except that the Employer shall have the right to make changes that are not inconsistent with this Agreement and that are fair, reasonable, and equitable. This includes, but is not limited to, the Postal Service Manual and the F-21, Timekeeper's Instructions.

The instant case concerns the assignment of collection box pick-ups in the Toledo Post Office. The Union here alleges that postal management unilaterally assigned collection boxes from the dedicated collection routes to regular carrier routes without ever doing a unit review, sharing the information with the Union and/or Carriers, without giving notice to the Union and/or Carriers, and without performing any type of inspections. According to Management, there was no route adjustment performed and the Union in this case failed to prove a violation occurred. Management further held that the instant grievance is not arbitrable since the Postal Operations Manual, Section 314.1 is not related to the employee's hours, wages, or working conditions.

Regarding Management's arguments on arbitrability, Article 19 provides in pertinent part, that "**Those parts of all handbooks, manuals and published regulations of the Postal Service, that directly relate to wages, hours or working conditions, as they apply to employees covered by this Agreement".** In the instant case, the Union's position is that the Collection Point Management System covered by Section 314 of the POM is clearly related to the wages, hours or

working conditions of their bargaining unit. Specifically, the Union cited their Exhibit 1 (U-1) as it provided the language for POM 314. Not only does this section covers CPMS but also provides the requirements for Manual Collection Tests and Volume Density Tests. The Union argued that collectors are required to scan boxes for the CPMS data and management has issued removals and other disciplinary actions where scans were shown to be missed. The Union held that certainly CPMS affects the working conditions of craft employees when they can receive discipline for missing a scan, and would receive overtime for having to be sent back out to scan any missed locations. Having heard many discipline cases involving missed scans, it is this Arbitrator's opinion that the POM Section 314 does directly relate to the working conditions of the employees covered by the bargaining agreement between the NALC and the USPS and therefore any grievance related to that section would be arbitrable and allowed to be heard on the merits. Additionally, the POM Section 314 goes on to provide guidance on Collection Tests and Density Test which could ultimately be used to adjust routes and therefore directly impacts the wages and hours for craft employees.

Management further alleged that the Union's Article 15 arguments against the Service presenting any contentions or arguments outside of their Step B contentions (because they did not meet the required Formal A deadlines and did not extend the grievance) should be applied to the NALC as well. The Service cited the fact that the Step B decision showed that the Union's appeal to the DRT was received nearly a month following the date that the Formal A meeting should have been held. However, the National Agreement at Article 15.3.B states in pertinent part:

> B. The failure of the employee or the Union in Informal Step A, or the Union thereafter to meet the prescribed time limits of the Steps of this procedure, including arbitration, shall be considered as a waiver of the grievance. **However, if the Employer fails to raise the issue of timeliness at Formal Step A, or at the step at which the employee or Union failed to meet the prescribed time limits, whichever is later, such objection to the processing of the grievance is waived.**

Although Management contended that the appeal to Step B was not timely, that issue was not raised at Step B; therefore, based on the provisions of Article 15.3.B, Management's right to raise an objection is waived.

Based on the merits of the instant grievance, the Union alleges the changes made to the CPMS data were done without notification to the Union and without Management conducting a Unit Review. They offered CPMS reports to distinguish the assignments based on the designation of P to show the box or collection point was collected by a designated collection route and C to show the collection point was assigned to a carrier route. The reports (JX-2 page 25-436) show the changes made to the Belongs to Column, however each entry also shows that the boxes, or collections were made by designated collectors (with a "P" designation). Although the boxes were assigned to the Carrier routes, as suggested by Management, apparently the designated collectors continued to pull the boxes.

The Union's arguments include a claim that Management unilaterally made the changes demonstrated by the CPMS report, which provided the appearance of a route adjustment; they also allege that no unit review was conducted and Management failed to notify the Union of the changes. The POM 314, which Management's witness testified was a Management-to-Management instruction that relates to a management tool, actually provides guidance to Management for the utilization of the Management tool and states in pertinent part:

POM 314.1

> All collection points are required to be entered in the Collection Point Management System (CPMS) by the responsible District where Internet access is available. No scheduled collection may be excluded from CPMS.
>
> The information recorded in CPMS must be accurate and complete and must be reviewed at least annually by the District for accuracy. All exceptions must be in accordance with 313.3. **CPMS is utilized to electronically verify collections.** Any collection points recorded in these systems and receiving electronic scan data do not require the manual test as specified in 314.2,

Although, as averred, the provisions of Section 314 provide instructions for Management to abide by, the end result directly affects the employees providing the collection service. Of particular interest is the fact that the tool is used to "verify collections"; and Management is advised that **"the information recorded in CPMS must be accurate and complete"**. Missed collections is often used as the basis for discipline, and the Union's concerns that the information was changed in the

system without their knowledge is a valid one, despite Management's claim the data changed was not related to a route adjustment.

The Union provided numerous arbitral awards and grievance resolutions surrounding collections in Toledo. One decision relied upon by the Union was that of Arbitrator Johnathan Klein in case number C11N-4C-C 13318083 where he stated:

> The instant case is controlled by the facts which are not in material dispute by the parties. Moreover, there is no significant difference between the facts presented in this matter and those in the grievances which were resolved in two prior awards by this arbitrator regarding adjustments to collection routes at the Toledo installation... ...Case No. C06N-4C-C 09245878, at 6, the arbitrator noted that "this is not the first time the issue of missing unit reviews and route adjustments has reared its menacing head in the Toledo installation."
>
> The applicable M-39 Handbook provisions require management to conduct at least annual unit reviews and share the results with both the local Union president and the regular letter carriers...The evidence of record presented in this case establishes that management failed to conduct a unit review prior to removing collection boxes and changing the duties of letter carriers assigned to collection routes. Additionally, no consultations with the impacted letter carriers were conducted by management.
>
> In addition to the aforementioned awards issued by this arbitrator, the documentary evidence contained in the joint case file clearly establishes that the parties have resolved this issue through previous settlement agreements. In USPS-and NALC, Case No. C06N-4C-D 09245878, the arbitrator referenced two citable Formal Step A settlements which indicated that management would conduct unit reviews in the future as required by the M-39 Handbook, as well as a Step B Decision which found that management violated Article 19 of the National Agreement by scheduling route inspections prior to completing a unit review and sharing the results with the Union and the regular carrier. The evidence of record reveals that management once again failed to comply with prior settlement agreements covering the issues presented in this case.
>
> For the aforementioned reasons, the arbitrator concludes that the Union has satisfied its burden of proof and the grievance shall be sustained as set forth in the Award.

Arbitrator Klein, in the cited case, awarded the collection routes to be reinstated, and compensated the affected carriers based on undisputed evidence that at least one hour was removed by management from each collection route and resulted in approximately $76,302.72 in compensation to the 6 affected letter carriers over 312 days. The fact circumstances differs in the case at bar. The

Union here satisfactorily convinced the Arbitrator by a combination of the evidence and testimony at hearing that a violation occurred when Management failed to ensure that CPMS data was accurate and complete. As alleged, Management unilaterally changed collection boxes from dedicated collection routes to city carrier routes without notifying the Union or performing a unit review; also in violation of prior cease and desist orders and Formal A resolutions. However, the Union failed to demonstrate the harm caused to Collectors and Carriers affected by the changes in CPMS; as previously discussed, although the boxes were assigned to the Carrier Routes in CPMS, the data reflects that the Dedicated Collections routes continued to do the actual work by scanning and pulling the collection points. This information does not support compensatory damages requested by the Union since Collection Route personnel continued to collect the boxes.

Based on the foregoing conclusions, the grievance is sustained. Management violated the National Agreement when they unilaterally changed the assignment of collection points from dedicated collection routes to City Carrier routes without notification to the Union and prior to conducting a unit review. The changes made in CPMS by Management in Toledo will be rescinded and the collection points returned to the dedicated collection routes. The Service will reimburse the Union a total of $5000.00 towards the cost of processing this grievance.

AWARD

The grievance is sustained. Management shall cease and desist violating the National Agreement by making collection point assignment changes to collection or carrier routes prior to conducting a unit review and notifying the Union. The changes made to CPMS by Management in Toledo will be rescinded and the collection points returned to the dedicated collection routes. The Service will reimburse the Union a total of $5000.00 towards the cost of processing this grievance.

Glenda M. August

GLENDA M. AUGUST
Arbitrator

December 27, 2018

New Iberia, LA

REGULAR ARBITRATION PANEL

In the Matter of the Arbitration	*	
	*	
between:	*	Grievant: Class Action
	*	
United States Postal Service	*	Post Office: Toledo, OH
	*	
and	*	USPS Case No: C16N-4C-C 18291916
	*	
National Association of Letter Carriers, AFL,CIO	*	NALC Case No: 236-C-18

BEFORE: Lawrence Roberts, Arbitrator

APPEARANCES:

For the U.S. Postal Service: Barbara Cook

For the Union: Brent Harbaugh

Place of Hearing: Postal Facility, Toledo, OH

Date of Hearing: December 14, 2018

Date of Award: March 5, 2019

Relevant Contract Provision: Article 8

Contract Year: 2016

Type of Grievance: Contract

Award Summary:

This is a matter of remedy only. The record shows the Employer has failed to meet the overtime posting requirements set forth in the Parties Local Memorandum of Understanding. The record identifies an habitual violation by the Employer as well as their disregard to cease and desist language. The Union's requested remedy is therefore granted as outlined below.

Lawrence Roberts

Lawrence Roberts, Panel Arbitrator

SUBMISSION:

This matter came to be Arbitrated pursuant to the terms of the Wage Agreement between United States Postal Service and the National Association of Letter Carriers Union, AFL-CIO, the Parties having failed to resolve this matter prior to the arbitral proceedings. The hearing in this cause was conducted on 14 December 2018 at the postal facility located in Toledo, OH. Testimony and evidence were received from both parties. A transcriber was not used. The Arbitrator made a record of the hearing by use of a digital recorder and personal notes. The Arbitrator is assigned to the Regular Regional Arbitration Panel in accordance with the Wage Agreement.

OPINION

BACKGROUND AND FACTS:

This is a class action grievance filed on behalf of Letter Carriers working at a Toledo, OH Postal facility, the Reynolds Corners Delivery Unit.

The issue in this matter involves the following language found in Item 14 of the 2016-2019 Memorandum of Understanding between the Toledo Ohio Post Office and National Association of Letter Carriers, AFL-CIO, Branch 100, Toledo, Ohio providing:

> "In accordance with Article 8, Section 5, of the National Agreement, a chart shall be posted and updated each quarter in each work location indicating each employee's accumulated overtime. In order to insure equitable opportunities for overtime, overtime hours worked and opportunities offered will be posted and updated weekly. The weekly posting will be posted the Wednesday after the service week has ended.
>
> An employee who has been contacted to work overtime and is excused by management and thus does

> not work overtime shall be credited on the chart, in red numbers periodically, as if he/she did work overtime."

And according to the Step B Decision, labeled "Explanation: Undisputed fact as agreed upon by the Formal A parties" provides:

> "It is undisputed between the parties that the weekly equitability at RC, (Reynolds Corners) for the week ending February 02, 2018, was not posted until February 10, 2018. Per the LMOU the posting was required to have been posted no later than Wednesday February 07, 2018."

The Parties disagreement regards the appropriate remedy to be applied in this case.

The Union's position is that local Management is well informed and aware of their obligation to provide the posting every Wednesday and all previous attempts to end this violation have not been successful. The Union asks the Grievants be made whole and, in addition, a remedy be fashioned to encourage the Employer to abide by the National Agreement.

Conversely, the Employer contends the Union has the burden to prove Management did not post the overtime tracking in a willful, intentional, or deliberate matter. The Employer insists no harm has been identified when Management posted the overtime tracking sheet just three days late. It is the Employer's

argument that posting the tracking sheet late does not have a direct effect on overtime equitability.

It was found the matter was properly processed through the prior steps of the Parties Grievance-Arbitration Procedure of Article 15, without resolve. The Step B Team then reached an impasse on 5 July 2018. Therefore, the matter is now before this arbitrator for final determination.

At the hearing, the Parties were afforded a fair and full opportunity to present evidence, examine and cross examine witnesses. The record was closed following the receipt of written closing briefs from the respective Advocates on 06 February 2019.

JOINT EXHIBITS:

1. Agreement between the National Association of Letter Carriers Union, AFL-CIO and the US Postal Service.
2. Grievance Package
3. Local Memorandum of Understanding, 2016-1019

UNION'S POSITION:

The Union first mentions this is a remedy case only. It is the Union's opinion that the Parties have agreed to undisputed facts that the Postal Service violated the National Agreement including the Local Memorandum of Understanding and several agreements they signed by not posting the overtime equitability chart by the Wednesday after the service week ended.

According to the Union, it is no secret Toledo Installation Management bargains in bad faith by signing agreements they have no intention to honor. And in the opinion of the Union, this case file is riddled with Toledo Installation arbitration decisions due to Toledo management's nonfulfillment of the agreement they sign.

The Union forecasts the opening statement of the Service will defame the Union and blame the Union for their failure to comply. Additionally, the Union predicts the Employer will defame and smear the Union's reputation simply because the Union has the audacity to request remedies that will force compliance with signed agreements.

The Union claims the Employer is once again forcing the Union to incur additional expense by taking a known violation to arbitration to get a remedy sufficient enough to end the violations.

The Union insists their arguments will be supported with a plethora of signed agreements showing that the overtime equitability is to be posted by Wednesday after the service week has ended. And the Union asserts it is undisputed in this case the Agency did not comply with these agreements.

Even though escalated remedies for repeated non-compliance has been addressed many time in the Toledo Installation arbitration awards, the Union is of the opinion that Management wants to take another bite at the apple.

The Union foresees the Employer will once again stand before an arbitrator and argue escalated corrective remedies are forbidden, with the same arguments that have already been dismissed in binding Toledo arbitration cases. And the Union anticipates Management will deploy the same arguments, such as; escalation of remedies to ensure compliance is not allowed by the National Agreement, arbitrators don't have the authority to grant escalated corrective remedies and they will even attempt to make a new argument stating it is against the law for the arbitrator to grant an escalated corrective remedy.

As projected by the Union, the Employer will make all of these arguments knowing that the doctrine of res judicata applies and knowing they have not sought to vacate any of the previous Awards granting escalated corrective remedies. And the Union insists they will be forced to incur this additional cost knowing escalated corrective remedies have been upheld in Toledo by the arbitrator presiding over this instant case.

The Union mentions they will provide the arbitrator evidence that the Union has been proactive in providing assistance to the Service to help them comply with their signed agreements. As claimed by the Union, the evidence will show they have provided assistance with equitability charting. The Union claims that after talks with the Postmaster, an email was sent on 15 November 2017 to all his staff notifying them of the requirement to post the equitability weekly and it must be posted by the Wednesday after the service week.

The Union mentions the evidence will also show the Union assisted Management in knowing the consequences for further non-compliance and documentation will show the Union placed Management on notice that escalated corrective remedies may result for non-compliance.

And as asserted by the Union, even though the Agency is here today arguing escalated corrective remedies are improper, agreements were signed allowing them. The Union claims the evidence will also show that Management signed agreements stating that "Failure to comply may result in increased remedies." According to the Union, the Service ignores and fails to honor this agreement also.

The Union also speculates that Management cites National Arbitrator Mittenthal but fails to understand the portion of the award which states, "Arbitrators have an extremely large measure of discretion how contract violations should be remedied." The Union believes the Service also looks past the National Arbitrator stating "… contract remedies, with only a few exceptions, are limited to 'make whole' remedies." In the opinion of the Union, Arbitrator Mittenthal understood that there are exceptions to the 'make whole' remedy which has also been addressed by this arbitrator in past awards.

From the perspective of the Union, the repeated non-compliance of the Service falls into the exception as it is not common to have a Party continue to disregard the agreements they sign.

In the opinion of the Union, the only reason we are here today incurring this extra expense and loss of time is the Service is hoping to find an arbitrator that will issue a remedy small enough that will allow them to continue ignoring agreements they have made with the Union.

The Union believes that Management is willing to pay the cost of this arbitration, along with all their other grievance processing costs up the entire chain, in the hopes of a remedy that will make it affordable to continue not complying.

The Union requests a proper remedy that will put an end to the bad faith non-compliance with signed agreements and is asking you to compensate each affected Carrier $100 and the Union $5000 for having to arbitrate repeat non-compliance issues over and over again.

COMPANY'S POSITION:

According to the Agency, the matter today involves an alleged contractual violation when Management failed to post the weekly overtime equitability by three days. Management adds it was not posted by that Wednesday and has been stipulated in the moving papers.

Management further stipulates that per a Pre-Arbitration settlement signed 27 September 2018, the Postmaster and the NALC Union President, on this exact issue, Management is going to compensate each Carrier on the OTDL List at the time of this grievance a lump sum payment of $20.00.

In Management's opinion, the case today will only need to be heard on the escalated remedy of Branch 100.

And according to the Service, Formal B agreed to the following issue statement: Did the Postal Service violate the National Agreement including, but not limited to, Article 8, 15, 17, 19, 30 and the LMOU when it failed to post the weekly overtime equitability? If so, what is the proper remedy?

In the opinion of the Employer, we are here again to advocate on yet another alleged non-compliance grievance. Management charges that Branch 100 is primarily filing 'non-compliance' grievances instead of grievances on the actual Article or Handbook violations because of a couple of arbitration awards which put money in their pockets.

The Agency argues this is an Arbitration about money.

Management forecasts the Union will try and say we are just bashing them. From their perspective, this does not make anyone in Management happy to advocate on the processes in Toledo currently.

The Agency projects there will be no name calling at the hearing. Instead, the Employer promises there will only be testimony under oath on the truth that exists in the Toledo grievance process currently.

The Agency speculates testimony will show how Toledo Branch 100's greed has altered how Article 15 is handled in Toledo now. Management mentions there has been Joint Article 15 refresher training twice, an Intervention requested by Management and Toledo Management/Branch 100 was selected by a Joint Headquarters NALC and USPS Team to be involved in the Joint Workplace Improvement Program to try and improve the Article 15 and the Dispute Resolution Team process in Toledo. But, in the Agency's opinion, currently the process is still severely broken.

Management believes Branch 100 still does it the way they want to do it, by flooding the grievance process with grievances to try and corner Management into violations, adding additional burden to Management by language added to the National Agreement or Handbooks and Manuals, mudding the waters and painting Toledo with a broad brush of non-compliance because it gave them money, and once you get a taste of money you want more regardless of how you have to get it.

Again, the Service predicts testimony will demonstrate how Branch 100 is trying to 'get it' by flooding the grievance system with specific grievances hoping to pigeon hole Management into such a fine corner that anything Management does could be considered non-compliance.

The Employer also anticipates testimony today will illustrate processes the new Postmaster has put into place in Toledo with the NALC Branch 100 President for the purpose of eliminating old non-compliance grievances, to clean up and resolve any past issues, and to educate his Management Team and hold them accountable. In Management's opinion, the Postmaster continues trying to make Toledo better for everyone moving forward.

According to the Service, Branch 100 abuses a couple arbitration decisions and you will hear testimony today on how they are being used. Management believes the arbitration awards, which have nothing to do with this case file, are being used for everything from Opting to Special Office Counts to Overtime to the newly ratified National Agreement Article 8.5.C.2 which brings us to Arbitration today trying to put a tourniquet on the extreme financial loss to our company by their escalation remedy requests. From Management's perspective, they are being used under the guise of "Non-Compliance."

The Employer charges that by Branch 100 using these Arbitration decisions in every grievance it is holding us back

from moving forward. Management claims we are in a continual round-a-bout going in circles with no end in sight. In the Employer's opinion, it is stagnant and cannot progress to a more positive future between us.

The Agency predicts Branch 100 will probably state, "Management must think it's more cost effective to go to Arbitration than to comply." as they have previously. But the Employer claims that is not the case. Due to the abuse of some arbitration decisions and the remedy requested at the lowest level of the grievance process, plus their extreme filing of grievances, it is Management's opinion their hand has been tied and cannot possibly resolve any issues due to the escalation requests made by Branch 100 and that will be presented in testimony today.

Management agrees that in the past Toledo Management had a rough time with compliance, but, under new leadership, in the past year and a half, this has turned around and testimony will show the results.

Again in the opinion of the Employer, Branch 100's greed is hurting Toledo and the positive growth that has been achieved with the new Postmaster; their greed is impacting the entire grievance process.

From the Agency's standpoint, Branch 100 is all about "Gotcha" and Management finds out about years old dusty non-precedent settlements and Arbitrations in the grievance procedure not by the Union working with Management as you should per the Joint Statement of Expectations, which reads as follows:

USPS-NALC JOINT STATEMENT OF EXPECTATIONS

The Parties at the National Level commit to the following principles of conduct when addressing disputes under Article 15 of the National Agreement. We believe these principles are essential to the effectiveness of any dispute resolution process as well as effective working relationships between the union and management. Our expectation is that these principles will guide union and management representatives at all levels of the organization.

- We will do our best to understand and respect each other's roles, responsibilities, interests, and challenges.
- We will make every effort to establish and maintain a more constructive, and cooperative working relationship between union and management at all levels of the organization by promoting integrity, professionalism, and fairness in our dealings with each other.

• We are committed to honoring our labor contract and the specific rights and responsibilities of the parties set forth therein.

• We will work together to prevent contract violations through communication, training, and good faith efforts to anticipate workplace problems and resolve disputes in a timely manner.

• We are committed to eliminating abuses of our grievance-arbitration procedure, such as the filing of unwarranted grievances to clog the system or a refusal to resolve grievances even where there are no legitimate differences of opinion between the parties.

• We are committed to mutual and joint efforts to improve the workplace environment and to improve the overall performance of the Postal Service.

.. We will make every effort to resolve our disputes in a professional manner and to avoid any unnecessary escalation of disputes which may adversely impact adherence to the above principles or adversely influence union-management relationships at other levels of the organization.

The Employer forecasts the Union will paint a picture of the non-compliance history in Toledo. Management will show that most of the resolutions in the case file doesn't have Management Contentions at all, state 'will not be cited in any forum', or have nothing in common with the instant case before you today. The Employer recognizes that while some of the Formal A resolutions contain language such as in the future, many of them do not.

The Service argues the Formal A resolutions in the case file contain the term "without prejudice." Citing Arbitrator Braverman to that end.

Management reasons they settle grievances for many reasons, even those that do not involve a violation. The Union, in the opinion of the Employer, is just using these resolutions as filler to pad the case file and give the appearance of non-compliance when in fact a lot of these resolutions are not for non-compliance.

The Employer Advocate assures that the testimony today is not to bash the Union, and all Advocates have expressed their concern regarding any harm to the Formal A relationship, but, as we have remained silent so far, that we must speak out to finally put a stop to it.

The Employer Advocate projects the testimony today will suggest that the grievance process seems to be orchestrated by

the 'Hall'. By that, the Employer Advocate suggests, it appears that the President and Vice President are directing the decisions of the Formal A Representatives, swapping out Representatives after meetings, and just plain interfering in the Formal A process.

Management references Article 15.2 (c).

As stated earlier, Management claims the evidence will show today through testimony that the union's request to obtain money for themselves does not lend itself to bargaining in good faith so these grievances may be settled at the lowest level.

Furthermore, Management suggests this goes against the USPS-NALC Joint Statement of Expectations which states in part:

"We are committed to eliminating abuses of our grievance-arbitration procedure, such as the filing of unwarranted grievances to clog the system or a refusal to resolve grievances even where there are no legitimate differences of opinion between the parties."

The Employer goes on to cite Arbitrator Stanton, in Case K16N-4K-C 17664487, when dealing with a Union requesting monetary remedy to themselves:

"The third remedy request may be the easiest one to deal with in this case. The Union's request for money to be paid to the labor organization as part of the grievance settlement is asking for a purely punitive remedy. There is no harm to Local 496 in this matter—either monetary or non-monetary. Arbitration precedent for decades has established that purely punitive damages are rarely awarded in arbitration. Awarding punitive damages to a Local Union as opposed to an employee overlays a problem on top of a problem. The Labor Management Relations Act was enacted in 1947. The purpose of the Act was to make unlawful undesirable labor relations practices including employers making payoffs to Unions or Unions demanding payments from employers. Section 302 of the Act makes it unlawful for an employer to "pay, lend, or deliver money or any "other thing of value" to a labor union or official, or for a union to "request, demand, receive or accept" the same from an employer. Financially, employers and unions are to be kept at arms-length to avoid the possibility of misconduct by either party. The law is poorly defined and the exact extent of its reach unknown. Even if such payments to a union are not unlawful, it still represents the kind of activity the law seeks to prevent and are therefore undesirable.

The Employer stresses the essential facts of the case today are:

- The weekly overtime equitability posting was not posted on February 7, 2018, it was posted February 10, 2018.

Management suggests that, reasonably, if you just look at how this case is put together by the Union you will see that they are trying to smear the arbitrator's thinking on how Toledo is NOW versus how Toledo was THEN. The Services queries "how long is Toledo going to be punished for the issues in the past?"

The Agency queries by asking when is the current leadership and the positive changes that are being implemented going to finally be rewarded instead of punished punitively?

And the Employer asks how much time has to pass before someone states, "Oh, they had a violation. Well, 2 years have passed, this is now just a grievance, not a non-compliance issue." And the Agency wonders when can Toledo move forward?

It is the argument of the Service that, in the end, it was posted and no harm became to any individual and definitely not to the Union Hall.

Management suggests that, once all the evidence and testimony is entered into the record, the record will show the Union did not prove with a preponderance of evidence that any harm befell the Union Hall. The Agency requests this escalated remedy be denied in its entirety.

THE ISSUE:

Did the Postal Service violate the National Agreement including, but not limited to, Article 8, 15, 17, 19, 30 and the LMOU when it failed to post the weekly overtime equitability? If so, what is the proper remedy?

PERTINENT CONTRACT PROVISIONS:

ARTICLE 15
GRIEVANCE-ARBITRATION PROCEDURE

DISCUSSION AND FINDINGS:

At the onset of the hearing, the Parties stipulated that a violation of the Local Memorandum of Understanding had occurred and the remaining issue was one of remedy.

There was literally a plethora of arguments and testimony received from both Parties in this case regarding their respective position. Little of that, in my view, pertained to the actual logistics of this case.

In their closing brief, the Employer Advocate stated:

> "The Union is solely using Arbitration awards and have thus removed Management's ability to resolve any grievances at any other level of the grievance procedure. By removing this ability, the Arbitrators have removed Managements ability to abide by Article 15 of the National Agreement and to the Joint Statement of Expectations.
>
> The Union continually files non-compliance. Management has been placed in a Catch 22 situation with regard to escalated remedies. We get an arbitration decision. We try to put measures in place to comply with arbitration decisions. Prior to implementing a decision, we are arbitrate cases with incident dates and appeals prior to the decision date of the previous arbitration. Since we have not had an opportunity to implement the process we are receiving another decision with escalated remedies. This has an inherent adverse snowball effect on management's ability to manage. Cases continue to up with larger and larger money mandates. How long will we be punished for something we are trying to make right?"

Despite Management's arguments to that end, little of that pertained directly to the issue at hand, that being, one of remedy. At face value, the Employer's position that the Union did not suffer any harm would resonate in such a case. The Postal Service argues the issue of escalated remedies places the Employer in a "Catch 22" situation. However, in reality, instead of escalation, the issue is really one of compliance.

The Employer insists that compliance has vastly improved in the last year and a half. However, the applicable language of the Local Memorandum of Understanding in this case is absolute and is certainly not dependent on local management assignments or whether it suites the needs of a particular supervisor or manager. The language is absolute, unambiguous and without exception. This particular contract language requires compliance, not merely improvement in doing so.

I understand there are exceptions to any rule, regulation, article or section. And if this particular occurrence were that single exception, the matter would more likely than not be dismissed. However, that is not the case. There have been multiple instances of the Employer's failure to meet that Wednesday posting requirement. And the Employer's same failure has resulted in settlements including cease and desist orders.

That last word should never be used in the plural sense. As I have stated in previous Awards, I believe a clear explanation as to the meaning and intent of a cease desist order would be beneficial. It means stop. It means immediately. It means to cease from the same action hereinafter into the future, without excuse. Compliance is mandatory. It's not an option or whenever one simply decides to do so.

The issue in this case is similar to a previous case I decided at this same installation labeled C11N-4C-C 17603805:

> "This case file identifies literally a plethora of non-compliance settlements at the Toledo Installation. Management correctly argued that many of those were non-precedent setting. And to that end, I agree, but only to the merits of the dispute. The mere quantity cannot be set aside, as it certainly identifies a serious pattern of non-compliance regarding various issues. The issues may have been resolved without precedence and carry absolutely no weight in my findings. However, any "without precedence" settlement does not simply provide a non-compliance bypass. The number of non-compliance settlements found in this case file cannot be set aside…
>
> And in 1994, Arbitrator Mittenthal provided a similar message in another National Award styled H7C-NA-C 36/132, HOC-NA-C 28:
>
> "It is generally accepted in labor arbitration that a damage award, arising from a violation of the collective bargaining agreement, should be limited to the amount necessary to make the injured employees whole. Those deprived of a contractual benefit are made whole for their loss. They receive compensatory damages to the extent required, no more and no less."

> I agree with Arbitrator Mittenthal that a remedy serves to restore the status quo ante. In the second Award, Arbitrator Mittenthal stops short of making that "status quo ante" mandatory by the use of wording such as "generally accepted" and "should be limited." Such mandatory dialogue indicates the intent of Arbitrator Mittenthal was not to eliminate the use of punitive awards in certain situations. And in my view, this is certainly one of those cases."

As previously stated, the Employer argues the Union is attempting to "cash in" on every non-compliance opportunity. I disagree as the facts of this case have not led me to such a conclusion. Instead, I am of the considered opinion the Union is on point in concluding the Employer has developed and maintained a pattern of non-compliance as it relates to the matter of Wednesday overtime postings.

The record identifies some ten or more settlements directly relating to Wednesday posting delays since the inception of that language into their 2016-2019 Local Memorandum of Understanding. Numerous settlements have included cease and desist orders. Paramount is the fact the Employer was unable to show any foundation for their non-compliance to this negotiated language. And with that reasoning, I am of the considered opinion the Union's requested remedy only be the next step in enforcing this particular language of the Parties Local Memorandum of Understanding.

Each affected Letter Carrier will be awarded $100. And the Union is granted $5000 as a result of local Management's continued defiance of this unambiguous language found in the 2016-2019 Local Memorandum of Understanding.

It is so ordered. I will retain jurisdiction for a period of forty five (45) days from the date of this Award for the purpose of ensuring compliance only.

AWARD

The grievance is sustained in accord with the above.

Dated: March 5, 2019
Fayette County PA

REGULAR REGIONAL ARBITRATION

In the Matter of the Arbitration between UNITED STATES POSTAL SERVICE and NATIONAL ASSOCIATION OF LETTER CARRIERS, AFL-CIO	Grievant: Willia Ashford Post Office: Toledo, OH - Station A USPS Case #C16N-4C-C18174356 BRANCH Case #320-C-18 DRT Case #11-435716

BEFORE: Tobie Braverman ARBITRATOR

APPEARANCES:

For the U.S. Postal Service: Steven Tremaine

For the Union: Jeff Fauver

Place of Hearing: Toledo, OH

Date of Hearing: December 6, 2018

AWARD: The grievance is sustained. The Employer is ordered to cease and desist in failing to complete one day mail counts fully and failing to provide Form 1838-C to carriers. The Grievant shall be paid the sum of $50.00 and the Union shall be paid the sum of $500.00.

Date of Award: February 19, 2019

PANEL: USPS Eastern Area / NALC Region 11

Award Summary

Declaring that a one day count will be disregarded is an insufficient remedy where there exists a pattern of incomplete one day counts and failures to provide the carrier with the 1838-C. The carrier is awarded monetary relief due to the lack of an otherwise adequate remedy, and the Union is awarded a monetary sum due to the repeated failure to abide by grievance resolutions.

Tobie Braverman

The instant case is submitted to the Arbitrator pursuant to the terms of the grievance arbitration provisions set forth in the Collective Bargaining Agreement of the parties. Hearing was held at Toledo, Ohio on December 6, 2018. The parties submitted post hearing briefs which were received by the Arbitrator on January 16 and January 18, 2019, and the matter was declared closed on the latter date. The parties stipulated that the matter is properly before the Arbitrator, and further stipulated that the issue for decision, as framed by the B Team, is as follows:

Did management violate the National Agreement, including Article 15 and previous Formal A and DRT decisions, when it failed to comply with grievance resolutions including 1222-C-178, and if so, what is the appropriate remedy?

FACTS

The Grievant is a letter carrier at Toledo, Ohio Station A. The instant grievance arose when a one day mail count was partially completed on her route on February 27, 2018. The Grievant was given notice of the count on the day prior via a notice posted on the time clock. On the day of the count, Manager Paul Dorobek completed the morning portion of the count, and advised the Grievant that she would be provided with the yellow copy of the From 1838-C upon her return to the office. When the Grievant returned to the office, it is undisputed that the afternoon portion of the count was not completed. The Grievant inquired concerning the copy of the 1338-C, asking both the afternoon supervisor and the Postmaster, who happened to be present in the office, concerning the form. Neither could locate the form. Postmaster Joseph Stewart contacted Dorobek by phone, but he could not provide any information as to the location of the

form. The Grievant's copy of the 1338-C was never located, and the afternoon portion of the count was not completed. The Employer argued in processing the grievance that the document was lost, but Dorobek did not either testify at hearing or provide a statement in the grievance file. It is therefore unclear whether the document was misplaced or never actually created. As a result of the inability to locate the form, Postmaster Stewart ordered that the count be canceled and discarded. The Grievant testified that the process of a count is "nerve wracking" with a manager standing behind her as she works for one and one half hours, and it is upsetting to not be advised as to the result.

Despite that cancellation of the count, the instant grievance was filed objecting to the one day count violation. Specifically, the grievance alleges that the Employer's actions in this instance constituted a serial violation and non-compliance with a Formal Step A grievance resolution in Toledo. That resolution dated October 31, 2017, was negotiated as a result of a series of one day counts which were incomplete and repetitive. The Union alleged that the counts were being used as a form of harassment. The grievance resolution therefore provided that all one day counts would use the carbon version of the 1838-C, and that the yellow copy would be provided to the carrier within twenty-four hours of the count. The resolution further provided that management officials conducting the count were required to devote full attention the count, including P.M. office duties. The agreement finally provided that one day mail counts were not to be used for purposes of harassment. A subsequent Formal A resolution dated December 11, 2017 included essentially the same language, as well as an additional requirement that the required

twenty-four hour prior notice of the count would be provided directly to the carrier.[1]

The evidence in the grievance file demonstrated that there have been at least ten prior grievance resolutions at either the Formal A or Informal A grievance step relating to one day mail counts dating from 2015 through May, 2018, with the majority occurring in 2018. The majority of these related to complaints that the counts were never entered into the system and that the 1838-C was not provided to the carrier. Because of the repeated failure to complete the counts, the carriers viewed the counts as a form of harassment rather than an effort to ascertain the carriers' efficiency. Several of the Informal A resolutions include payments in the amount of $25.00 to the affected carriers. None includes payment to the Union. The Union at hearing in this grievance requested a payment in the amount of $50.00 to the Grievant and $500.00 to the Union, although the requested payment to the Union has varied during the course of the processing of this grievance. It is against this backdrop that the instant grievance proceeded through the grievance procedure without resolution to arbitration.

RELEVANT CONTRACTUAL PROVISIONS

ARTICLE 3 - MANAGEMENT RIGHTS

The Employer shall have the exclusive right, subject to the provisions of this Agreement and consistent with applicable laws and regulations:
A. To direct employees of the Employer in the performance of official duties; ...
C. To maintain the efficiency of the operations entrusted to it;

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[1] Although mentioned at hearing, the Union did not argue that the notice posted at the time clock was insufficient at the lower levels of the grievance procedure in this case, and the Arbitrator will therefore not address that issue.

D. To determine the methods, means, and personnel by which such operations are to be conducted; ...

ARTICLE 19 HANDBOOKS AND MANUALS:

Those parts of all handbooks, manuals and published regulations of the Postal Service, that directly relate to wages, hours or working conditions, as they apply to employees covered by this Agreement, ... shall be continued in effect ...

Handbook M-39

141.12 Office Routines ...
141.2 Special Office Mail Counts
When management desires to determine the efficiency of a carrier in the office, a count of mail may be made. The carrier must be given one day's advance notification of this special count. Use Form 1838-C to record count and time items concerned. The carrier must be advised of the result of the office mail count.

POSITIONS OF THE PARTIES

Union Position: The Union contends that it has met its burden of proof to demonstrate not only a violation of the Formal A resolutions regarding office mail counts, but has further demonstrated that there is a pattern and practice of repeated and serial non-compliance with grievance settlements and B Team grievance resolutions in Toledo. There is no question that the mail count of the Grievant was not completed and she was not provided with the 1838-C. This has been a repeated issue, and the subject of numerous grievances and grievance resolutions. Knowing this, a reasonable effort to comply should have been made, but apparently it was not. Despite the number of grievance settlements the Employer has continued to violate the agreed prior resolutions. Additionally, there is a history in Toledo of repeated violations in other areas which have been the subject of several arbitrations in which arbitrators have awarded escalating

monetary remedies as a result of management's repetitive violations. Even with the imposition of escalated remedies, the violations have persisted. The only way to stop the violations at this point is to escalate the remedies to the carriers and the Union to such an extent that it is less profitable to violate the grievance resolutions than to comply. While the Employer has attempted to paint the Union as greedy, the Union has been forced to expend its time and resources to enforce its members' rights. Because this issue is a recurring one, the Union should be granted a monetary award to compensate for its need to repeatedly pursue grievances on the same issue and to impress on the Employer the need for future compliance. The grievance should therefore be sustained in its entirety.

Employer Position: The Employer contends that the evidence demonstrated that there was no violation of the National Agreement in this case. While an office count was begun on the Grievant, when the 1838-C could not be located upon her return to the office, management attempted to locate the form, and discarded the count when it could not be found. That action was sufficient to remedy the failure to complete the count and provide the Grievant with its result. There was therefore no harm which requires a remedy. The Employer further notes that the Union's Formal A representative did not appear to have authority to settle the grievance as is required by Article 15. She made a phone call during the meeting, and advised Sabriya Glass, the management representative, that she could not settle without the payment of some amount of money. This amounted to bad faith bargaining. Further, many of the grievance resolutions included in the case file by the Union address unrelated matters, and are merely filler to give the appearance of non-compliance where none exists. Finally, the requested payment to the Union in this case is strictly punitive. Such a remedy is not provided for by the National Agreement. The

Union has failed to demonstrate harm to either the Grievant or to the Union. The requested payments are therefor unjustified and should not be awarded in this case. The grievance should be denied it its entirety.

DISCUSSION AND ANALYSIS

This being a case of contract interpretation, it is clear that the burden of proof is on the Union to demonstrate by a preponderance of the evidence that the Employer violated the terms of the Collective Bargaining Agreement in its conduct of a one day mail count on the Grievant without either completing the count or providing her with a 1838-C within twenty-four hours thereafter. That violation appears to be clear. The Grievant testified without contradiction that the count was not completed and she did not ever receive the 1838-C for the count which Dorobek conducted on February 27, 2018. While the Employer asserted that the form was merely lost and the count was thrown out by the Postmaster after the 1838-C could not be located, it was not proven that in fact the form was ever created in the first instance.

This is of particular concern in view of the history of grievances in Toledo which resulted from one day mail counts which followed just this pattern. While the Employer argues that the one day count was not proven to be harassment, the Grievant testified that it is stressful to have a supervisor stand behind her for one and one-half hours in the office looking for mistakes and missteps. There is little doubt that this is a typical reaction to that scenario, and having a supervisor look over your shoulder as you work creates an inherently stressful situation. The conduct of a one day mail count, however, regardless of whether or not it creates stress to the

carrier, normally has a legitimate purpose. That is, to determine if the carrier is performing efficiently, and to correct inefficiencies which may be observed. On the other hand, if the carrier is not provided with either commendation for a job well done or correction for mistakes, the count can have only one purpose. That is, to serve as a mild form of intimidation or harassment. In fact, this was the basis for the prior grievances resolved at Formal Step A which sought to end this managerial practice. In light of this history, and in the absence of any testimony or statement from Dorobek, it can only be presumed that the one day count on the Grievant was a continuation of the inappropriate practice which the Employer had agreed to stop in two different grievance resolutions.[2]

It is unclear why management in Toledo cannot fully complete one day counts and provide the carrier with the appropriate feed back from the count as is required both by the Formal A grievance resolutions and M-39 §141.2, quoted above. While on occasion, the press of business or an emergency may prevent the completion of the count, there was no evidence that such was the case here. In light of the history on this issue, it is simply an unacceptable excuse that, in the course of a single work day, the form was irretrievably lost. Further, simply "discarding" the count after the fact does not compensate the carrier for undergoing the undue stress imposed by the count which ultimately served no legitimate purpose. This is effectively no remedy at all since the count was already invalid since it was incomplete and undocumented. To permit the Employer to repeat this pattern while resolving the violation by ignoring the count, results in

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[2] The testimony established that Dorobek, as the opening supervisor, was gone for the day by the time the Grievant returned from the street. The evidence suggested that the afternoon supervisors were not even informed that there was a count to complete for the Grievant, and they certainly were not advised as to the location of any 1838-C.

harm to the Grievant without providing the potential for a remedy. Under these circumstances, a monetary remedy is appropriate. The Grievant shall be awarded the sum of $50.00, double the amount agreed upon in prior grievance resolutions, due to the repeated nature of this violation.

The other aspect of remedy requested by the Union in this case concerns the Union's request for a monetary payment to serve as incentive for the Employer's future compliance and to to compensate the Union for the time and expense involved in repeatedly pursuing grievances concerning the same issue. In the initial grievance the Union sought $5,000.00, at hearing however, this amount of was reduced to $500.00. In its post-hearing brief the Union requested an amount "large enough to guarantee management's compliance with settlements". While this Arbitrator has on occasion awarded such payments in cases where it is necessary to file serial grievances to enforce prior grievance settlements or arbitration awards, the Arbitrator is not entirely convinced that an award in excess of $5,000.00 as requested by the Union here would either be an equitable award or would have the desired effect of stopping all future violations. Further, the evidence in this case demonstrates that this is the first arbitration regarding the issue presented here. Thus, while there have been a number of grievances and grievance resolutions regarding one day count violations, this is the first time the issue has reached the arbitration step of the grievance procedure.

The issue of compliance with grievance settlements and arbitration awards in general, on the other hand, has been a particularly difficult one in Toledo. The grievance file, as well as several arbitration awards, demonstrate that the Employer has repeatedly reached grievance resolutions or been ordered to cease and desist or make payments by arbitrators only to either commit the same offense again many tines or delay payment for an inordinate amount of time.

These actions, as Union Vice-President, Andy Adkinson testified, have resulted in a significant loss of credibility for the Union with its members. In fact, Adkinson testified that some members have threatened to resign their membership due to the Union's inability to compel contractual compliance. Additionally, the repeated violations have resulted in the Union's need to expend scarce resources to pursue multiple grievances on the same topic. Under these circumstances, the Arbitrator believes that a payment to the Union is appropriate. However, the amount requested by the Union is excessive and was not adequately justified. The Union shall therefore be awarded the sum of $500.00 which is intended to impress upon the Employer that repeated and continuing violations of agreed upon grievance resolutions are not acceptable. Managers and Supervisors must be made aware of those actions which are improper and be clearly instructed as to expectations. Ultimately, it is only through clear expectations set by upper management that management at the office level will be made to conform.

AWARD

The grievance is sustained. The Employer is ordered to cease and desist in failing to complete one day mail counts fully and failing to provide Form 1838-C to carriers. The Grievant shall be paid the sum of $50.00 and the Union shall be paid the sum of $500.00.

Dated: February 19, 2019

Tobie Braverman, Arbitrator