29507

REGULAR ARBITRATION

In the Matter of the Arbitration

between

UNITED STATES POSTAL SERVICE

and

NATIONAL ASSOCIATION OF
LETTER CARRIERS, AFL-CIO

Grievant: Class Action

Post Office: Ann Arbor MI

Case No: J06N 4J C 09430162

Union No: 06-155891

BEFORE ARBITRATOR Karen H. Jacobs

APPEARANCES

For the U S Postal Service:	Wanda VanHorn, Labor Relations Specialist
For the NALC:	James Wolstencroft, Union Advocate
Place of Hearing	Ann Arbor MI
Date of Hearing:	June 24, 2011

AWARD

The grievance is sustained. The management of the Ann Arbor post office is ordered to cease and desist from violating the requirement to give a safety talk weekly, and to pay to the local Union an amount equal to 2 hours overtime pay for each of the four representative letter carriers.

Date of Award July 9, 2011

PANEL: Great Lakes Regular Regional

Karen H. Jacobs
Arbitrator

ISSUE:

The Step B Team's statement of the issue is adopted:

Did management violate the provisions of Articles 14, 15, and 19 of the National Agreement when failing to provide a Safety Talk to section 48103 the week of 9/7/2009, and failing to adhere to prior settlements?

If so, what shall the remedy be?

FACTS:

Management did not give a safety talk to the letter carriers in section 48103 of the Ann Arbor MI post office during the week of September 7, 2009.

The Union filed this Class Action grievance on behalf of the letter carriers of that section on September 16, 2009 claiming a violation of the National Agreement. The Union presented during the grievance process the statements of four letter carriers representing the approximately 50 letter carriers in section 48103, and their testimony at arbitration.

The portion of Article 14 of the National Agreement relied on by the Union is

"14.1. It is the responsibility of management to provide safe working conditions in all present and future installations and to develop a safe working force."

The Local Memorandum of Understanding (LMOU) contains a provision concerning safety talks at Art. 14.B.5:

"The unit supervisor for all carriers should hold regularly scheduled safety talks on the clock. ..."

The Article 15 violations claimed by the Union relate to the provisions about the dispute resolution process, and the requirement for good faith observance of the principles and procedures of the process (Art. 15.3.A.) especially the duty to honor agreements reached by the parties, or decisions of the Step B team or an arbitrator during that process.

The Union claims a violation of Art. 19, specifically the provision that incorporates handbooks, manuals and published regulations. The Union cites Handbook EL-801,1-7:

"Scheduled safety talks are intended to promote safety awareness. All line supervisors are required to conduct safety talks at least once a week with their employee groups, including temporary, casual and relief personnel. ..."

This grievance was filed on September 16, 2009. The Step A meeting was held on January 25, 2010. The Step B team received the file on February 1, 2010. They declared an impasse on February 17, 2010. The arbitration was held on June 24, 2011, and the matter is now properly before this arbitrator for decision.

UNION'S POSITION:

The Union states that the Ann Arbor management violated the National Agreement when it failed to give a safety talk to the letter carriers of section 48103 in the Ann Arbor post office during the week of September 7, 2009 through September 13, 2009. That obligation to give the safety talk is found in the National Agreement at Arts. 14, 15, and 19, and in the Local Memorandum of Understanding (LMOU). The Union steward testified that management would not settle the grievance at Informal A because of the request for a monetary remedy, $10 per carrier.

The Union has raised the issue of safety talks with management on many occasions, and management has continued to repeat the violation. The Union has recently filed another grievance on the issue. The repeating of the violation after grievances, settlement agreements, monetary awards, and directives from higher management to honor settlement agreements, requires that a progressive monetary award be made in this case. Management claims that the Union is just trying to obtain a financial benefit. However, management agreed in prior settlements that further violation of the safety talk rule would justify a monetary award. The Union seeks a minimal payment to just four letter carriers, rather than a payment to the about 50 letter carriers in the section who did not receive a safety talk the week in question.

The Union requests the grievance be sustained with an award that will insure future compliance by the Ann Arbor management to abide by their settlements, an order to cease and desist from failing to give safety talks, and a compensatory remedy equal to 2 hours of overtime to the four individuals who, as representatives of the letter carriers in section 48103, participated in this grievance, and/or whatever remedy deemed appropriate.

The Union submitted the following four awards:

Arb. Dilts (J06N-4J-C 09156808, April, 2011) dealt with a case solely raising an issue of remedy. He found a monetary award appropriate when prior cease and desist orders had been ineffective in gaining management's compliance in similar matters; he found that requiring management to pay all the costs of the arbitration too punitive; he ordered the payment of $100 to the Union branch when the request was for $500.

Arb. Suardi (J01N-4J-C 07030670, September. 2007) dealt with a history of failure by management to meet at Formal Step A. The principle of developing a grievance at the various steps must be supported, so he rejected the management's proposed remedy, moving the case to the next step, and ordered management to pay $500 to the branch.

In a case about the equalizing of overtime, Arb. Gamser (NC-S-5426 (apparently a national award) April, 1979) held that "to provide for an appropriate remedy for breaches of the terms of an agreement, even where no specific provision defining the nature of such remedy is to be found in the agreement, certainly is found within the inherent powers of the arbitrator." He found it

unnecessary to list citations. However, he rejected the request for a monetary award to make up the lost overtime for the quarter in question in this case because in the circumstances it was reasonable to balance the hours in a following quarter to achieve the equalizing of overtime. He also noted that a monetary award might well be in order if the violation was caused by a flagrant disregard or defiance of the contractual obligation.

Arb. Mittenthal (N8-NA-0141 (also apparently a national award) July, 1980) dealt with an issue of maximization of full time assignments. He cites Enterprise Wheel (363 US 593 (1960)) for the proposition that the arbitrator must bring his informed judgment to bear in order to reach a fair solution in formulating remedies.

POSTAL SERVICE'S POSITION:

At Formal Step A, management's position was that the remedy requested was 'improper and egregious' for an Article 14 violation. Further, management claimed that the Union had not met its obligation to cooperate with and assist management to live up to the responsibilities set forth in Article 14.

The Step B statement by the management representative states that no violation of the LMOU was shown because the language of the LMOU is that management "should" hold a regular safety talk, that is, it is not an absolute requirement.

Further, the Step B representative concludes the remedy is improper and egregious for an Art. 14 violation because the Union has not shown any economic loss for which a monetary payment would be appropriate, and punitive damages are not provided for in the National Agreement. The Step B representative also pointed out that during the time the prior settlement agreements were signed (2000-2007) there were a number of changes in management. The Union should have let the current management know of these issues rather than file grievances and seek monetary remedy. Current management should not be held responsible for knowing about those agreements.

At arbitration, management argued that the Union had not shown a violation, that the Union conceded that it was just the four letter carriers who gave statements who did not get a service talk. That four out of 100 letter carriers did not get a safety talk in the two years since the last settlement agreement does not establish that no safety talk was given.

The Union rejected management's request to have everyone clock over to training time for safety talks so there would be proof the talks were given, and who heard them. The rejection was because the Union claimed it would have an adverse effect on route evaluations. Management claims that the time for safety talks is not built into office time.

The Union has shown no spirit of cooperation as required by Article 14. They have not reminded management or made requests to their supervisor for safety talks.

The correspondence from various national and district offices submitted by the Union show that failure to live up to settlement agreements is an issue nationwide, and not just an issue in Ann Arbor. The last settlement in Ann Arbor on this issue was in 2007, so safety talks must have been given from then until the current grievance was filed in September, 2009.

When asked whether there was any other remedy that could be given other than a monetary award, which is punitive in nature, the Union was unable to suggest any alternative. A monetary remedy is not appropriate. The National Agreement does not provide for a monetary award. There was no monetary harm.

The grievance should be denied in its entirety.

Management submitted the following awards:

In Arb. Thomas' (A98C-1A-C 99211670 November, 2000) case a number of letter carriers had witnessed a supervisor perform bargaining unit work for 4 hours. The Union sought 4 hours at overtime rate for each of those letter carriers as a remedy. It was not shown that all the carriers had watched the whole time. The arbitrator found no connection between the alleged violation and the requested remedy, and there was no ongoing history of this kind of violation or of management not fulfilling settlements or agreements. The arbitrator's standard was that punitive damages should only be awarded in extremely narrow instances, such as where the employer's conduct is willful, malicious or in bad faith. The grievance was denied.

Arb. Mittenthal (National Award H1C-NA-C 97, February 1989) held that a remedy for a violation of the National Agreement should try to put the parties back to where they would have been if the contract violation had not occurred. Management unilaterally made some changes in the steps for processing attendance discipline. Those changes violated the National Agreement. The APWU sought expungement of any discipline issued under the new program, and reinstatement and back pay for any discipline issued under the changed process. The arbitrator held 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. He found that, in the absence of the change, or if their cases had been delayed while the changes were negotiated, their discipline would have been reviewed under the proper process. He held they should be put back where they would have been. Here the cases should be reevaluated under the proper process. The discipline is not expunged. The employees were not given back pay as a result of this grievance.

A PTF's request for a special inspection was improperly denied. The question of proper remedy was before Arb. Goodman (W7N-5K-C 31822, June, 1992). The Union had requested a payment of $10 a day for the period the inspection was not done (about 5 months) because just

doing the evaluation much later was insufficient remedy. The arbitrator denied a monetary award. He decided that where there has been no economic injury, monetary relief must be reserved for the exceptional case, for those instances where the contractual violation is particularly flagrant, willful, or repetitive." Other terms he used to describe the situation for monetary relief included arbitrary or capricious, in bad faith, deliberate, willful, gross neglect or indifference. Further, 'a primary factor that will and should be considered in determining if a non-compensatory award is warranted is repetitive behavior with regard to timeline violations.'

Arb. Scearce's case (S4N-3W-C 13100, April, 1987) concerns two PTFs on hold-downs, one became a regular carrier, and was assigned to the route the remaining PTF was holding down. Technical violations occurred. But the arbitrator did not issue any monetary award. First, he questioned whether punitive damages are legitimate in arbitration, and if they are, it is only when the terms and intent of a collective bargaining agreement are blatantly, arrogantly or repetitively violated..."

Arb. Snow (W1C-5F-C 4734, August, 1987) dealt with a situation where the letter carriers in the section received timely notice of a change in starting time, but the Union did not. The Union's rights were violated, but the rights of the individuals were not violated. Since only a single violation was shown, the arbitrator issued a cease and desist order, but denied any monetary award.

DECISION:

In this contract interpretation matter, the Union bears the burden of establishing that the National Agreement was violated, and that the remedy requested is appropriate.

The statement of the Issue throughout the grievance process consistently cited several parts of the contract that the Union claimed were violated. The Union maintains that management did not abide by the National Agreement itself, Article 14 about safety, Article 15 about the grievance process, and Article 19 which incorporates Handbook EL-801 1-7, that requires the conducting of a weekly safety talk; and the LMOU.

The first question is whether a safety talk was given to the letter carriers of the 48103 section of the Ann Arbor post office during the week at issue. At arbitration, management argued that the Union did not prove that management failed to give a safety talk that week. This argument is based on the clarification the Union made at Step A that a their contention was that 'at least' 4 letter carriers in that section were not given a safety talk during that week. Management argues that that contention is a concession that a safety talk was given.

The Union argued that they obtained statements from four letter carriers of section 48103 as representative of the whole section, but that their testimony and statements represent the whole section.

The statement of the issue on the 8190, Grievance Form, claimed a failure "to give a safety talk to section 48103." That has continued to be the stated issue throughout the grievance process, including the Step B statement of issue. I find that the references to 'at least' four letter carriers when also referring to them as representatives of the whole section was not a concession that conflicts with the issue as consistently stated.

At arbitration, the unit supervisor (who had been a letter carrier in Ann Arbor until about 2008) testified he gave a safety talk during the week of September 7, 2009. The Union objected to this testimony as new evidence, and new argument. I have found no representation or claim by management in the file that went to the Step B Team, or in the Step B decision, that a safety talk was given in the week of September 7, 2009. This unit supervisor was the management representative at the informal A meeting on September 16, 2009.

As noted, the Union's basic claim that there was no service talk that week was in the statement of the issue of the grievance initially, and consistently thereafter. I find nothing in the Step B file (which includes the material from Informal A and Step A) to suggest that management ever challenged that representation. Remedy and the Union's obligation to cooperate in the process were the subjects management addressed at each level.

Based on the fundamental principle adopted by the parties that issues not raised at Step B or earlier cannot be raised at arbitration, I find that the premise of the Union's case, that no service talk was given the week of September 7, is a fact for purposes of this arbitration.

As further support for this conclusion, I note that EL-801, Supervisor's Safety Handbook, sec 1-7, in the last paragraph, states:

"You (addressing the supervisor) must keep a record of all safety talks on file for 3 years, including the following:

a. The date, time, and unit where the safety talk was given.
b. The name of the person giving the talk.
c. The subject of the talk.
d. The names of employees attending the safety talk. An annotated unit roster or other automated attendance document is acceptable."

The issues raised in the grievance process and brought to arbitration are whether not giving a safety talk that week was a violation of the National Agreement; whether the Union bears any responsibility for no safety talk because of not fulfilling an obligation that management claims they had to assist management in meeting management's Article 14 responsibilities for safety; and, if there was a violation, what is the appropriate remedy.

The LMOU expresses an expectation, that management "should hold regularly scheduled safety talks", not a mandate, 'is required to' or 'must'. It also does not set forth a definite time schedule. It speaks of "regularly scheduled", not daily, or weekly or monthly. The LMOU does not

set forth a specific standard that was violated by the failure to give a service talk the week of September 7.

Article 14 makes safety a fundamental concern for both parties to the National Agreement. EL-801, incorporated in the National Agreement by Art. 19, sets the specific requirement for a weekly safety talk. Art. 14 suggests the weight to be given to this safety requirement. Management did not give a weekly safety talk, so management violated EL-801, and therefore, violated Art. 14.

The violation of Article 15 of the National Agreement alleged by the Union is based on the 15.3.A: it calls for good faith observance of the principles of the grievance process. The alleged violation lies in failure to abide by settlement agreements or decisions entered into to resolve grievances. Relating to the specific issue of safety talks, the settlement agreements include

a.) a Step A resolution on October 12, 2006 in which the Ann Arbor post office management agreed to have weekly safety talk of at least five minutes given by each unit supervisor; also a make up talk will be given the same week to all employees missing the regular talk; and management will cease and desist further violations;

b.) a Step A resolution on October 22, 2007, between the same parties that management will comply with previous settlements; the unit supervisor in every section will give one safety talk of at least five minutes every week. Those absent will be given the safety talk the next day carrier is available; a cease and desist provision; and adds that any continued violations will immediately obligate payment of monetary damages by the Ann Arbor post office.

c.) an Informal A settlement on December 4, 2008 that each unit supervisor will give a weekly safety talk of at least five minutes; a make up talk will be given the same week to all employees missing regular talk; and a cease and desist provision.

Relating to the general principle of abiding by settlement agreements there is a Step A settlement on July 8, 2008, reminding management that the National Agreement requires compliance with grievance settlements; others that are similar are dated 11/12/2004 and 11/30/2004.

About a monetary remedy, the parties entered a Step A settlement on December 14, 2004, that any failure to comply with a grievance settlement after that date will require an increased monetary remedy.

There are also several Step B decisions (5/12/2000; 6/18/2001) dealing with Ann Arbor management's failure to comply with settlement agreements.

In addition to the Ann Arbor documents, the Union submitted documents from other levels of Postal administration:

1. Memo, March 20, 1998, from the Vice President, Labor Relations to area Human Resource managers: arbitration awards and grievance settlements are final and binding and must be complied with.
2. Memo, June 10, 1998, from Area Office to all managers and supervisors, Great Lakes Area: relaying the information in the March 20 memo. This was further relayed to 'all 481 PM's on June 16.
3. Memo, August 31, 2001 from the manager of contract administration in Labor Relations, to area managers of human resources and labor relations reaffirming the above information, and setting up a process to monitor non-compliance with arbitration awards and settlement agreement among other things. (Although this memo refers specifically to the APWU, the principle would seem to apply to other unions.)
4. Memo, November 30, 2001 from the manager of Liberty Station (Ann Arbor) to all station managers and supervisors in Ann Arbor Installations, reminding them that any agreement at any level between them and an NALC representative must be complied with.

Article 31 authorizes the local office, Union and management, to negotiate a LMOU on certain specified subjects. I do not find safety standards on the list of subjects which the local office can modify. Therefore, I find Sec. 14.b.5. of the LMOU, which says that management "should" give a safety talk, does not reduce the obligation created by EL-801.

However, Art. 15.4.A.6 provides that "All decisions of arbitrators shall be limited to the terms and provisions of this Agreement, and in no event may the terms and provisions of this Agreement be altered, amended, or modified by an arbitrator. Therefore, this arbitrator is precluded from finding violations of the National Agreement in any violation of the terms of settlement agreements that expand management's obligation under EL-801 "to conduct safety talks at least once a week with their employee groups..." I find that those obligations were expanded in several grievance settlements. Such expansions include the specification that the safety talk be at least 5 minutes long, and that a make up talk be given to all employees missing the regular talk (10/12/06 grievance resolution); that a carrier who missed a talk be given the talk the next day that carrier is available (10/22/07 grievance resolution). These settlement terms are not included in the National Agreement, and are not consistent with each other. However, this limitation does not affect the validity of the underlying agreement to conduct a weekly safety talk.

In this case, management at Formal A, and thereafter, claims that the Union had an obligation to assist management in meeting the responsibilities of Art 14.1. and that the Union

failed to fulfill that obligation. Management concludes that this failure mitigates or excuses management's failure to give safety talks.

The Art. 14 provisions about the Union's responsibility is to cooperate with and assist management in living up to its responsibilities. This specifically refers to observing safety rules and procedures, and notifying management of any unsafe, unsanitary, unhealthy conditions. The article provides for establishing safety and health committees at every level of the Postal Service. Art. 14.2 contemplates the possibility of grievance in the event a safety issue is not dealt with by management. While Art. 14 embodies a broad ranging significant concern with safety and health issues, it is aimed primarily at existing physical conditions that may need repair or correction. Safety talks are not addressed in Art. 14. The duty of the letter carrier is primarily directed toward bringing to the attention of management situations or conditions that present an unsafe work environment. Given the history of grievances and settlements, and the Union's testimony that the Union's representative to the local safety committee had brought the issue up on occasion, and even offered to give a safety talk, or have other Union members give one, which offer was not accepted, I do not find that the Art. 14 responsibility of the Union to participate in safety efforts to mitigate management's failure to give safety talks here.

Management argued that there had been a lot of turnover in the position of Postmaster/Officer in Charge in recent years. (The Union president estimated that during his 30+ years as a letter carrier in Ann Arbor there had been about a dozen, and of those, the first two had each been there close to 10 years each.) Because of the turnover, management argues that Ann Arbor postmaster should not be expected to know the history of grievance settlements or be held responsible for a money award based on such past settlements.

The basic requirement to have safety talks given by unit supervisor weekly has been a part of the national handbooks and a standard postal practice for a long time. A new manager can be held responsible for such national contract terms. There was no suggestion that all of the local management changed with the change of a postmaster or officer in charge. 'Institutional' knowledge should be available. The supervisor who testified for management had worked in Ann Arbor for 12 years, the last 3 as a supervisor.

The cases submitted by both the Union and management generally agree that where there is no other remedy, and the contract violation has recurred, a monetary award not related to a specific monetary loss can be appropriate in the Postal Service dispute resolution process.

Here, the violation relates to a safety issue. Safety is important to everyone. Fortunately this grievance did not involve a monetary loss resulting from an accident due to a safety problem. However, the safety talk is to occur weekly. Over a period of time, it has not. No reason or excuse was given for it not being given the week cited here. Efforts to correct this recurring problem,

including cease and desist orders, and agreements to future monetary awards, have not been successful in correcting this situation. The amount of the monetary remedy requested is progressive from the last monetary award but has not been shown to be excessive. However, since the four letter carriers who participated in the grievance and arbitration were acting as representatives of the class, and no reason was shown that they should benefit more than the others in the section, this arbitrator orders that the payment be made to the local branch of the Union to benefit all the members.

AWARD:

The grievance is sustained. The management of the Ann Arbor post office is ordered to cease and desist from violating the requirement to give a safety talk weekly, and to pay to the local Union an amount equal to 2 hours overtime pay for each of the four representative letter carriers.

Karen H. Jacobs
Arbitrator