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REGULAR ARBITRATION PANEL

In the Matter of Arbitration (Grievant: Class Action
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between (Post Office: Waianae, HI
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UNITED STATES POSTAL SERVICE (USPS Case No: F06N-4F-C 03155116
(
and (NALC Case No: 01-046785
(
NATIONAL ASSOCIATION OF (LETTER CARRIERS
(

BEFORE: Jonathan S. Monat, Ph.D., Arbitrator

For the U.S. Postal Service: Rae Katano

For the Union: Bryant Almario

Place of Hearing: Waianae Post Office

Date of Hearing: October 16, 2008

Briefs Filed: December 31, 2008

Date of Award: February 14, 2009

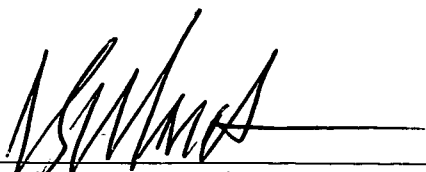
Relevant Contract Provision: Article 12

Contract Year: 2006-2010

Type of Grievance: Contract

Award Summary:

Management violated Article 12 of the National Agreement when, on January 11, 2003, Ewa Beach Full-Time Letter Carrier Catherine Oya was excessed to the Waianae Post Office. Ms. Oya shall be paid for travel time and mileage for the difference in travel from Ewa Beach Post Office to Waianae Post Office from the day of excess, January 11, 2003, until August 23, 2003, when the employee was offered and accepted a return to Ewa Beach.


Jonathan S. Monat, Ph.D.
Arbitrator

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NALC HEADQUARTERS

STIPULATIONS

The parties did not agree on the procedural arbitrability of this grievance. If the Arbitrator finds that the grievance is not arbitrable, there can be no ruling on the substantive content of the grievance. All evidence and testimony of the witness were taken under oath. The parties submitted joint exhibits which included the National Agreement (J1) and the moving papers (J2). The parties agreed to file written post-hearing briefs to be mailed to the Arbitrator and cross-mailed to each other November 7, 2007. The date was extended by mutual agreement between the advocates to December 31, 2008. The post-hearing briefs were received by the Arbitrator on January 5, 2009. The hearing was closed at that time. Contract language will not be reproduced below except as necessary in the Arbitrator's Findings or arguments of the parties. The parties granted the Arbitrator an extension to February 16th in the filing of his decision.

ISSUES

Management raised the threshold issue of arbitrability on the basis of the lack of timeliness.

The parties essentially agreed that the issue of merit before the Arbitrator is as stated in the Step B Team Impasse Decision (J3:1):

- 1) Whether management violated Article 12 of the National Agreement when, on January 11, 2003, Ewa Beach Full-Time Carrier Catherine Oya was exccessed to the Waianae Post Office?
- 2) If so, what is the appropriate remedy?

The Union would put the dates Ms. Oya was exccessed to Waianae, January 14, 2003 to August 23, 2003.

The Arbitrator accepts the Union's addition of the specific dates as part of the issue.

ARGUMENTS ON PROCEDURAL ARBITRABILITY

Management argued that Article 15.2.a. requires that "any employee who feels aggrieved must discuss the grievance with the employee's immediate supervisor within fourteen (14) days of the date on which the employee or the Union first learned or may reasonably have been expected to have learned of its cause...." This is the Informal A filing date. Article 15.2.B states in relevant part: "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.”

Full-time Regular City Carrier Catherine Oya was excessed from Ewa Beach Post Office to the Waianae Post Office on January 11, 2003. The Ewa Beach NALC had first-hand knowledge of the hours worked prior to Oya’s being excessed. The 14 day filing period would have started no later than January 11, 2003, not when the Comparative Work Hours Report (CWHR) was received.

This grievance was filed in the Waianae Post Office on June 2, 2003, some five months later. Management declared this grievance to be untimely filed, there-fore waived under Article 15.3.B. The supposedly “injured part on January 11th was Ewa Beach City Letter Carrier Oya. No grievance was filed by her or on her behalf at Informal A in the Ewa Beach Post Office with the required 14 days. Nor did the Ewa Beach NALC Branch 5206 certify John Simbahon to file a grievance on her behalf. He is not the proper representative in this case. This grievance should be considered as waived.

The Union argued the CWHR was received from Pacific Area management on May 19th but provided no date for when the request for the report was made. According to the Union, the NBA requested the CWHR 60 days after Oya was excessed. The report was received on May 19, 2003. The Union filed its Informal Step A grievance on June 2, 2003, within the 14-day filing window. The Union argued that the 14-day filing period started when it received the data showing excessing was improper. It could not file a grievance until it had evidence of improper excessing. According to the Union, the Service stated at Formal A, “If the grievance was only based on the CWHR, then that portion of the grievance is considered timely.”

With respect to the Postal Service claim that Steward Simbahon was not the proper steward to file the grievance for Ewa Beach Carrier Oya, technically Oya became a Waianae employee January 11th. She was allowed to bid on and was awarded a full-time route which she could not have done as an Ewa Beach employee. She remained on the route until August 2003, two months after the grievance was filed

on June 2nd. She was a Waianae employee at that time. More importantly, the grievance was filed as a class action on behalf of the carrier craft at Waianae and the remedy requested is a class action remedy. To say that Simbahon was not the proper steward to file the grievance is new argument which should be rejected by the Arbitrator.

ARBITRATOR'S FINDINGS AND OPINION

This grievance arose from the excessing of Letter Carrier Cathy Oya from the Ewa Beach Post Office to the Waianae Post Office. The grievant was excessed on January 11, 2003, as a consequence of the elimination of a route in a military housing area. The eliminated route was not transferred to a different Postal facility. Ms. Oya reported to Waianae and did not file a grievance within 14 days as required by Article 15.2 of the parties' National Agreement. In fact, she never filed a grievance over her being excessed. The Union did not file a grievance over Ms. Oya's excessing to Waianae by January 25, 2003 which was the end of the 14-day period within which to file a grievance on Oya's behalf. While at Waianae, a full-time route opened and Oya was the successful bidder. She worked on this route until she returned voluntarily to Ewa Beach on August 23, 2003, to preserve her seniority.

The Union requested the Comparative Work Hour Report (CWHR) approximately 60 days after Oya was involuntarily assigned to Waianae as required by the JCAM. The CWHR pertains to the installation from where the excessing occurred, in this case, Ewa Beach. The record does not show a specific date on which the request was made. However, there is no dispute that the request was made in a timely manner by the National Business Agent Region 1 sixty (60) days after the date the letter carrier was excessed as required by Article 12.4.C. The CWHR was received by the Union on May 19, 2003. The Union filed an Informal Step-A grievance based on the letter carrier's excessing from Ewa Beach on June 2, 2003.

The Union argued that no grievance could be filed until Union representatives could review the CWHR to determine if excessing was improper, making the receipt of the report the triggering date. The

language of the JCAM, Section 15.2 discusses the meaning of the language about Informal Step A grievance filings. The language is specific that "an employee or union representative must discuss the grievance with the employee's immediate supervisor within fourteen calendar days of when the grievant or the union first learned, or may have reasonably been expected to learn, of its cause." However, the date of the tolling of the 14-day grievance filing period is not clear in the facts of this excessing case.

The discussion of Article 15.2 in the JCAM emphasizes "when the grievant *or* the union first learned, or "may *reasonably have been expected* to learn" of the cause. Learning of the cause does not mean, in this case, that the Union or the employee knew of a violation. Certainly the grievant knew of the excessing on January 11th. Section 12.5.B.4 requires that unions affected shall be notified in advance when an employee is to be excessed to another installation. The Union, in this case, would have reasonably known of the excessing in January but could only file an inquiry. It would not have known that the excessing was in violation of Article 12 unless it had the CWHR, the document identified in the JCAM for determining the propriety of a carrier's involuntary reassignment. Otherwise, if a grievance was filed every time an employee was excessed, it could slow operations and impair operational efficiency.

The Union would know of the excessing on January 14th but would not have reasonably known if there was a violation of the NA until it had the data management used to make its' decision to excess Oya to Waianae. The data could not be requested until 60 days after the carrier was excessed. The Union pointed to other arbitration decisions which addressed the issue of the "discovery rule." Following the discovery rule, it was not possible for the Union to determine if there was a violation at the time of excessing. A violation could be determined only when the Union had received and analyzed the CWHR. Because the contract contains a 60-day waiting period before the report can be requested, the Union claimed that the time limits for filing an Informal Step A should be tolled.

The unique connection between Article 15.2 and 12.4.C. and their conflicting time limits weighs in favor of the Arbitrator finding that the time limits for filing a grievance on behalf of individual letter

carrier Oya were tolled. The parties agreed in the NA that the Union had 14-days from when it first learned or "may reasonably have been expected to learn" of the grievance's cause. "Cause" is inferred to mean "violation." The mere fact of excessing is not a violation. Management is not required to provide the CWHR from the losing installation for 60days. Since the CWHR is the report on which the Union must base its grievance on behalf of the individual letter carrier in this type of case, the 14-day time limit is deemed tolled under the discovery rule. The time began to run upon receipt of the CWHR. The grievance was filled in a timely manner under these facts.

Merits

According to the evidence on the record, letter carrier Oya voluntarily returned to the Ewa Beach Post Office in order to retain her seniority. An attachment to the Step A Grievance Form contained an offer of remedy in this and Oya's return to Ewa Beach was part of the offer. Because Oya's return was voluntary, management contended that the grievance was moot. However, a majority of arbitrators have concluded that a violation of the National Agreement without a remedy would allow management to act with impunity because there would be no cost or penalty for its violation of the NA.

The Union claimed that Ms. Oya was improperly excessed and was entitled to a remedy from the date the cause became known (June 2, 2003) until August 14, when Oya returned to the Ewa Beach Post Office. Analysis of the CWHR was provided by both parties with each side claiming its analysis proved its case. The Arbitrator conducted an analysis of the CWHR (J2:18 - Attachment 2) and found the differences between before and after excessing to be of a lesser magnitude than management claimed, or even in a different direction. The average PTF overtime represented 19.3% before and 21.1% after excessing. The average FTR/PTR straight time hours to PTF straight time hours remained about the same (1.17 vs. 1.13). This supplemental analysis favors the Union's claim that management failed "to minimize the impact on FTR positions by reducing PTFs" in violation of Article 12.

It is well-established in the NA and JCAM that PTFs hours are not guaranteed and PTFs are not

guaranteed forty (40) hour schedules. The JCAM requires the burden of reductions first fall on PTFS. It is understood that PTFs perform a variety of functions to deal with variable workflow, leaves, and other predictable and unpredictable needs of the Service. When a FTR is excess, the burden is on management to show that excessing was done within the contract. Though there was a net reduction of 2 PTFs at Ewa Beach when Oya was excessed, the preponderance of the evidence before the Arbitrator shows that PTFs could have been reduced further and prevented Oya's excessing. A telling measure is that the number of overtime hours worked by PTFs did not decrease. The needs of the service may require some overtime by PTFs but not so much that PTF OT was higher than FTR OT. Secondary evidence for this conclusion is found in management's offer of remedy at grievance Step A which included offering Oya retreat rights to Ewa Beach with commutation time/costs and promotion of the senior part-time carrier at Waianae.

Oya bid for a regular route at Waianae and was given the route as the senior qualified bidder. The Union claims the excessing of Oya from Ewa Beach to Waianae took away an opportunity for a senior PTF to move up to an FTR bid job. Had that route not been assigned to the excessed Ewa Beach carrier, the senior qualified Waianae PTF employee would have been awarded the route and presumably was after Oya returned to Ewa Beach.

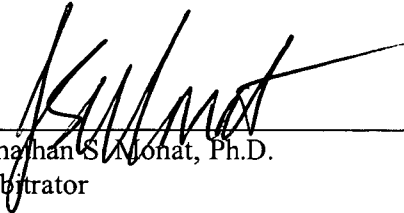
This grievance has languished for unknown reasons for over five (5) years. Thus, there is a question of reasonableness in determining the remedy. The JCAM does not specify a remedy in this situation. There is arbitrable history cited by the parties that the arbitrator does have authority to fashion a remedy in the absence of contract language. Letter Carrier Oya shall be paid for travel time and mileage for the difference in travel from Ewa Beach Post Office to Waianae Post Office from the day of excess, January 11, 2003, since the employee was offered and accepted a return to Ewa Beach. The mileage rate shall be at the IRS mileage rate in effect for January - August 2003. Travel time shall be at the overtime rate since the hours traveled would have been in excess of eight. It is assumed the senior PTF was converted to full-time status at Waianae to replace Oya since she was on a bid assignment; if

not, the conversion is order. Because of the long period of time that this case has been pending, the Arbitrator will award no other remedy.

AWARD

Management violated Article 12 of the National Agreement when, on January 11, 2003, Ewa Beach Full-Time Letter Carrier Catherine Oya was excessed to the Waianae Post Office. Ms. Oya shall be paid for travel time and mileage for the difference in travel from Ewa Beach Post Office to Waianae Post Office from the day of excess, January 11, 2003, until August 23, 2003, when the employee was offered and accepted a return to Ewa Beach.

February 14, 2009


Jonathan S. Monat, Ph.D.
Arbitrator