

C-20275

USPS 815168

IN THE MATTER OF ARBITRATION)
)
 BETWEEN)
)
 AMERICAN POSTAL WORKERS UNION)
)
 AND)
)
 UNITED STATES POSTAL SERVICE)
 (Case No. W1C-5F-C 4734))
 (Local Grievance)

ANALYSIS AND AWARD

CARLTON J. SNOW
Arbitrator

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Grievance and Arbitration
Labor Relations Department

I. INTRODUCTION

This matter came for hearing pursuant to a collective bargaining agreement between the parties effective during 1982. A hearing occurred on June 2, 1987 at the postal facility located on 1135 Broadway Northeast in Albuquerque, New Mexico. Mr. Leo Gutierrez, Manager of Labor Relations, represented the United States Postal Service. Mr. Leon E. Garcia, Executive Vice-president, represented the American Postal Workers Union.

The parties had scheduled nine cases to be heard by the arbitrator. Four cases actually went to hearing and have been decided by the arbitrator. These were Case No. W1C-5F-C 4734, Case No. W1C-5F-C 7466, Case No. W4C-5S-C 31665 (Turner Grievance), and Case No. W4C-5S-C 36083. The parties reached a settlement prior to the hearing with regard to Case No. W4C-5F-C 4081. The parties were in dispute at this hearing with regard to whether a second case, Case No. W1C-5F-C 8194, had been settled, and the arbitrator

did not hear the case. At this hearing, the Union withdrew Case No. W4C-5S-C 35406 without prejudice. The arbitrator did not hear Case No. W4C-5S-C 36472 nor Case No. W4C-5S-C 36843.

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

There were no challenges to the substantive or procedural arbitrability of the dispute, and the parties stipulated that this case properly had been submitted to arbitration. The parties authorized the arbitrator to retain jurisdiction in the matter for ninety days after issuance of a report. The parties submitted the matter on the basis of evidence presented at the hearing and oral closing arguments.

II. STATEMENT OF THE ISSUE

The issue before the arbitrator is as follows:

Did the Employer violate the parties' National Agreement by not notifying the Union fourteen days prior to implementing a permanent change in the reporting time of an entire section? If so, what is an appropriate remedy?

III. RELEVANT CONTRACTUAL PROVISIONS

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 tghat conflicts with this Agree-ment, 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 SWervice Manual and the F-21 Timekeeper's Instructions.

ARTICLE 30 - LOCAL IMPLEMENTATION

A. Presently effective local memoranda of understanding not inconsistent or in conflict with the 1981 National Agreement shall remain in effect during the term of this Agreement unless changed by mmutual agreement pursuant to the local implementa-tion procedure set forth below.

B. There shall be a 30-day period of local implementation to commence October 1, 1981 on the 22 specific items enumerated below, provided that no local memorandum of understanding may be incon-sistent with or vary the terms of the 1981 National Agreement:

21. Those other items which are subject to local negotiations as provided in the craft provisions of this Agreement.

ARTICLE 37 - CLERK CRAFT

Section 3. Posting and Bidding

A. Newly established and vacant clerk craft duty assignments shall be posted as follows:

5. The determination of what constitutes a sufficient change in starting time of a duty assignment to cause the assignment to be reposted is negotiable at the local level, provided:
 - a. No assignment will be reposted when the change in starting time is one hour or less;

IV. STATEMENT OF FACTS

In this case, the Union has challenged the Employer's failure to give the Union fourteen days of advance notice about an impending change in the reporting time of an entire section of employees. Events giving rise to this grievance occurred in 1982 or earlier. Consequently, documentary evidence about the matter has been scant. There were some facts, however, about which the parties were not in dispute.

On April 17, 1982, the Employer made a permanent change in the reporting time of approximately 158 employees in the Clerk craft. Their "reporting hours were changed from 2300 to 2200." (See, Joint Exhibit No. 2(C)). The Employer gave the Albuquerque local no more than three days of notice about the impending change. Whether this was the only instance of this type of occurrence has been disputed by the parties.

The Employee and Labor Relations Manual, in Section 434.6, provides for an "out of schedule premium" to be paid to eligible full-time bargaining unit members who work outside and instead of their regularly scheduled work days or work weeks. An employee is paid an out-of-schedule premium when notice of the temporary schedule change is given to the employee by Wednesday of the preceding service week. (See, Joint Exhibit No. 3). The parties did not submit evidence regarding how many of the 150 employees affected by management's change in reporting time on April 17, 1982, held the status of full-time regular employees. It is also unclear how many, if any, of the affected employees failed to receive timely notification

of the change in their reporting times. The parties agreed that the Employer had violated the collective bargaining agreement, but they were unable to agree on an appropriate remedy for the violation. When they were unable to resolve their differences, the matter proceeded to arbitration.

V. POSITION OF THE PARTIES:

A. The Union:

The Union contends that the Employer violated the Local Memorandum of Understanding when it failed to give the Union fourteen days of notice about an impending change in the reporting time of an entire section of employees to take effect on April 17, 1982. The Union argues that the appropriate remedy for this violation is to require the Employer to pay one hour of out-of-schedule premium to all employees affected by management's change in their reporting time on April 17, 1982, from that date until the grievance is resolved. It is the belief of the Union that this is an appropriate remedy for several reasons.

First, the Union contends that a violation of the Union's rights constitutes a violation of the rights of all employees. The Union notes that Section 434.6 of the Employee and Labor Relations Manual provides for an out-of-schedule premium to be paid employees who are required to work hours outside of and instead of their regular shift. Accordingly, the Union

maintains that it is logical to treat the Employer's failure to notify the Union as an effective failure to allow employees to work their regular schedules.

Moreover, the Union suggests that, in some cases, the Employer has failed to give individual employees timely notification of an impending change in their reporting time. Under those circumstances, the Union argues that the collective bargaining agreement between the parties mandates payment of out-of-schedule pay.

Even if the parties' agreement does not require this remedy, the Union maintains that the arbitrator has authority to fashion any remedy which is appropriate. In this case, the Union argues that the Employer has violated Article VIII, Section 2.c.a of the Local Memorandum of Understanding and has done so on a continual basis. Consequently, the Union contends that requiring the Employer to pay out-of-schedule pay to all affected employees would be an appropriate means for being certain that the Employer adheres to terms of the collective bargaining agreement.

B. The Employer:

The Employer concedes that it failed to give the Union fourteen days of notice of an impending change in an entire section's reporting time on April 17, 1982. The Employer contends, however, that paying all affected employees an out-of-schedule premium is an inappropriate remedy for this contractual violation.

It is the position of the Employer that it violated only the contractual rights of the Union. Management denies that any individual employees failed to receive timely notification of the impending schedule change. Section 434.6 of the Employee and Labor Relations Manual allegedly cannot be used to remedy the Union's harm because, according to the Employer, it only provides an entitlement to employees for the inconvenience they incur as a result of a temporary schedule change. That provision does not entitle employees to a premium for management's failure to notify the Union of upcoming schedule changes, according to the Employer. Even if Section 434.6 of the Employee and Labor Relations Manual were applicable, the Employer maintains that the remedy requested by the Union fails to differentiate between full-time regular employees (who are eligible for out-of-schedule pay), and part-time flexible employees (who are not).

VI. ANALYSIS

In this case, the parties have stipulated that the Employer failed to notify the Union at least fourteen days prior to changing the reporting time of a section of employees. The parties also have agreed that this failure violated Article VIII, Section 2.c.a of the Local Memorandum of Understanding. They have disagreed vigorously with regard to the appropriate remedy for this violation.

The Union has argued that the Employer should be required to pay all affected employees an hour of out-of-schedule premium pay from the date of the change in reporting time until the effective settlement of this grievance. According to the Union, such a result has been dictated by the parties' collective bargaining agreement. The Union has relied on Article VIII, Section 2.c.a. That clause provides:

Changes in Reporting Time

1. When permanent changes in the reporting time of entire units, sections, or tours are contemplated by management, Albuquerque Local APWU shall be consulted 14 days prior to implementation.
2. Duty assignments changed in starting time by more than one (1) hour shall be reposted for bid. (See, Joint Exhibit No. 2(E)).

Additionally, Article 19 of the parties' agreement has given effect to those parts of Handbooks and Manuals relating to wages, hours, or working conditions. Thus, the agreement of the parties has incorporated Section 434.6 of the Employee and Labor Relations Manual. Section 434.611 states:

'Out-of-schedule' premium is paid to an eligible full-time bargaining unit employee for time worked outside of, and instead of, the employee's regularly

scheduled work day or work week when the employee is working on a temporary schedule at the request of management, provided that notice of the temporary schedule change is given to the employee by Wednesday of the preceding service week. (See, Joint Exhibit No. 3).

The Union represents all bargaining unit members in this case. Accordingly, the Union has reasoned that, by failing to provide notice to the Union, management violated the rights of all individuals affected by the change in reporting time. The Union has noted that the Employee and Labor Relations Manual includes a provision for out-of-schedule premium for employees who work outside of and instead of their regular work days. It is the position of the Union that the employees whose schedules were changed without proper Union notification effectively worked "out-of-schedule." Consequently, it is the belief of the Union that out-of-schedule pay is an appropriate remedy for management's violation of the rights of its employees.

The Union, however, failed to be persuasive with this theory on several bases. First, the Union failed adequately to distinguish between rights of the Union and rights of individual employees. Were the Union's theory of the case to be accepted, the Employer could satisfy its obligation to notify the Union of an upcoming change in a section's reporting time simply by giving notice to all individual bargaining unit members fourteen days in advance. The Union and individual employees, however, are not synonymous. Article VIII, Section 2.c.a gives only the Union a right to such notification. Section 434.6 of the Employee and Labor Relations

Manual has provided out-of-schedule pay to individual employees only in specified circumstances. This provision does not require out-of-schedule pay in this case when only the Union's rights have been violated.

It is arguable that Section 434.6 of the Employee and Labor Relations Manual would apply if management had abridged the rights not only of the Union but also of specific employees as well. The arbitrator, however, failed to receive evidence that showed this to be the case. At one point in the arbitration hearing, Mr. Garcia, president of the Albuquerque APWU Local in 1982, testified that he knew of two employees who had not been notified of the scheduled change. At the same time, the Union stated in its opening statement that all affected clerks had received appropriate notification of their transfers. Additionally, in his own testimony, Mr. Garcia stated that all employees were notified of the impending schedule change. The point is that the evidence failed adequately to support a finding that management did not give individual employees the notice to which they enjoyed a contractual entitlement.

Nor did the Employer violate rights of individual employees under Article VIII, Section 2.c.a.2 of the Local Memorandum of Understanding. It is undisputed in the case that the Employer did not change the starting times of employees by more than one hour. Consequently, management had no obligation to repost duty assignments for those employees.

Circumstances under which Section 434.6 of the Employee

and Labor Relations Manual calls for out-of-schedule pay for employees failed to be established in this case. The requirements of the section are clear. It provides that an employee may receive out-of-schedule pay only when he or she actually works substituted hours at the request of management, provided the employee has received timely notification of the temporary schedule change. In this case, affected employees did not work out-of-schedule hours. Rather, management made a permanent change in their starting time. Once that change had been accomplished, the employees worked their regular shift.

Section 434.6 of the Employee and Labor Relations Manual provides out-of-schedule pay only for full-time regular employees. The Union's proposed remedy made no differentiation between part-time flexible employees and full-time regular employees who may have been affected by the change in reporting time which occurred on April 17, 1982. Consequently, the remedy requested by the Union failed to flow directly from the requirements of Section 434.6 of the Employee and Labor Relations Manual. The point is that the Union failed to show its proposed remedy is required by any specific term of the collective bargaining agreement or the Employee and Labor Relations Manual.

The Union has also argued that awarding out-of-schedule pay is within an arbitrator's authority. It is the contention of the Union that the Employer knowingly and repeatedly has violated Article VIII, Section 2.c.a of the Local Memorandum of Understanding. It is the position of the Union

that an award of out-of-schedule pay to all employees affected by the change in reporting time would serve to deter the Employer from an improper practice and to make management realize that it must adhere to provisions of the parties' agreement.

It is recognized that arbitrators possess reasonably broad power to fashion an effective remedy. As the U.S. Supreme Court has stated:

When an arbitrator is commissioned to interpret and apply the collective bargaining agreement, he is to bring his informed judgment to bear in order to reach a fair solution of the problem. This is especially true when it comes to formulating remedy. There the need is for flexibility in meeting a wide variety of situations. The draftsman may never have thought of what specific remedy should be awarded to meet a particular contingency. (See, United Steelworkers of America v. Enterprise Wheel and Car Corp., 363 U.S. 593 (1960)).

In fashioning remedies, however, arbitrators generally have adhered to the principle that damages should correspond to the harm suffered. A deeply rooted principle of measuring contract damages is that such damages must be based on the injured party's expectation. (See, Fuller and Perdue, "The Reliance Interest in Contract Damages," 46 Yale L.J. 52 (1936)). The expectation interest of the party in contract cases generally has been measured by the actual worth that performance of the agreement would have had for the individual, and in this case the Union has not demonstrated that any employee was harmed. The weight of the evidence makes it reasonable to conclude that all affected employees received timely notice. Moreover, even if one accepted the Union's

theory of the case, only full time bargaining unit members would receive out-of-schedule pay, and an award to all employees, including part-time flexible employees, would not conform to the administrative regulation.

It is recognized that some arbitrators have awarded punitive damages when a party's violation of an agreement has been constant and repeated or malicious. That approach, however, has not been consistent with the common law which has taught that, no matter how reprehensible a breach, punitive damages which were in excess of an injured party's lost expectation generally have not been awarded for a breach of contract. (See, Judge A. White, Inc., v. Metropolitan Merchandise Mart, 107 A.2d 892 (1954); Den v. Den, 222 A.2d 647 (1966); and White v. Venkowski, 155 N.W.2d 74 (1967)). As the U.S. Supreme Court has taught, "if the contract is broken, the measure of damages generally is the same, whatever the cause of the breach." (See, Globe Refining Company v. Landa Cotton Oil Company, 190 U.S. 540, 544 (1903)).

Even if one accepted the teaching of some arbitrators that punitive damages should be awarded when a party's violation has been malicious and persistent, the principle would not be applicable in this particular case. Mr. Garcia testified that management's failure to notify the Union of upcoming schedule changes had happened too often to be ignored and that further research would bring to light similar violations. The arbitrator, however, has received evidence only with regard to one violation of Article VIII. Nor has the

arbitrator received any evidence to demonstrate malice on the Employer's part. In other words, no circumstances showed a basis for awarding punitive damages even if that arbitral principle were followed.

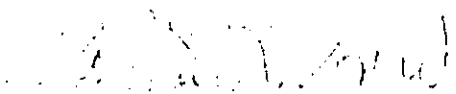
On the other hand, the Union established a violation by management which must be addressed. The Employer argued that the Local Memorandum of Understanding might be invalid because it was inconsistent with the rest of the Agreement. The employer contended that Section 434.611 of the Employee and Labor Relations Manual, included in the parties' agreement pursuant to Article 19, gives individual employees a right to notification of schedule changes. The Memorandum of Understanding gives a similar right to the Union. The Employer argued that this fact might constitute an inconsistency between terms of the Local Memorandum of Understanding and the remainder of the agreement.

The Employer, however, failed to establish any inconsistency in the provisions that provide the Union and individual employees separate notification rights. The Employer is obligated to adhere to terms of the Local Memorandum of Understanding. While no retroactive remedy is appropriate in this case at this time, it is reasonable to require the Employer to cease and desist from any further actions which would violate Article VIII, Section 2.c.a of the parties' Memorandum of Understanding.

AWARD

Having carefully considered all evidence submitted by the parties concerning this matter, the arbitrator concludes that the Employer violated Article VIII, Section 2.c.a of the Local Memorandum of Understanding when it failed to give the Union fourteen days of notice of an impending change in the reporting time of an entire section. Because evidence submitted by the parties demonstrated only a single violation of this provision in 1982, no retroactive remedy has been deemed appropriate. The Employer, however, must cease and desist from any further failure to provide the Union with timely notification of such changes. The arbitrator shall retain jurisdiction of this matter for ninety days from the date of the report in order to resolve any problems resulting from the remedy in the award. It is so ordered and awarded.

Respectfully submitted,



Carlton J. Snow
Professor of Law

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