29373

REGULAR ARBITRATION PANEL

In the Matter of the Arbitration	)	
	)	Grievant: Karen Merriam
between	)	
	)	Post Office: Waterbury, CT
	)	
US POSTAL SERVICE	)	Case No: B06N-4B-C 10244445
	)	
and	)	Union No. 010310
	)	DRT # 14-170358
NATIONAL ASSOCIATION OF	)	
OF LETTER CARRIERS, AFL-CIO	)	

BEFORE: Donald J. Barrett, Arbitrator

APPEARANCES:

For the U. S. Postal Service: Vernon N. Tyler, Jr., District Labor Relations Specialist

For the Union: Gennaro G. Mascolo, Local Business Agent, Region 14

Place of Hearing: Waterbury, Ct

Date of Hearing: April 4, 2011

AWARD: This grievance is sustained

Date of Award: April 13, 2011

AWARD SUMMARY

I find that the Union has met their burden of proof to demonstrate a violation of Article 5 & 30 of the National Agreement, and Article 23 of the Local Memorandum of Understanding when they failed to allow the grievant to bid the newly available Saturday Non-Scheduled day. The grievant shall be compensated accordingly, as stated in the Award.

STATEMENT OF PROCEEDINGS

This grievance was heard at a hearing on April 4, 2011 at the Waterbury, CT Post Office, pursuant to the grievance-arbitration provisions of the 2006-2011 Collective Bargaining Agreement, also known as the National Agreement, or Agreement between the National Association of Letter Carriers, also known as the Union, and the US Postal Service, also known as the Service.

The parties were provided a full and impartial opportunity to present their case, to present witnesses, argument and evidence on behalf of their respective positions. Both advocates represented their positions with due diligence.

The Union presented two witnesses, the grievant, and Ms. Lynda Flood-Doms, the Chief Steward for Branch 20. Both witnesses were duly sworn prior to receiving their testimony.

The Service did not call any witnesses.

The Union provided an Opening and Closing Statement, orally and in writing.

The Service deferred their Opening Statement until the conclusion of the Union's case in chief, at which time they presented their "hearing statement" which encompassed opening and closing remarks.

At the conclusion of the hearing, the Union provided the Arbitrator with six previously issued arbitration awards, three national, and three regional.

The Service provided the Arbitrator with two previously issued national arbitration awards.

The Arbitrator has thoroughly reviewed each one and will offer comment, as found to be applicable in the opinion.

The parties submitted JOINT EXHIBITS consisting of the following:

Joint 1 – The National Agreement

Joint 2 – Moving Papers consisting of Pages 1- 37

Joint 3 – Employee & Labor Relations Manual, Section 434.6

STIPULATED FACTS

The parties stipulated to the following:

"Management eventually granted the grievant Non-Scheduled days of Saturday/Sunday effective November 6, 2010."

ISSUE AS FRAMED BY THE PARTIES

The parties disagreed as to the issue with the Union offering the Step B Team Issue as appropriate, and the Service offering that only the appropriate remedy should be decided by the Arbitrator.

The Arbitrator explained that it was important to know the reasons behind the Service's decision not to award the subject non-scheduled days to the grievant in order to determine what, if any remedy may be applicable. For those reasons, the Arbitrator informs that the Step B Team Issue shall be that which the Arbitrator is tasked with deciding.

"Did management violate Articles 5 and 30 of the National Agreement and Article 23 page 8 of the Local Agreement under the heading: Saturday non-Schedule Day when they did not allow the Grievant to bid for a Saturday that was available?"

BACKGROUND

In May, 2010, the Manager of Customer Services for Waterbury determined not to allow a recently vacant letter carrier position with a Saturday/Sunday non-scheduled days to be awarded to the grievant. The two senior letter carriers declined the supervisor's invitation to assume the days off, but before the grievant, the next in line could accept the Saturday non-scheduled, the decision was made that it was no longer prudent to have another Saturday non-scheduled. However, in November, 2010, the grievant was granted a Saturday non-scheduled day

CONTRACT PROVISIONS CITED

Article 5 – Prohibition of Unilateral Action

"The Employer will not take any action affecting wages, hours and other terms and conditions of employment as defined in Section 8(d) of the National Labor Relations Act which violate the terms of this Agreement or are otherwise inconsistent with its obligations under law."

Article 30 – Local Implementation

"30.A Presently effective local memoranda of understanding not inconsistent or in conflict with the 2006 National Agreement shall remain in effect during the term of this Agreement unless changed by mutual agreement pursuant to the local implementation procedure set forth below or, as a result of an arbitration award or settlement arising from either party's impasse of an item from the presently effective local memorandum of understanding (LMOU)."

"30D An alleged violation of the terms of an LMOU shall be subject to the grievance-arbitration procedure." (Relevant items only cited)

POSITION OF THE PARTIES

THE NATIONAL ASSOCIATION OF LETTER CARRIERS

The Union states that management at the Waterbury office violated provisions of the Agreement and the LMOU when, on May 22, 2010 the Manager, Customer Services failed to permit the grievant from bidding for a Saturday non-scheduled day.

The Union maintains that it was a past practice in that office to allow the senior letter carrier the opportunity to bid for a Saturday non-scheduled when one became available, as it did in the instant case due to a retirement of a senior carrier who had a Saturday as a non-scheduled day. The Union points to Article 23 of their Local Memorandum of Understanding (LMOU) that states in relevant part, "When a Saturday non-scheduled (N/S) day becomes available it will be bid installation wide by seniority." The Union argues that this has been the process uninterrupted for many years, and the Service's failure to continue this practice in the instant case denied the grievant her rights.

The Union argues that the reason offered by the Service for withholding the Saturday NS day, that the NS day did not become available, and the high cost of overtime on Saturdays, and not being able to cover a "floater" assignment is without merit.

The Union maintains that Article 30 of the Agreement mandates the parties to adhere to whatever provisions of the LMOU are agreed to during the life of that agreement and can only be changed through the local negotiating process.

The Union argues that by denying the grievant her right to this Saturday NS day, she had to use a number of annual leave days on Saturdays that she otherwise would not have to use.

The Union asks that the grievant be made whole by receiving out of schedule premium for all hours worked outside of the assignment she would otherwise have been entitled to, be reaccredited the annual leave used on Saturdays from May 22, 2010 until she was awarded the Saturday NS day in November, 2010, and whatever more suitable remedy the Arbitrator may find appropriate.

THE US POSTAL SERVICE

The Service maintains that Article 3, Managements Rights, allows it, "To maintain the efficiency of the operations entrusted to it.", and "To determine the methods, means, and personnel by which such operations are to be conducted." The Service argues that due to a high rate of overtime used on Saturdays, granting another Saturday NS day would have incurred added overtime costs.

The Service states that with the elimination of carrier routes, a string of utility routes were lost, and there was no longer enough coverage for Saturday NS days.

The Service also maintains that the language in LMOU Article 23 states, "When a Saturday non-scheduled day off becomes available it will be bid installation wide by seniority" and in the instant case, it did not become available because the manager determined that it was not needed.

The Service argues that the reasoning for the manager's decision was discussed with the Union and therefore, was not a unilateral undertaking.

The Service maintains that the grievant was allowed to assume Saturday as her nonscheduled day effective November 6, 2010, and therefore the remedy requested by the Union would be tantamount to unjust enrichment.

The Service asks that the Arbitrator deny this grievance in its entirety.

OPINION

The Union, in this matter must persuade the Arbitrator that there is a violation of the Agreement, or parts thereof, including the Local Agreement. With only peripheral opposition by the Service, they have done so.

First, the Union argues a violation of the Local Memorandum of Understanding, the parties local agreement, Article 23, "Other Miscellaneous Items" subsection "Saturday Non-Scheduled Day" that states in relevant part, "When a Saturday non-scheduled day becomes available it will be bid installation wide by seniority."

Article 30 of the National Agreement, "Local Implementation" allows the parties, for one brief period during the life of the National Agreement to negotiate a number of items of concern to those local parties.

There is no dispute presented that "Saturday Non-Scheduled Day" was one of those items negotiated by the parties at the Waterbury office many years previous and that no attempt to change or alter the subject language was undertaken by either local party. Further, there was no evidence presented by either party that such a provision violated or, was in conflict with the terms of the National Agreement. Further, it is obvious that such a provision carried with it a great deal of importance to one of both parties when one considers the uniqueness of this provision.

While neither party presented witnesses to the original negotiating process that resulted in this provision, one must use what is commonly referred to as the "reasonable person" standard employed in the arbitration process to understand the intent of the subject provision, and thus determine if a violation has occurred.

The Service correctly advances their rights pursuant to Article 3, "Management Rights" of the Agreement, and such rights carry a great responsibility to maintain the efficiency of the operations entrusted to it, maybe more so today than ever before. However, those rights are..." subject to the provisions of this Agreement..." Article 30, "Local Implementation" remains one of those provisions that must be honored to be in compliance.

The Service supports their position for not granting the grievant the subject Saturday NS day by the part of Article 23 that states "...becomes available..." when they argue that the bid position of the retiring letter carrier was not available because the manager, customer services was not going to post the Saturday NS day, thus it was not available.

It is clear that the parties have operated under this provision for many years, with the expectation that it would continue, at least until such time as the parties could, if they so desired, change it during the next local negotiation period.

To have done so in the past, and then in this instance, albeit for what can be argued is good cause, the subject manager suddenly interprets the meaning of "when available" differently is without contractual protection. In May, 2010, in the Waterbury office, there was a retirement of a letter carrier who had a Saturday NS day – this was, apparently a regular route whose duties did not change. In the past coverage was needed on Saturday for this route, and coverage would continue to be needed. This is not in dispute. Further, the argument presented by the manager that granting the Saturday NS day to the grievant would result in higher use of overtime defies such logic when the Union presents undisputed testimony that the grievant was granted many Saturday's of annual leave during the period May – November, 2010. If overtime was the issue supported by the Service for not granting the NS day in May, why would you then grant annual leave on Saturday's to the grievant during the subject time frame that would surely incur such overtime?

I find it reasonable to conclude the intent of the provision "When a Saturday non-scheduled day <u>becomes available</u> it will be bid installation wide by seniority" (underlined added) to mean when a regular bid opens, such as due to a retirement, and the position is not being considered for elimination pursuant to another contractual provision or requirement, it has, in fact <u>become available</u>, and as such, the provision must be adhered to completely. (Underlined added)

Unrefuted testimony offered that in the instant case, when the NS day became available due to a retirement, the supervisor began the practice of contacting the senior letter carriers to ascertain their intentions, and had discussed the NS day with the Chief steward and the grievant, who had also contacted the two senior letter carriers, learning that they were not interested, and she would be in a position to now have a Saturday NS day.

While evidence in the file supports the Service position concerning the manager's attempt to hold down overtime (See J-2, Pages 36 & 37) as the reason for his denying this Saturday NS day, there is no evidence that this actually occurred. Also, the manager offered that adding "... an extra Saturday off above and beyond the compliment would have a negative impact to our customers and service." There is no evidence presented that the subject Saturday NS day was extra, or it was in addition to what was already part of the compliment equation. Further, it is of no consequence when the action taken is in violation of the Agreement, which I find this to be.

Further, the service offers in support of their position, LMOU, Section 23, Item 4 that states, "The senior carrier in the installation will get the Saturday NS day if they so desire and the successful bidder will have their choice of the non-workday that they had or the one assigned by management." (Underlined added) The Service maintains that "the one assigned by management" allows, per Article 3 of the Agreement their right to assign the N/S day. I find the key word in this item to be "desire". The instant matter involves a senior carrier, the grievant, who did, in fact "desire" the Saturday N/S day that this provision allowed, as had been the ongoing practice of the LMOU. That practice, for better or worse cannot simply be ignored or altered in May, and then provided in November. Article 5 of the Agreement alone prohibits such action. While the Service may acknowledge that they corrected this issue, the Union argues that that acknowledgement alone does not make things right. Thus we must look at remedy – the central issue of the case in chief of the Service.

The Union argues that the Arbitrator, if he finds a violation has the authority to fashion a remedy he finds to be appropriate. The Union maintains that the Arbitrator can pay the grievant out of schedule premium.

The Service argues that to order such a remedy would among to an unjust enrichment of the grievant – that the Union has failed to demonstrate any financial harm to the grievant.

Among the previously issued arbitration decisions provided to this Arbitrator by the Service in support of this position is Arbitrator Mittenthal in a National panel decision. (President of APWU – H1C-NA –C 97, Feb. 3, 1989)

That which I find relevant to the matter before states, "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 status quo ante in this case, had there been no violation of the contract would have been the grievant with the Saturday N/S day in May, 2010 when it became available and the prevailing practice began, only to be inappropriately halted by the manager.

The Union provided a case that provides relevant guidance of a similar nature to the instant case, regarding remedy.

Arbitrator Snow stated in Case No. W1C-5F-C 4734, Sept. 1987, "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." "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 ..."

In summation, I find that the Union has demonstrated a violation of Article 5 and 30 of the Agreement, and through that, Article 23 of the Local Memorandum of Understanding. There was an agreement by the parties to offer the available Saturday N/S day to the senior letter carrier. The Service failed to do so without contractual justification and protection. Offering such to the grievant, while admirable, nearly 6 months later is still a violation at the time of the incident.

While many arbitrators, myself included, consider the Agreement to be a living, breathing work, it is not so flexible that it can be adjusted to fit any/all circumstances of the moment without regard to the intent of the parties and the integrity of the process, no matter the best of intentions.

AWARD

For the reasons stated above, I find that the Union has demonstrated a violation of the Agreement and this grievance is sustained.

The grievant shall be paid out of schedule for 4 hours per week for the period in question, when she otherwise would have been working the original Saturday N/S day. This shall be subject to normal withholding.

The Service is ordered to adhere to those provisions cited found to be in violation without fail.

Note: The Union requested annual leave reaccredited to the grievant that she used for any Saturdays during the period cited. I do not find that to be an appropriate remedy in this matter. While the grievant had the expectation of Saturday N/S when it became available in May, and she was disappointed by its loss, there is no evidence that she was harmed in a way that would fairly entertain such an award.

Respectfully Submitted,

Donald J. Barrett

Arbitrator

Date April 13, 2011