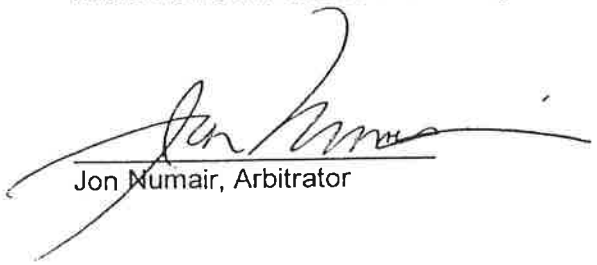
REGULAR ARBITRATION PANEL

IN THE MATTER OF ARBITRATION BETWEEN UNITED STATES POSTAL SERVICE AND AMERICAN POSTAL WORKERS UNION, AFL-CIO	Grievant – Class Action Post Office – Phoenix, AZ USPS Case # E10C-1E-C 16059035 APWU Case # 354115

BEFORE:	Jon Numair, Arbitrator
APPEARANCES:	
For the U.S. Postal Service:	Luther Sutton, Labor Relations Specialist
For the American Postal Workers Union:	JoAnn Gerhart, National Business Agent
Place of Hearing:	Phoenix, AZ
Date of Hearing:	November 15, 2016
Briefs Received:	January 6, 2017
Date of Award:	February 2, 2017
Relevant Contract Provisions:	Article 8
Contract Year:	2010-2015
Type of Grievance:	Contract

Award Summary:

The Employer violated Article 8 of the Agreement when it assigned Postal Support Employees to work beyond sixty (60) hours in a service week. The Employer is directed to cease such assignments and compensate affected employees by paying them an extra 50% premium for all hours worked in excess of the sixty hour maximum.



Jon Numair, Arbitrator

ISSUE

After a fair amount of discussion, the parties agreed to a general concept of the issue, although they varied in their framing. The Union suggested the issue to be:

> *What shall the remedy be for the Post Office admitted ongoing violation of Article 8 of the Collective Bargaining Agreement by working PSE employees beyond the 60 hours limit in a service week, during December?*

The Employer proposed the following issue statement:

> *Did Management at the Phoenix Processing & Distribution Center (P&DC) violate Article 8, Section 5G, by working employee's (sic) over sixty (60) hours in a service week during the exception period of December? If so, is the Union's requested enhanced remedy appropriate?*

The parties agreed to allow the Arbitrator to frame the Issue based on their suggestions and his understanding of the dispute. Therefore, the issue to be decided is:

Did the Employer violate Article 8 of the Collective Bargaining Agreement (Agreement) when it assigned Postal Support Employees (PSEs) to work beyond sixty (60) hours in a service week, during December, 2015? If so, what is the remedy?

BACKGROUND

The grievance challenges the Employer's assignment of PSE employees to work beyond sixty hours in a service week. The grievance chain and witness testimony insinuate the practice has been going on for some time, with claims the Employer routinely settled grievances by paying affected employees an extra 50% premium for hours in excess of 60. This grievance, however, asks for a remedy of Administrative Leave equal to the number of hours worked beyond 60. The Union argues the 50% penalty has not inhibited the Employer from routinely violating the Agreement.

The parties differing submissions on the issue relate to both scope and substance. As suggested by their proposed issue statement, the Union viewed the dispute as simply of remedy. They contend the Employer has not disputed grievances challenging the assignment of PSEs to schedules of more than 60 hours in a week, and have routinely agreed to remedy grievances which challenged the Employer's actions. In addition to past settlements, they

alluded to nine cases held in abeyance by the parties at step 3, awaiting the decision in this case, two of which were entered into evidence.

The Employer held a more expansive view, refusing to concede the Agreement was violated in addition to arguing against the requested remedy as excessive.

The Union filed the grievance on December 26, 2015, challenging the Employers assignment of PSEs to work that exceeded sixty hours during the service week, PP 27, week 1 of 2015. The timing of the alleged violation brings another factor into play, the "December Exclusion" period found in Article 8. The parties agree this week was during the exclusionary timeframe provided for in Article 8.5.G., although there is dispute over the application of the exclusion to PSEs. The grievance moved through the negotiated grievance process in an orderly manner and was appealed to arbitration on June 16, 2016. The parties stipulated it was properly before the Arbitrator and no procedural challenges were raised.

Each party had full and ample opportunity to present evidence and testimony to support their case. At the conclusion of the hearing the parties opted to summarize their positions by way of post-hearing briefs to be transmitted no later than January 6, 2017. The briefs were received accordingly and supporting documentation was received by January 9, 2017.

RELEVANT CONTRACTUAL PROVISIONS

ARTICLE 8 - HOURS OF WORK

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Section 4. Overtime Work

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G. Overtime Work PSEs
PSEs shall be paid overtime for work performed in excess of forty (40) work hours in any one service week. Overtime pay for PSEs is to be paid at the rate of one and one-half (1½) times the basic hourly straight-time rate.

. . . .

Section 5. Overtime Assignments

When needed, overtime work for regular full-time employees shall be scheduled among qualified employees doing similar work in the work location where the employees regularly work in accordance with the following:

A. Two weeks prior to the start of each calendar quarter, full-time regular employees desiring to work overtime during that quarter shall place their names on an "Overtime Desired" list.

B. Lists will be established by craft, section, or tour in accordance with Article 30, Local Implementation.

C. 1. a. When during the quarter the need for overtime arises, employees with the necessary skills having listed their names will be selected in order of their seniority on a rotating basis.

b. Those absent or on leave shall be passed over.

D. If the voluntary "Overtime Desired" list does not provide sufficient qualified people, qualified full-time regular employees not on the list may be required to work overtime on a rotating basis with the first opportunity assigned to the junior employee.

E. Exceptions to C and D above if requested by the employee, may be approved by local management in exceptional cases based on equity (e.g., anniversaries, birthdays, illness, deaths).

F. Excluding December, no full-time regular employee will be required to work overtime on more than four (4) of the employee's five (5) scheduled days in a service week or work over ten (10) hours on a regularly scheduled day, over eight (8) hours on a non-scheduled day, or over six (6) days in a service week.

G. Full-time employees not on the "Overtime Desired" list may be required to work overtime only if all available employees on the "Overtime Desired" list have worked up to twelve (12) hours in a day or sixty (60) hours in a service week. Employees on the "Overtime Desired" list:

1. may be required to work up to twelve (12) hours in a day and sixty (60) hours in a service week (subject to payment of penalty overtime pay set forth in Section 4.D for contravention of Section 5.F); and

2. excluding December, shall be limited to no more than twelve (12) hours of work in a day and no more than sixty (60) hours of work in a service week.

However, the Employer is not required to utilize employees on the "Overtime Desired" list at the penalty overtime rate if qualified employees on the "Overtime Desired" list who are not yet entitled to penalty overtime are available for the overtime assignment.

CONTENTION OF THE PARTIES

Position of the Union

The Union contends this case presents a simple matter of remedy as the Employer has routinely settled cases with similar fact circumstances. They allege, however, the status quo remedy has failed to deter the Employer's actions which, they have previously agreed, violate the Agreement. The Union, therefore, seeks an enhanced remedy of Administrative Leave for the aggrieved employees.

They argue -

> *...it is within the authority of the arbitrator to award (*an appropriate damages remedy). *National Arbitrators have opined that remedy should be fashioned to not only grant perhaps a monetary award, but to grant a remedy to impress an incentive for Management to discontinue the practice.* [1]

They contend they made *unrefuted* claims that the previous cases were settled in part, despite Employer claims the Union did not provide proof of an ongoing violation. They assert the previous settlements are part of the record in this case and point to the Step 3 Response which refers to the Union's current request as "*undue enrichment*" as compared to previous cases, as the basis, in part, for their denial.

In response to Employer argument that the settlements in previous cases were agreed to be non-citable, the Union points to a Step 4 Settlement which allows such citation if the full remedy is not honored. As the Union's requests for "Cease and Desist" remedies have not been complied with, they assert their right to cite previous settlements and ask for full relief here, including the additional remedy of Administrative Leave. They contend,

> *Management has established the 50% additional pay to the PSE for all hours over 60 in a work week. But in doing so, the amounts are so negligible, that it has not proven to be a deterrent to management from the continuing the practice. The Month of December is not an exception to the 60 hour rule, therefore, the Union ask(s) the Arbitrator to disregard that argument in determining the remedy.* [2]

The Union argues the December "*exemption period*" of Article 8.5, which 1) waives penalty overtime for hours worked by part-time flexible employees over 10 per day or 56 per week and 2) waives the 60 hour limitation for overtime desired list (ODL) employees who

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[1] Post-Hearing Brief of the Union
[2] Post-Hearing Brief of the Union

volunteer to work beyond 60 hours) do not apply to PSE employees, inferring that the 60 hour limitation is in place.

As to remedy,

> *The Union seeks relief for the PSE's, asking for a corrective remedy, which is administrative leave, for all hours worked (over 60 per week)), to be used at the employee's request. Cease and desist bargaining in bad faith and imposing the mandatory work schedules of over 60 hours per week.* [3]

In support of their position the Union submitted the following citations for the Arbitrator's consideration: A90C-1A-C 94005435, Arbitrator Judith C. Bello (October 25, 1994; West Jersey, NJ); B94N- 4B- C 99130675(et al), Arbitrator George R. Shea, Jr. (October 9, 1999, Framingham, MA); E10C-4E-C 12147420, Arbitrator T. Zane Reeves (September 26, 2013, Colorado Springs, CO.).

Position of the Employer

The Employer does not dispute PSE employees were assigned to work beyond 60 hours during the week of December 12, 2015. They argue the employees were properly compensated for their work. They contend the work was assigned during the December exception period and only after scheduling employees on the ODL to the maximum extent.

They claim that since the instant case deals with a week within the "*exclusion period*" of Article 8.5.F and 8.5.G, "*no other foregone conclusion can be drawn other than there is no remedy to be awarded and the union's request is without merit.*" The payment of the standard overtime premium of one and one-half (1.5) times the basic hourly rate was, and is, all the employees are entitled to. To award any additional compensation would be viewed as a "*punitive*" remedy and result in unjust enrichment.

They contend providing the aggrieved employees the remedy sought by the Union would afford them a "*greater economic right*" than the status quo provided by the Agreement for full-time regular employees.

> *Article 8.4.D is specific in that the exclusive remedy agreed to by the parties for contravention of Article 8.5.F is penalty overtime (50% beyond the normal 150% overtime premium). This sole and exclusive remedy was agreed to by the parties at the National Level not only in past several Contract Negotiations, but also in the JCIM which was developed jointly by the two parties at the National level.* [4]

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[3] Post-Hearing Brief of the Union

[4] Post-Hearing Brief of the Employer

The Employer further contends the Union is asking the Arbitrator to modify the terms of the Agreement by requesting the additional remedy and point to the Joint Contract Interpretations Manual (JCIM) for the mutually agreed upon remedy in the event of contravention of Article 8.5.F and 8.5.G.

> *Had the parties intended for there to be an additional remedy for what the union calls "excessive" violations of Article 8.5.G it would have been provided for in the National Agreement. In other words, the meaning of the word excessive would have been defined and would have been part of the language of Article 8.5.F and/or 8.5.G and or the JCIM.* [5]

Finally, they argue, the Union has not defined nor met any standard of "*impunity*" established by the parties at the national level and included in the mutually agreed upon "Remedies" section of the JCIM addressing violations of the 60 hour rule. They maintain the Union improperly cited past settlements as a means of inflating the current claim.

In support of their position the Employer submitted the following citations for the Arbitrator's consideration: J90C-1J-C 95064983, Arbitrator John C. Fletcher (February 2, 2002, Chicago BMC); S7C-3W-C 36925, Arbitrator Ernest E. Marlatt (January 24, 1992, Fort Myers, FL); A90N-4A-C 94042668, Arbitrator Carlton J. Snow (November 30, 1998, National Award); C7C-4G-C 21454, Arbitrator Robert W. McAllister (October 28, 1991, Indianapolis, IN).

ANALYSIS AND OPINION

On the Merits

Despite the numerous arguments, references, and nuances – advanced by both parties, the issue of a 60 hour ceiling is not an open question. Arbitrator Mittenthal settled the question long ago in his National Interpretive Award in Case H4N-NA-C 21 (and 27), issued May 12, 1986.[6] The issue in that case was whether the 60 hour limitation was an absolute bar to employees working beyond 60 hours in a service week. Although the case dealt with full-time employees on the ODL who reached 60 hours work during the course of a normal work day, Arbitrator Mittenthal's conclusion was far more comprehensive. In his discussion of the case he offers the following,

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[5] Post-Hearing Brief of the Employer

[6] Joint Exhibit (JE) #5

Turning to the merits of the dispute, the parties disagree on the scope of Article 8, Section 5G2. This provision says ODL employees "...excluding December, shall be limited to... no more than sixty (60) hours of work in a service week." These words clearly establish a ceiling on the number of hours an ODL employee may work during a week. They flatly prohibit anyone working more than 60 hours.

Emphasis added

He goes on to reason,

If Section 5G meant only to "define[e]... the relationships involving the overtime desired list...", as the Postal Service asserts, the parties would have stopped with 5G1. For the relationship between non-ODL and ODL employees was fully spelled out by the end of 5G1. The extra language in 5G2, the 60 hour ceiling, obviously had some larger purpose. It has nothing to do with the relationship between non-ODL and ODL employees.

And,

My view of the matter is reinforced by the recent negotiations. NALC President Sombrotto testified that the following remarks were made at the bargaining table at the time the 5G2 concept was discussed:

> *"The idea of the twelve- and sixty-hour restrictions were that no employee would be either required or to volunteer to work over sixty hours and that management's representative, the then Postmaster General, made it clear that those were absolute limitations that would not and could not be violated.*

This testimony was not contradicted by any Management witness. Hence the purpose of 5G2 was to create an absolute bar against employees working more than 60 hours.

Emphasis in original

. . . .

For these reasons, my ruling is that Article 8, Section 5G2 is an absolute bar to employees working more than 60 hours in a week.

His award then reads, in part,

Article 8, Section 5G2 does establish an absolute bar against employees working more than 60 hours in a service week.

Emphasis added

Arbitrator Mittenthal's choice of words is what is important here. Throughout the decision, the parties argued and Mittenthal considered whether an ODL employee should

complete a regularly scheduled shift once the employee reached 60 hours of work in a week. However, his decision, based upon bargaining history and the intent of the parties, unequivocally sets the sixty hour limitation for all employees in the bargaining unit. There were no exceptions.

Although the PSE classification did not exist in 1986, we must apply contractual interpretations that existed at the time of their creation. Since 1986, "employees" (in this context) has meant all bargaining unit employees. Since 1986, employees were barred from working more than 60 hours in a service week. Nothing changed from 1986 until the events leading to this grievance other than the creation of the new classification. The parties created the classification with the knowledge and understanding, supplied by Arbitrator Mittenthal's interpretation, that all employees were barred from working beyond the 60 hour threshold.

The Employer is prohibited from working PSE employees beyond sixty (60) hours in a service week.

The December Exclusion

Once the 60 hour ceiling is established, as above, we must consider whether the exclusionary language of Article 8.5.G.2 permits the assignment of PSE employees beyond 60 hours work in a service week during the period determined to be within the December Exclusion, as argued by the Employer.

The exclusionary language of Article 8.5.G.2 has a prefatory clause that reads "*Employees on the 'Overtime Desired' list:*" Accordingly, this exclusion clearly applies only to those employees on the ODL and PSE employees were not (cannot) be on the ODL.

Exclusionary language also exists for the part-time flexible classification, found in Article 8, Section 4.E.

> *E. Excluding December, part-time flexible employees will receive penalty overtime pay [7] for all work in excess of ten (10) hours in a service day or fifty-six hours in a service week.*

The overtime provision specific to PSEs, Article 8, Section 4.G, simply specifies overtime payment of 1.5 times the basic hourly rate to PSEs for work performed in excess of forty hours in a service week. No mention of penalty overtime pay or December exclusion is contained in the section.

Therefore, we have specific provisions of the Agreement which allow for certain work hour ceilings, for certain employees, to be exceeded during the month of December, with no

[7] Two times the basic hourly straight-time rate. (Article 8. Section 4.C)

such provision for PSE employees. The established principle of *"inclusio unius exclusio alterius"* applies here. The Agreement allows for a conditional lifting of the workhour ceiling for full-time regular employees on the ODL and part-time flexible employees. By their specific reference, it is implied other categories of employees are excluded from the exception. The Mittenthal bar is not waived for PSEs. The December exclusionary period does not apply to them.

The Employer cannot claim the December Exclusion as a contractual basis for the assignment of PSE employees beyond sixty (60) hours in a service week.

Remedy

The Union has asserted since the filing of the Grievance that an enhanced remedy is required in this case due to the Employer's continual violations of the sixty hour limit. Union Representatives Monica Chavez and Davyd Collie testified the Employer had settled previous grievances by agreeing to pay PSE employees an extra 50% premium for hours worked in excess of 60 in a service week. The testimony was unrebutted; however, there was no quantification. How many grievances? How many hours... how many employees... how many settlements? The JCIM contains an agreement that the payment of an extra 50% premium should not be construed as a license to exceed the given limit with "*impunity.*" Extrapolating that agreement to the case at hand, the Union would have to establish such impunity.

The Union introduced two exhibits to support their argument. One, a "Payout Request History" for a grievance settlement which shows a total of $37.76 was paid to eight employees for Pay Period (PP) 10 of 2015.[8] APWU Chief Steward Chavez testified this was the result of a similar grievance. The second, which included the moving papers, showed a similar complaint and a step 2 settlement which provided an extra 50% premium paid to a mixture of full-time regulars and PSEs. [9] The "Payout Request History" for this grievance shows 16 employees shared in a payout of $234.13 for PP 23 of 2015.

Two other cases, submitted as joint exhibits, have been held in abeyance pending the outcome of this case. [10] These two cases had similar fact circumstances, in that, they involved a dispute over working PSEs in excess of 60 hours in a service week during the December Exclusionary period. JE# 6 addresses alleged violations for PP 27, week 2 of 2015, wherein the Union calculated 20 employees worked a total of 86.39 hours over the 60 hour limit. JE#7

[8] Union Exhibit (UE) #2
[9] UE #3
[10] JE #6 and 7

addresses alleged violations for PP 2, week 1 of 2016, wherein the Union calculated two employees worked a total of 1.30 hours over the 60 hour limit.

The Union alluded to six additional cases in their opening, which allege PSEs worked over 60 hours in a week outside the disputed exclusion period. No evidence of these cases was brought forward. Indeed, no other evidence was supplied attempting to prove the contention of ongoing, repeated violations amounting to impunity.

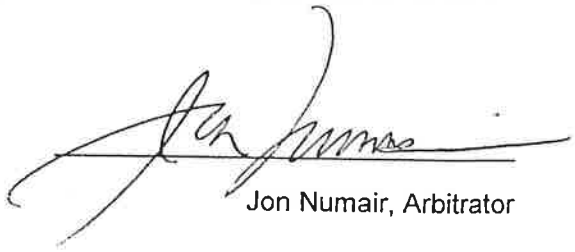
Enhanced remedies are sometimes appropriate. In this case, however, the Union did not demonstrate that appropriateness. The burden of proof in making a case for an enhanced remedy requires a showing the previous remedy was inadequate. This was not done. As discussed, there was no showing of number of violations, depth of those violations, numbers of employees affected, etc. No showing the ceiling was exceeded with impunity.

But, as the findings above reveal, the Agreement has been violated. The payment of an additional 50% premium for hours worked in excess of 60 in a service week is an appropriate remedy for the following reasons.

1. The parties have constructed multiple remedy schemes of an extra 50% premium for hours worked in excess of established ceilings.
2. Ms. Chavez and Mr. Collie provided unrebutted testimony the Employer had been agreeing to this remedy in past cases. It was only when the Union sought the enhanced remedy for this and the other pending cases that the Employer took a hard line stance and denied the grievance(s) on merit as well as for the remedy requested.
3. The Union has not established sufficient foundation for an enhanced remedy – a remedy that would exceed the status quo.

CONCLUSION

After a review of all the evidence and testimony, and consideration of the applicable contractual provisions, I find the Employer violated Article 8 of the Agreement when it assigned Postal Support Employees to work beyond sixty (60) hours in a service week. The Employer is directed to compensate affected employees by paying them an extra 50% premium for all hours worked in excess of the sixty hour maximum.



Jon Numair, Arbitrator

February 2, 2017