C # 3200

In the Matter of the Arbitration between	Case No. NC-S-5426 Rossville, Georgia
NATIONAL ASSOCIATION OF LETTER CARRIERS, AFL-CIO	
and	OPINION AND AWARD
UNITED STATES POSTAL SERVICE	

APPEARANCES:

For the NALC - Mozart G. Ratner, P.C.
by: Kenneth J. Simon-Rose, Esq.

For the USPS - Larry B. Anderson, Esq.

BACKGROUND:

This case is before the Arbitrator upon the parties' request for a determination as to whether the Postal Service violates the provisions of the 1975 collective bargaining agreement when it does not pay an employee covered by the terms of Article VIII, Section 5-C-2 for having failed to provide that employee with an equitable opportunity to work overtime. The parties agreed that the case which arose at the Rossville, Georgia Post Office would be employed to illustrate the matter in issue. However, the facts in that particular case did not have to be adjudicated in order to dispose of the question posed in this proceeding.

At the Rossville Post Office it was conceded by the Postal Service in the 4th Step of the grievance procedure that in the case of the named grievant the Postmaster provided, "...less than an equitable opportunity to work overtime." To that extent the grievance

was sustained. The Postmaster was thereafter directed by his superiors to comply with both the "spirit and intent" of Article VIII, Section 5-C-2. The NALC contended that such a directive did not provide an appropriate remedy for the breach of the Agreement. The Union took the position that the Postal Service was obligated to compensate the grievant by paying him for the overtime he was not afforded the opportunity to work in the quarter.

THE ISSUE:

The parties did not agree upon a definition of the dispute to be presented for determination. However, from the contentions raised, it is apparent that in issue is whether the Postal Service must, if it fails to live up to its obligation to provide, in the quarter, for equitable opportunities for eligible employees to work overtime, pay the employees deprived of such opportunities for the overtime hours they did not work.

CONTENTIONS OF THE PARTIES:

The NALC contended that a violation of this provision of the Agreement is properly remedied only by awarding the grievant expectation or compensatory damages. The Union stated that the Agreement is silent on the question of appropriate remedy, and the prior agreements made in 1966, 1968 and 1971, which also contained the requirement for equitable distribution, lacked the additional specific reference to having same accomplished in accordance with a quarterly overtime desired list. Under those old agreements, the USPS arguably had an open-ended period to achieve equitability. However, under the 1975 Agreement, a violation specifically occurs at the end of a quarter. For that reason, the Postal Service had to provide monetary compensation to employees who

did not get an opportunity to share in the overtime opportunities in that quarter.

The NALC also contended that nothing in the previous bargaining history or the conduct of the Union regarding such violations indicated that it had waived or dropped its claim that monetary compensation was the appropriate remedy and contemplated by the language of the provision of the Agreement under consideration. The Union pointed out that it had consistently insisted that compensation, for those who grieved under this provision and had such grievances sustained, was required. As soon as the Postal Reorganization Act eliminated restrictions placed on such payments formerly imposed by the Comptroller General's Office, the Union renewed with increased vigor its claim that all such violations be compensated with appropriate payments at the end of the quarter.

The Union also argued that the fact that the Postal Service may have had a uniform policy of not providing such compensation should not be construed as an acceptance by the NALC of the appropriateness of such a policy. The Union also put into evidence certain grievance settlements which placed in issue the credibility of the Service's contention that payment was never forthcoming for such violations. Related to this contention was the Union's argument that advancing a demand in negotiations for a provision specifically providing for compensation was not an admission that such remedy was not already provided in the Agreement. According to the Union, the terms of the Agreement speak for themselves and the failure to cover the question of remedy substantiates the Union's claim that no agreement on an appropriate remedy was ever reached.

The Union then goes on to contend that the appropriate remedy

must be found to be a monetary award equal to the pay that the Carrier would have received if the contract had not been breached. This is the only way that a grievant could be made whole and also provide an effective deterrent against further contract violations. The Union asserted that merely directing a Postmaster to comply with the provisions of the contract cannot be regarded as an effective way to make a specific grievant whole nor insure future compliance with the requirements of the contract.

Even if the remedy required that the Postmaster provide the grievant with a make-up opportunity in a subsequent quarter, when that was done the spirit of equitable distribution during that quarter would be violated. The Union cited a number of arbitration decisions which held that this form of remedy, providing for monetary compensation, was well accepted, not punitive, and regarded as just and equitable. This is particularly true in this case because the agreement provides for a quarterly reassessment of overtime opportunities. Other agreements do not have expressed or established time periods in which management must achieve compliance with the overtime distribution provision. Once the quarter is over, according to the NALC, a new list is posted and it is too late for management to provide for a correction of an error which it committed in the previous quarter. In the current quarter, the overtime hours available must be distributed among those who signify their desire to be included on the overtime desired list. To use some of those hours for make up would create a violation of the terms of the National Agreement.

Finally, the Union argued that there were other provisions of the Agreement, such as Article XI, Section 6, dealing with holidays,

where although the provision does not contain a specific remedy an arbitrator found that monetary compensation for a breach was an appropriate remedy. The Postal Service has also agreed, according to the evidence in this record submitted by the Union, to provide monetary compensation to employees denied bargaining unit work which was improperly assigned to a non-bargaining unit employee in violation of Article I, Section 6A. This provision also does not contain any reference to an appropriate remedy for breaches.

The Postal Service argued that in the absence of an express provision in the Agreement providing for monetary damages the Arbitrator does not have inherent or implied authority to provide for such damages. For him to do so, according to the Postal Service, would be to violate the provision of Article XV, Section 3, which provides, inter alia, that the agreement may not be altered, amended, or modified by an arbitrator.

The Employer also argued that the intention of the parties can be ascertained from the language in the current agreement, the language in the prior agreements, and the manner in which the parties resolved disputes concerning equitable distribution of overtime which arose under those agreements. In this connection, the USPS provided testimony to establish that, since 1966 when the concept of equitable distribution first appeared in the agreement, failures to provide for such an opportunity were remedied by another opportunity to equalize the equitable distribution subsequently granted. The Postal Service also claimed that even after the rulings of the Comptroller General prohibiting payment for work not performed no longer applied the parties did not provide in the later agreements for such payment.

The Employer claimed that the Union had participated in the creation of a "time-honored" practice during the terms of the 1966, 1968, 1971 and 1973 agreements that equitable distribution violation cases would be resolved on a "makeup opportunity" basis. Management contended that the evidence submitted in this proceeding established that where the parties provided for monetary compensation as an appropriate remedy such a remedy was clearly written into the agreement, such as in Article XVI, or established by agreement of the parties, such as for remedying breaches of Article I, XIII, and XXIX. In the instant case, the Service claimed that the NALC could not point to any specific language or mutal agreement to support its claim that monetary damages were an accepted remedial action.

The Postal Service pointed to the fact that the NALC had proposed in the 1975 and again in 1978 specific language, in Section 5-C, which would provide for monetary compensation. Those proposals were rejected by the USPS. These persistent efforts, according to the Employer, provide convincing evidence that the parties had never understood that such a remedy already was implied by the terms of the Agreement. The Union could not have been seeking to clarify a right since it had not attempted to exercise the right prior to demanding the "clarifying" language in 1975. In addition, after the Union's efforts to provide for such language in the agreement were unsuccessful in 1975 and again in 1978, the Union continued to resolve grievances concerning alleged breaches of Section 5-C-2 by agreeing to accept make-up opportunities in most instances, and where monetary payments were made this was done on a non-precedential basis.

In addition, the Employer argued that the NALC did not present a persuasive case for the adoption of such a remedy if it were in the power of the Arbitrator to provide for it. The Employer

by granting a makeup opportunity has in effect made the aggrieved whole. This remedy has also, by practice, been considered a satisfactory and equitable one by the majority of NALC representatives who police the agreement. The makeup remedy, according to the Employer, has proved effective in preventing the abuse of the equal opportunity provision. At most, the aggrieved employee had only suffered a temporary postponement of an opportunity to earn additional compensation. The opportunity which the grievant missed was enjoyed prematurely by a fellow employee. Neither really suffered any permanent loss or gain from the failure to observe the requirements of Section 5-C-2 later corrected with a makeup opportunity. Any monetary remedy, according to the Employer, would provide for the unjust enrichment of an employee who was compensated in this manner. It would amount to a$_n$ award of punitive damages which are only imposed in an arbitration award under the most exceptional circumstances.

Finally, the Employer argued that providing another opportunity to make up for the time missed is a well accepted remedy in industrial relations which has been adopted by the majority of arbitrators absent special circumstances not present in this case. The Service also distinguished the award of such damages in a holiday pay case on the basis of such loss being gone forever whereas the opportunity for makeup is clearly present in overtime cases.

OPINION OF THE ARBITRATOR:

It is necessary at the outset to dispose of one threshold contention raised by the Employer. It was contended that the agreement provides in Article XV that the arbitrator has no authority to add to, subtract from, or modify the terms of the agreement. So it

does. That restriction upon the jurisdiction of the arbitrator must be scrupulously observed. However, 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. No lengthy citations or discussion of the nature of the dispute resolution process which these parties have mutually agreed to is necessary to support such a conclusion.

Before the Arbitrator in this proceeding is the question of whether the parties have agreed upon the remedy to be provided for breaches of the Employer's obligation under Article VIII, Section 5-C-2, or, in the event they have not done so, what is an appropriate remedy for such breach as did occur in the Rossville, Georgia, Post Office.

Article VIII-C-2 reads as follows:

> 2. Only in the letter carrier craft, when during the quarter the need for overtime arises, employees with the necessary skills having listed their names will be selected from the list. During the quarter every effort will be made to distribute equitably the opportunities for overtime among those on the list. In order to insure equitable opportunities for overtime, overtime hours worked and opportunities offered will be posted and updated quarterly. Recourse to the "Overtime Desired" list is not necessary in the case of a letter carrier working on his own route on one of his regularly scheduled days.

There is no additional language in this Section or in any other provision of the Agreement called to the Arbitrator's attention in this proceeding which would appear to spell out an agreement of these parties to remedy a breach of the above-quoted provision in a specific fashion either by providing a makeup opportunity, as the Employer contends is appropriate, or by providing monetary compensation to the aggrieved at overtime rates for the hours missed, as the

NALC desires.

Absent specific language in the Agreement, the intent of the parties may be determined from collateral sources. As to the past practice revealed by this record, it would appear that the remedy most frequently provided has been a makeup opportunity. However, the Union has furnished sufficient evidence of local practice to the contrary, even ignoring settlements made on a non-precedential basis which the Undersigned believes must be done, to indicate a certain amount of inconsistency which does not make the practice totally conclusive evidence of intent.

Also revealing intent of the parties is their exchanges during the negotiation of this and previous agreements. Here, the proposals advanced by the NALC at the 1975 as well as the 1978 negotiations, when the language of this provision was the same, gives strong indication that the Union did not believe there was a clear right to a monetary compensation remedy to be found in the agreement being renegotiated. It cannot be found that the Union was only seeking with these proposals to clarify a right since the testimony concerningthese negotiations, and the respective positions of the parties regarding a monetary compensation remedy, indicated that the USPS had clearly contended no right to such compensation existed. The chief spokesman for the Union at the bargaining table strongly contended that such a monetary remedy was in order and then he put forward proposed contract language to insure it would be provided. It does appear that the rejection of this proposal and the signing of an agreement which did not contain any such language gives strong indication that the Union is now seeking something which it did not secure in negotiations, an agreement that breaches of Section 5-C-2 must be remedied by providing monetary compensation to the successful

grievant.

Based upon such considerations discussed above, the question still remains how shall breaches of Section 5-C-2 be appropriately remedied absent a written agreement of the parties as to a specific means and also absent clear and compelling evidence of their intent. Contrary to the contention advanced by the NALC, the weight of arbitral opinion does not appear to support their position that an appropriate remedy for failure to provide the proper employee with the overtime opportunity requires that employee be made whole with a monetary award equaling the potential earnings that overtime would have provided. My reading of a fair sample of awards on this issue appears to support a finding that providing an opportunity to make up such overtime within a reasonable time is considered an appropriate remedy except under certain circumstances. Obviously, when the overtime was awarded to a person outside the eligible pool of employees to whom such overtime must be awarded, such as when machinist overtime is awarded to a millwright when the contract requires such overtime be shared only among machinists, many arbitrators have found that monetary compensation to the most eligible machinist is the appropriate remedy since there is no way of replenishing the bank of overtime available to employees in that job classification.

Likewise, there seems to be a general consensus that monetary compensation is also in order when the failure to provide the appropriate employee with the opportunity was caused by a flagrant disregard or defiance of the contractual obligation, such as distribution of overtime based upon favoritism or some other inappapropriate criteria. Here a monetary award would provide the deterrent effect which is plainly warranted.

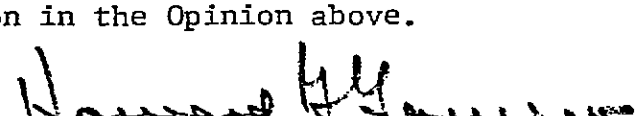
Finally, monetary compensation is also awarded as an appropriate remedy in those cases where the possibility of providing an equalizing opportunity within a reasonable period of time is not available or only a remote possibility. Here again, those special circumstances dictate the only effective means of correcting the breach of an obligation to the adversely affected employee or employees.

Thus, directing in the instant case that the appropriate remedy for a breach of the obligation to provide an overtime opportunity to the proper member of the craft on the "Overtime Desired" list in a specific quarter must be remedied by providing an equalizing opportunity in the next immediate quarter, or pay a compensatory monetary award if this is not done, appears most appropriate. It was found in the case under review that the failure to comply with Section 5-C-2 was not caused by granting such overtime to a person outside the eligible pool, a willful disregard or defiance of the contractual provision, a deliberate attempt to grant disparate or favorite treatment to an employee or group of employees, or caused a situation in which the equalizing opportunity could not be afforded within the next quarter.

Such a disposition of the issue raised in this proceeding will be provided in the Award below.

A W A R D

The issue raised in Case No. NC-S-5426 shall be resolved in a manner consistent with the discussion in the Opinion above.



HOWARD G. GAMSER, ARBITRATOR

Washington, DC
April 3, 1979