C#18926

NATIONAL ARBITRATION PANEL

In the Matter of Arbitration	)	
	)	
between	)	
	)	
NATIONAL ASSOCIATION OF LETTER CARRIERS	)	
	)	Case Nos. A90N-4A-C 94042668
and	)	A90N-4A-C 94048740
	)	
UNITED STATES POSTAL SERVICE	)	
	)	
with	)	
	)	
AMERICAN POSTAL WORKERS UNION (Intervenor)	)	

BEFORE: Carlton J. Snow, Professor of Law

APPEARANCES: For the NALC: Mr. Keith E. Secular

For the APWU Mr. Bobby Donelson

For the Employer: Mr. Kevin B. Rachel

PLACE OF HEARING: Washington, D.C.

DATE OF HEARING: June 30, 1998

POST-HEARING BRIEFS: September 1, 1998

AWARD

Having carefully considered all evidence submitted by the parties concerning this matter, the arbitrator concludes that the grievance must be denied. It is so ordered and awarded.

Respectfully submitted,

Carlton J. Snow, Professor of Law

Date: November 30, 1998

IN THE MATTER OF ARBITRATION BETWEEN NATIONAL ASSOCIATION OF LETTER CARRIERS AND UNITED STATES POSTAL SERVICE WITH AMERICAN POSTAL WORKERS UNION (Intervenor) (Case Nos. A90N-4A-C 94042668 A90N-4A-C 94048740)	)	ANALYSIS AND AWARD Carlton J. Snow Arbitrator

I. INTRODUCTION

This matter came before the arbitrator pursuant to a collective bargaining agreement between the parties effective from June 12, 1991 through November 20, 1994. A hearing was held on June 30, 1998 in a conference room of the United States Postal Headquarters building located in Washington, D.C. Mr. Keith E. Secular, with the law firm of Cohen,

Weiss, and Simon in New York City, represented the National Association of Letter Carriers. Mr. Bobby Donelson, National Representative at large, represented the American Postal Workers Union. Mr. Kevin B. Rachel, Labor Relations Counsel, represented the United States Postal Service.

The hearing proceeded in an orderly manner. The parties had a full opportunity to submit evidence, to examine and cross-examine witnesses, and to argue the matter. Mr. Andy Schachter of Diversified Reporting Services, Inc. was present to record and subsequently submitted a transcript of 50 pages. The advocates fully and fairly represented their respective parties.

The parties stipulated that the matter properly was before the arbitrator and that there were no issues of substantive or procedural arbitrability to be resolved. They elected to submit the matter on the basis of evidence presented at the hearing as well as post-hearing briefs. The arbitrator officially closed the hearing on September 1, 1998 after receipt of the final brief in the matter. Illness delayed the arbitrator's issuing an award.

II. STATEMENT OF THE ISSUE

The issue before the arbitrator is as follows:

Does the Memorandum of Understanding dated October 19, 1998 between the U.S. Postal Service and the National Association of Letter Carriers provide the exclusive remedy for violations of Article 8.5.G.2 of the parties' collective bargaining agreement?

III. RELEVANT CONTRACTUAL PROVISIONS

ARTICLE 8 HOURS OF WORK

C. Penalty overtime pay is to be paid at the rate of two (2)times the base hourly straight time rate. Penalty overtime pay will not be paid for any hours worked in the month of December.

D. Penalty overtime pay will be paid to full-time regular employees for any overtime work in contravention of the restrictions in Section D.F.

Section 5 Overtime Assignments

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 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.

IV. STATEMENT OF FACTS

In this case, the Union challenges the Employer's interpretation of a Memorandum of Understanding dated October 19, 1988. The dispute before the arbitrator arose in two separate local grievances, and the Employer denied both of them based on language in the Memorandum of Understanding. Because the October 19, 1988 Memorandum of Understanding was the product of a long period of negotiation, grievances, and arbitration hearings about the overtime clause in the parties' agreement, the facts of this case are historical in nature. Details of the two grievances that triggered this arbitration proceeding essentially served to illustrate the issue.

Article 8.5 of the parties' agreement sets out provisions regarding overtime assignments. In the current agreement, employees are limited to 12 hours of work in a day and 60 hours of work in a week. (*See* Joint Exhibit 1, p. 22.) Two rates of pay for overtime work have been included in the agreement, namely, the usual overtime rate (1-1/2 times the straight time rate) and penalty overtime (two times the straight time rate). Ordinary overtime is paid for hours worked beyond the 40 hour regular time limit. Penalty overtime is paid for hours worked over the limit set forth in Article 8.4.C of the parties' agreement.

Prior to 1984, no upper limit on overtime hours existed in the parties' agreement. (*See* Union's Exhibit No. 2.) The current contractual provision in Article 8.5.G.2 limiting overtime hours to 12 hours a day and 60 hours a week first appeared in the 1984-87 collective bargaining agreement. Its text has not been materially altered since that time. (*See* Union's Exhibit No. 3.) It was also in the 1984-87 agreement that penalty overtime pay came into the parties' agreement.

Several grievances arose regarding the meaning of the new overtime provision. (*See* Union's Exhibit Nos. 5-9.) In the fourth of a series of five decisions, Arbitrator Mittenthal addressed the issue of remedy where the maximum overtime limit was exceeded. He issued an arbitration

award on June 9, 1986 in which he concluded that, when the Employer violated the upper overtime limit of Article 8.5.G.2, the remedy was not necessarily limited to penalty overtime pay, that is, double time. Arbitrator Mittenthal held that the Union's request for a uniform remedy of a 50% premium was not appropriate. He emphasized in his decision the need for flexibility in fashioning remedies. (*See* Union's Exhibit No. 8, p. 8.)

Implementation of the Mittenthal award proved to be problematic to both parties. In two subsequent cases, for example, the Employer unintentionally violated the overtime limit; and the Union requested as a remedy an additional 50% premium for the excess hours over the limit, generating a total of two and a half times the straight time rate of pay. In applying Arbitrator Mittenthal's case-by-case approach, Arbitrators Martin and Kasher concluded that an additional penalty rate of pay was inappropriate where the Employer lacked culpable intent. (*See* Employer's Exhibit Nos. 1 and 2.)

These two outcomes were not compatible with needs of the parties. As a consequence, two years later the parties signed a Memorandum of Understanding resolving two outstanding disputes regarding overtime and holiday provisions. *(See* Union's Exhibit No. 1.) The Memorandum of Understanding provided, in part, that the remedy for

violation of the maximum overtime limit would be an additional 50% of the straight time pay rate in addition to the penalty rate.

In 1994, two grievances arose in New Jersey in which the Employer allegedly required letter carriers to work beyond the 60 hour limit on several occasions. (*See* Joint Exhibit No. 2.) The Union requested a remedy of administrative leave and a pay rate of five times the straight time rate. The Employer denied the request and cited the Memorandum of Understanding as limiting the remedy to an additional 50% of pay. The Union sought arbitration with regard to the narrow issue of whether the "50%" remedy is the exclusive remedy for violation of Article 8.5.G.2. When efforts to achieve a negotiated settlement were unsuccessful, the matter proceeded to arbitration.

V. POSITION OF THE PARTIES

A. The National Association of Letter Carriers

The NALC argues that this case must be seen within the context of the purpose of overtime provisions at issue in the dispute. Because the parties were attempting to eliminate excessive overtime, the

Union argues that "purpose" interpretation must inform the outcome of the case. The Union acknowledges, as a threshold matter, that the Memorandum of Understanding of October 19, 1988 controls the outcome of the case. It is also recognized by the Union that "the 50% premium provided by the MOU does not depend on a showing of management's culpability." (*See* Union's Post-hearing Brief, p. 6.)

It is the contention of the Union, however, that the MOU does not absolutely bar an arbitrator from awarding a remedy beyond the 50% premium. Its first argument is that there is no statement or implication in the Memorandum of Understanding suggesting that the "50% premium" remedy is the sole and exclusive remedy for violation of the maximum overtime limit. The Union argues that the "limited instances" language used in the second sentence of the second paragraph restricts the operation of the "50% premium" remedy to cases in which the violations have been "limited" and that, if the Employer has not "limited" the violations, an arbitrator has the discretionary authority to award an additional remedy.

The Union finds further support for its interpretation in the third sentence of the Memorandum of Understanding because it defines the boundaries of cases in which the "50%" remedy applies as those in which the Employer does not violate the provision "with impunity." As the Union

views it, any other interpretation of this sentence would render it as mere surplusage and, thus, would violate fundamental rules of contract interpretation. The Union argues that the standard definition of "impunity" as "exemption from . . . penalty" and as "immunity" supports its theory of the case. (*See* Union's Post-hearing Brief, p. 9.)

In support of its interpretation, the Union proposes two hypothetical examples of how the provision should apply. First, where a local office has no prior pattern of violations, an overtime violation would be "limited" and subject to the 50% remedy provided by the Memorandum of Understanding. But where an office decides that excessive overtime on a regular basis is an efficient way to do business, an overtime violation would not be a "limited" occurrence; and an arbitrator would have authority to impose additional penalties.

The Union proposes a third hypothetical situation in which an arbitrator issues a "cease and desist" order for repeated violations of the overtime limit. In such a situation, the Employer's additional violations would also constitute a violation of the arbitrator's award and subject management to penalties on that basis as well. Because this result was approved by Arbitrator Mittenthal in his decision in the "fifth issue" case and has the effect of imposing additional penalties, the Union contends that

the language of this provision cannot be read to prevent an arbitrator from imposing additional remedies directly as the case requires. (*See* Union's Post-hearing Brief, p. 9.)

The Union also argues that the purpose of the Memorandum of Understanding was not only to provide a remedy for overtime violations but also to eliminate them. Both the text of the provision (including the "with impunity" language) and the context in which the MOU was negotiated (including the related Mittenthal decisions) show that the parties intended to discourage and limit violations, according to the Union. The Union, therefore, argues that, if the penalty provided by the MOU does not have its intended deterrent effect, the arbitrator must be able to consider further remedies better to achieve that purpose.

B. The American Postal Workers Union as Intervenor

The American Postal Workers Union supports the position of the National Association of Letter Carriers to the effect that the MOU "does not create a presumptive maximum on the remedy the unions can seek for violations of the overtime limits. Additional remedy beyond that stated in

the MOU is available for the Postal Service's regular or excessive use of overtime." (*See* APWU letter of August 20, 1998.)

C. The Employer

The Employer argues that the 50% premium set forth in the Memorandum of Understanding is the exclusive remedy for violations of the overtime limit. While arbitrators generally have flexibility to fashion remedies, management argues that flexibility in this case is necessarily constrained by terms of the parties' agreement, as evidenced by the Memorandum of Understanding.

The Employer builds its argument on the Mittenthal award of June 9, 1986 and subsequent decisions. Management acknowledges that remedies granted during the time before the Memorandum of Understanding were applied flexibly to suit the facts of the case, but the Employer also argues that the parties specifically rejected that model in place of a remedy that would be both predictable and easy to apply. In doing so, they necessarily limited an arbitrator's discretionary authority to fashion some remedies, according to the Employer.

The Employer contends that the language of the MOU is clear and unequivocal in providing only one remedy for violations of Article 8.5.G.2 in the parties' agreement. Management maintains that, if the parties had intended the "50% pay" penalty for only a certain subset of violations, it would have defined that subset clearly and would have provided another remedy for the remainder. Instead, in the Employer's view, terms of the Memorandum of Understanding are simple and allegedly do not support the Union's claims regarding the significance of the "limited instances" and "with impunity" language.

In particular, the Employer argues that the "limited instances" language referred to violations that are not a separate category of violations, but the language merely expressed the beliefs and intentions of the parties that violations of this provision would be rare, according to the Employer. If the meaning were as the Union suggests, the parties allegedly would have addressed the "other instances" as well, according to the Employer. Similarly, the Employer asserts that the "with impunity" sentence merely emphasizes that, despite the fixed remedy, the parties will take the overtime limitations seriously. The Employer insists that, if the parties had intended further remedies, they would have expressed them directly in the Memorandum of Understanding.

The Employer argues the context and purpose of the MOU reveal that the parties each compromised in reaching their agreement. That is, while the Union is able to get an automatic remedy without regard to Employer fault, the Employer's costs will never go beyond the 50% premium pay. As the Employer sees it, both parties gained predictability and a reduction in costly litigation. It is the position of the Employer that the parties clearly intended a simple, predictable remedy for violations of Article 8.5.G.2 of the agreement and that the Union's position in this arbitration proceeding allegedly is contrary to the intended purpose of the parties. The Employer maintains that anything but a single remedy will not make sense, given the case-by-case analysis being applied prior to the time of the Memorandum of Understanding.

The Employer argues that the Memorandum of Understanding controls the outcome of this case and limits the ability of an arbitrator to award anything except the 50% premium. Management argues that the Union's position would destroy the parties' bargain and return the parties to the position they were in before they signed the Memorandum of Understanding. Further, management asserts that the Union is seeking punitive damages and that such damages are inappropriate. The Union allegedly is asking for more than it asked for in prior cases and in the

negotiation of the MOU. If the Union's position is upheld, it allegedly would radically alter the MOU, in the Employer's view of the case.

VI. ANALYSIS

The roots of this case go back to 1984 when the parties modified the "overtime" provision in the agreement to include a maximum limitation but failed to specify a remedy for its violation. The parties left open to speculation the reason for not including the remedy. Perhaps, the lack of remedy resulted from the parties' belief that hourly limits would not be violated. Perhaps, other questions were at the forefront of their considerations. For whatever reason, the parties chose to leave a gap in the terms of their agreement.

Grievances arose almost immediately with regard to an appropriate interpretation of the new contractual provision. These disputes were arbitrated in 1986 and 1987 and resulted in a series of carefully crafted decisions by Arbitrator Mittenthal. (*See* Union's Exhibit Nos. 5-9.) One decision addressed directly the question of violations of the "overtime" provision and led to further negotiation. Those negotiations culminated in the Memorandum of Understanding at issue in this case. (*See* Union's Exhibit No. 8.)

Close inspection of the arbitration decision that led to the relevant Memorandum of Understanding is in order. The grievance that led to the Mittenthal award of June 9, 1986 arose because the parties disagreed

about the appropriate remedy for an overtime violation where the Employer's culpability was low. The Union argued for a uniform 50% pay premium as a remedy for all violations of the provision. The Employer argued that the issue was not arbitrable because the parties' agreement did not authorize a third overtime rate beyond the penalty (double rate). Arbitrator Mittenthal disagreed with both parties. He concluded that contractual violations should be remedied whenever possible, but he also rejected the Union's suggested remedy because a fixed remedy was not well suited when the factual circumstances of violations could vary widely.

In resolving the problem, Arbitrator Mittenthal applied standard interpretive principles to reach a logical result because of the absence of clear evidence with regard to the parties' contractual intent. He affirmed the inherent power of arbitrators to fashion remedies for violation of a labor contract and emphasized that such remedy must be carefully conceived to address a particular violation. Arbitrator Mittenthal took special note of the purpose of the contractual provision, namely, that of prohibiting and not merely discouraging overtime work beyond the upper limit. With this purpose as a guideline, Arbitrator Mittenthal concluded that pay for hours worked over the limit is not restricted to penalty (double) pay. But in rejecting the Union's proposed single remedy, Arbitrator Mittenthal

also cited the need for flexibility in fashioning remedies. Because the Mittenthal decision directly addresses the problem at issue in this case, it would control the outcome to be adopted by this arbitrator were there not an intervening agreement.

But the parties directly overrode the Mittenthal decision in the form of an October 19, 1988 Memorandum of Understanding. (*See* the Union's Exhibit No. 1.) Because the Memorandum of Understanding controls the outcome of this case, its language must be examined to determine its meaning and the intent of the parties with regard to the remedy for violations of Article 8.5.G.2. A surface reading of the three relevant sentences in the Memorandum of Understanding reveals that the language is reasonably clear and unambiguous. Only through an intricate parsing of the words and a use of refined logic are doubts thrown on the meaning of the provision. Both the ordinary meaning of the words themselves and the context in which the Memorandum of Understanding was negotiated show that the 50% additional premium constitutes the exclusive remedy for violating the maximum overtime limit.

Focusing on the second paragraph of the October 19, 1988 Memorandum of Understanding, the parties set the stage for the provision. The provision states:

> The parties agree that with the exception of December, full time employees are prohibited from working more than 12 hours in a single work day or 60 hours within a service week. (*See* Union's Exhibit No. 1, p. 1, emphasis added.)

This restatement of the parties' agreement is a stronger statement of the rule than its phrasing in the agreement itself. In Article 8.5.G.2 of the agreement, the parties stated that:

> Excluding December [employees] 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. (*See* Joint Exhibit No. 1, p. 22, emphasis added.)

The restatement of the rule in the Memorandum of Understanding is stronger than its counterpart in the agreement because of the emphasis in the MOU on prohibition as contrasted with a focus on maximum limits in Article 8.5.G.2.

It is the second sentence in the second paragraph of the Memorandum of Understanding that is the new, substantive addition. It provides the remedy that was missing from the 1984 agreement. The sentence states:

> In those limited instances where this provision is or has been violated and a timely grievance filed, full-time employees will be compensated at an additional premium of 50 percent of the base hourly straight time rate for those hours worked beyond the 12 or 60 hour limitation. (*See* Union's Exhibit No. 1, p. 1, emphasis added.)

While not stated as an unconditional remedy, it is specifically applicable "in those limited instances where this provision is or has been violated and a

timely grievance filed." (*See* Union's Exhibit No. 1, p. 1.) In other words, both a violation and timely filing are required for the remedy to be applicable. This much is clear.

The Union focused intently on the term "limited instances" in the second sentence. Had the parties chosen to omit the word "limited," the Union seems to suggest that it would have had no basis for its claim in this case. Thus, the meaning and effect of this word is of central importance. Did the parties mean to create a subcategory of violations by using this term? Or did the parties use the word "limited" merely to modify "instances" in order to express the hope of the parties that violations would be rare?

Had the parties intended to set a uniform remedy for only a certain number of violations, it would have been simpler to have said so explicitly. In any number of ways, they could have used clearer language to achieve that substantive effect. Perhaps the strongest argument against the Union's reading of the language is what is not stated in the provision. If the parties had intended to set up a uniform remedy for only some violations, surely they would have said something about the other violations, that is, some reference to the fact that "unlimited" violations would be remedied on a case-by-case basis.

The parties presented no evidence regarding the content of negotiations that led to the Memorandum of Understanding. Accordingly, it is unclear who authored the language at issue in the case. Use of the term "limited instances," however, logically sees designed to reassure the Union that the Employer expected any violation of the overtime limits to be a rare occurrence. Moreover, the term is frequently used in common speech to indicate one's expectations or assurances of future action, and "language is interpreted in accordance with its generally prevailing meaning," absent evidence to the contrary. (*See*, Section 201, comment a, Restatement (Second) of Contracts, 83 (1981).)

The arbitrator's proposed interpretation of the second sentence in the 1988 Memorandum of Understanding is supported by the third sentence. It states:

> The employment of this remedy shall not be construed as an agreement by the parties that the Employer may exceed the 12 and 60 hour limitation with impunity. (*See,* Union's Exhibit No. 1, p. 1.)

Verbiage in the third sentence is language of reassurance. It is language of reassurance that the Employer did not intend to view the uniform remedy as merely another pay rate. The language is limiting only to the extent that the prior two sentences cannot be read as implementing a third overtime pay rate but, rather, must be seen as deterring and preventing violation. The

sentence was included in the document to forestall the Employer from taking the limitation lightly.

The Union, however, interpreted the third sentence as setting limits on the applicability of the 50% premium. But an alternative explanation is that the sentence serves to clarify the parties' intention that the 50% premium would not be used as a third overtime rate or to suggest that the limitation could be violated with impunity. Inclusion of such language provided a clear indication that the parties contemplated the possibility of Employer abuse, but a separate remedy to protect against such potential abuse was not made a part of the agreement. It is not logical for the arbitrator to assume from such silence that the parties, whose purpose in drafting the MOU was to provide a remedy for the violation, intended a different remedy.

Not only is the exclusiveness of the 50% remedy mandated by language of the MOU itself, but also it is supported by the context of its drafting. At the time the 1988 Memorandum of Understanding was discussed and reduced to writing, the governing precedent for the parties was the Mittenthal award in which a flexible, case-by-case inquiry was instituted. If the MOU meant what the Union now asserts, it seems illogical that the Employer would have agreed to it because, by leaving the question

of intent subject to arbitration, it offered little advantage over the prior system.

It is clear the parties wanted to change the status quo, or the MOU would not exist in its present state. The parties had accumulated some experience in the Martin and Kasher award, with implementing a case-by-case approach. In those two instances, an arbitrator denied the Union's request for additional penalties. But the Employer knew that the potential for high penalties existed. Both parties had reason to negotiate a consistent penalty (the Union to be assured of some consequences for violations and the Employer to be able to predict the cost of violations), and both parties would benefit from reducing the number of cases taken to arbitration. They clearly understood what stakes were involved. It is unlikely that the Union did not anticipate egregious Employer violations. If it had not, the "limited instances" and "with impunity" language might not have been added. The Union knew that the Employer might use the uniform penalty as a license to violate the limits, and the language about expectations of infrequent problems reflected their insistence that the Employer acknowledge their commitment to take the limitation seriosly.

It is reasonable to conclude that the Union gave up its right to arbitrate for harsher penalties in exchange for a consistent penalty and a

reduced need to arbitrate for it. If a problem with excessive Employer violations is emerging, it is an issue about which there is a need to negotiate. The Memorandum of Understanding as drafted does not support the Union's theory of the case and does not empower the arbitrator to insert a new remedy. Accordingly, the grievance must be denied.

AWARD

Having carefully considered all evidence submitted by the parties concerning this matter, the arbitrator concludes that the grievance must be denied. It is so ordered and awarded.

Respectfully submitted,

Carlton J. Snow

Carlton J. Snow, Professor of Law

Date: November 30, 1998