AMERICAN ARBITRATION ASSOCIATION

UNITED PARCEL SERVICE, INC.

-and-

Case No. 01-18-0004-2914
Grievance No. N-18-199

INTERNATIONAL BROTHERHOOD
OF TEAMSTERS, LOCAL 688

SUBJECT

Drivers' contractual right to limit and/or reduce overtime; claims for triple time pay while on 9.5 Opt-In List.

ISSUE

Did the Employer continually work grievant Kevin Watson more than 9.5 hours per day three days in a workweek during his five months on the 9.5 Opt-In List starting February 19, 2016? If so, was he entitled to triple time pay under Article 37 Section 1(c) for hours worked in excess of 9.5 hours on June 27, 29 and 30, 2016?

CHRONOLOGY

Grievances filed: July 1, 2016
National Grievance Committee Deadlock: October 2, 2018
Arbitration hearing: June 25, 2018
Briefs received: August 9, 2019
Award issued: September 6, 2019

APPEARANCES

For the Employer: Tony C. Coleman, Attorney
For the Union: Brian A. Spector, Attorney

EVIDENCE AND ARGUMENT

This case involves drivers' rights under Article 37 of the National Master Agreement (NMA) to limit assigned overtime. Specifically, it presents a claim by Kevin Watson for triple time pay for time worked in excess of 9.5 hours on three days, June 27, 28 and 29, 2016, a total of 1.5 hours for which he was paid time-and-a-half. Financially, all that is at issue is 1.5 times his hourly rate for 1.5 hours, in itself a trivial matter. But his case came to arbitration as an agreed "pilot" for identical claims by many other drivers who requested but were denied triple time pay for time worked in excess of 9.5 hours on three days in a week *only once* during their five months on the "9.5 Opt-In List." It also is the culmination of the parties' long efforts to address excessive overtime issues in national negotiations since 2002 and local, supplemental and national grievance panels and committees. The contractual result of their bargaining efforts is Article 37 Section 1(c) of the NMA, which in pertinent parts reads as follows:

> The Employer shall make a reasonable effort to reduce package car drivers' workdays below nine and one half (9.5) hours per day where requested. If a review indicates that progress is not being made in the reduction of assigned hours of work, (i.e., the package driver has worked more than 9.5 hours on three (3) days in a workweek), the following language shall apply except in the months of November and December:
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> The affected regular package driver may make such a request to be added to the "9.5 Opt-In List" effective on the first day of his/her workweek after making the request. The driver shall notify the manager and steward of his/her desire to be added to the List. The request must be made within the time limit for filing a grievance in the applicable Supplement, Rider or Addendum. Once the driver has signed the List, he/she shall remain on the list for five months, except for the period of time specified in the preceding paragraph.
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> Employees within the full-time driver classification shall be eligible for the protection of this Section provided: [details omitted, because it is undisputed that Watson *was* eligible] . . .
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> Drivers who choose to opt-in on the 9.5 list shall have the right to file a grievance if the Employer has continually worked a driver more than nine and one half (9.5) hours per day for any three (3) days in a workweek. The Company will not assign excessive overtime on the two remaining days within the workweek in order to retaliate against a drier for opting onto the 9.5 List.
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> If a driver is paid a penalty under this subsection more than three times in a single five month period, then the District labor Manager and Business Agent will meet with the Center Manager, the steward and the driver to ensure future compliance under this subsection. If any further penalty is paid on this employee during the five month period, a meeting shall be scheduled with the above parties and the Co-Chairs of the applicable Supplemental panel to determine what actions are necessary to ensure compliance.
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> If a grievance under this provision (or a grievance under any excessive overtime provision of a Supplement, Rider or Addendum) cannot be resolved at the local level, including Supple-

> mental Panels, where applicable, the Union may docket the grievance to be heard by the "9.5 Committee." This Committee shall be composed of two Union and two Employer representatives. The 9.5 Committee shall have the authority to direct the Employer to adjust the driver's work schedule. Deadlocked cases shall be referred to the Employer's Vice President of Labor Relations and the Co-Chair of the Teamsters United Parcel Service Negotiating Committee for final and binding resolution.
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> The Employer's Vice President and the Union's Co-Chair shall have the discretion to grant the grievant triple time pay for hours worked in excess of nine and one-half hours per day and/or to order the Employer to adjust the driver's work schedule. In the event the Employer's Vice President and the Union's Co-Chair cannot resolve a grievance, either party may refer the matter to arbitration in accordance with Article 8. In the event the position of the Union is sustained, the arbitrator shall have authority to impose any remedy set forth in this section.

Exactly what other steps this grievance went through before the National Small Package Panel heard it in October 2018 is unknown to the arbitrator, but the parties' written presentations to that panel were presented as joint exhibits along with its Deadlock Decision dated October 2, 2018. The Union's presentation said it asked the Employer to "stop continually working the grievant excessive overtime and pay the penalty owed under the language [of Article 37 Section 1(c)] and asserted that his working "in excess of 9.5 hours three days in a workweek" during while he was on the 9.5 Opt-In List violated that language, but did not explain how a single *instance* more than four months after he went on the list was *continual*. The Employer's focused entirely on the word "continually," insisting, with dictionary citations, that it meant *frequently, repeatedly* and/or *constantly*, and one instance in five months could not reasonably be so construed.

There is no indication that any specific facts of Watson's work schedule or behavior on those three days in June 2016 were discussed by the parties' representatives before the National Panel or considered by panel members. In arbitration, however, the Employer presented testimony by his supervisor that one one of those days, June 27, he sent Watson a helper in mid-shift and explicitly told him not to work more than 9.5 hours. He also said he always tried to keep all drivers below 9.5 hours per day, but that was contradicted by a document he presented which showed Employer projections of the time required for Watson's assigned deliveries on June 29 and 30 exceeded 9.5 hours. The supervisor also said he did not discipline or even criticize Watson for not returning to the center within 9.5 hours on June 27, as he claimed he directed him to, although former Labor Relations

Global President Michael Rosentreter testified that in his opinion that was tantamount to insubordination, for which Watson should have been fired.

Both parties presented extensive documentary exhibits about the bargaining history of Article 37 Section 1(c). They showed that the Union originally proposed the "continually worked" language but in later negotiations proposed unsuccessfully to delete it. Otherwise, detailed recitation and analysis of that history is not needed here, because only one part of it, which is the primary focus of the Union's position, bears directly on the meaning and intended application of that language.

It also involved Rosentreter, the Employer's chief negotiator in 2013 bargaining, who early in the January 31, 2013 bargaining session presented proposed new language in response to Union concern that the Employer would work drivers on the Opt-In List more than 9.5 hours three days in a week several times before paying them the triple time penalty. The language he presented is now the first sentence of the second paragraph in Section 1(c): "The affected regular package driver may make such a request to be added to the '9.5 Opt-In List' effective *on the first day of his/her workweek after making the request*." [Emphasis added.] According to the transcript of that session, Union chief negotiator Ken Hall asked, "If you violate him next week, is there a waiting period in your proposal or is he subject to whatever penalties are outlined here?" and Rosentreter replied, "We're giving you assurances across the table in the scenario you just laid out, if you're on the list next week and we're able to fix it [but don't], you get a [penalty]."

The Union argues that assurance should be extended beyond a driver's first week on the Opt-In List and supports its claim that a single instance of such excessive overtime while a driver is on it triggers the contractual triple time penalty. It insists the Employer violated Article 37 by refusing to pay the penalty to Watson, and all the aggrieved drivers in identical circumstances, so the grievance should be sustained without regard for factual peculiarities in any of those cases.

The Employer insists those peculiarities are relevant and must be considered, because Article 37 Section 1(c) gives an employee on the List the right to file a grievance only if "the Employer has continually worked a driver more than nine and one half hours per day

for any three days in a workweek." The Employer argues this language must be read in context with its contractual obligation to "make a reasonable effort to reduce package car drivers' workdays below nine and one half hours per day where requested" and requires a determination of whether its effort *was* reasonable and whether the driver himself caused his workday to extend beyond 9.5 hours. In this case, it argues the supervisor's effort to send Watson a helper and explicit direct him *not to work* more than 9.5 hours on June 27 was eminently reasonable and Watson's noncompliance with that directive caused to that workday to exceed 9.5 hours, and rather than complain he should have been grateful he wasn't fired for insubordination as Rosentreter said he should have been. More generally, the Employer argues one instance of working more than 9.5 hours three times in a week, *four months after he went on the List*, could not be considered *continual* under any plausible interpretation of that word, so his claim should fail on both counts.

It also asserts that the Union is attempting to gain through this arbitration something it repeatedly sought but did not achieve in the 2002 bargaining when the 9.5 hour threshold and penalty (albeit then double time, not triple) originated: penalty pay for any instance of exceeding that threshold. On this point the Employer insists there is no ambiguity in the contract language, and whatever "continually" might mean in other circumstances, it cannot mean once in a five-month period — and even if there were any ambiguity on this point, it should be construed against the party who first proposed it, *the Union.*

Finally, the Employer emphasizes that the triple-time penalty is not *required* in Article 37 but *discretionary* with the Employer's Vice President and Union Co-Chair, who may grant it "and/or order the Employer to adjust the driver's work schedule." It argues the arbitrator thus has that same discretion, and even if, contrary to the facts of the case and plain meaning of the contract language, I were to find that it did continually work Watson more than 9.5 hours three times in a week, schedule adjustment would be a more reasonable remedy than a triple time penalty payment.

DISCUSSION AND FINDINGS

The Union is correct that the Employer's version of the facts of this case as related by Watson's supervisor should not control the resolution of this dispute, for multiple reasons. First, I heard only the manager's account of his purported directive that Watson not work beyond 9.5 hours on June 27, and its reliability is questionable after the passage of three years. Second, documents he brought with him suggest he may not have made a reasonable effort to keep Watson under the 9.5 hour threshold that week, since the Employer's own projections indicated he would have been expected to work more than 9.5 hours to complete his assigned deliveries two other days that week. Third, and most important, although the supervisor said he mentioned those matters at the local grievance meeting, they were not presented to or considered by the National Panel. This case came to that panel and then to arbitration as a "pilot" for many others identically arising from one isolated instance of a driver being worked more than 9.5 hours three times in a week sometime during five months on the 9.5 Opt-In List, but not the very first week. Presumably for that reason, Watson did not attend the arbitration hearing, so I did not hear his version of those facts. But even if I had, this proceeding being appellate in nature, it would not be inappropriate, and would defeat the purpose of presenting one case as an exemplar for many others, for me to decide it on the basis of peculiar facts the Panel did not consider.

The Union is wrong, however, in arguing that the phrase "continually worked" does not control resolution of this dispute and Article 37 Section 1(c) requires the triple-time penalty any time a driver works more than 9.5 hours three times in a week while on the 9.5 Opt-In List. To so interpret Article 37 Section 1(c) would deprive that phrase of *any* meaning, effectively eliminating it from the contract and abusing my authority under Article 8 Section 6 of the NMA, which says an arbitrator is to "apply the provisions of this Agreement . . . but shall not have the authority to amend or modify" it.

The Employer appropriately has cited standard dictionary definitions of "continually" as synonymous with other terms such as "frequently or constantly," and those constitute reasonable guideposts for determining whether Watson was "continually worked" more than 9.5 hours per day in week. This determination cannot be made in a formulaic, one-

size-fits-all manner, and bargaining history here in evidence does not indicate the parties ever discussed and agreed upon exactly how it should be made in any given case. The closest they seem to have come was the Rosentreter-Hall exchange on January 31, 2013, when Rosentreter gave "assurances" that if the Employer worked a driver more than 9.5 hours three days in the first week after a request for placement on the Opt-In List and could have avoided doing so by reasonable effort to stay below that threshold, that driver would be entitled to triple time penalty pay for that week.

Those assurances seem to have satisfied the Union negotiators, who communicated them to Union members in pre-ratification "Highlights of the UPS Tentative Agreement." Now, however, the Union now unreasonably seeks to vastly expand those assurances into an obligation to pay the penalty for *any single week* when the Employer works a driver on the List more than 9.5 hours on three days — no matter how long after the driver went on the List or whether it happened any other week in his/her five-months on the List. The crux of Rosentreter's assurance was and the core meaning of "continually worked" *is* that the Employer has to have worked a driver more than 9.5 hours thrice in multiple weeks in close temporal proximity for that phenomenon to be "continual." Two times in two consecutive weeks certainly would satisfy that criteria, as Rosentreter recognized, and two or three times in relatively close temporal proximity, perhaps separated by a week or two in which the Employer did not exceed the 9.5 hours/three days threshold, might also be considered "continual," depending on case-by-case circumstantial analysis.

It is not my role or responsibility to categorically but hypothetically dictate those or any other fixed criteria without such factual context. My authority and responsibility are to determine whether the Employer violated Article 37 Section 1(c) in the circumstances of this particular case and many others for which it is an exemplar: namely, one instance of working a driver more than 9.5 hours in a week while on the Opt-In List, long after a previous instance that led to placement on the List.

With due regard for common sense, the commonly understood meanings of the words "continually worked," bargaining history, and the inherent ambiguity of that phrase as it might apply in other circumstances, it can only be determined that in *these* circumstances

Watson was *not continually worked* more than 9.5 hours in a week by any stretch of any reasonable person's imagination. Therefore he was not entitled to triple time pay for time worked in excess of 9.5 hours on June 27, 29 and 30; the Employer did not violate Article 37 Section 1(c) by denying him such payment; and the grievance protesting such denial must itself be denied.

AWARD

Grievance No. N-18-199 is denied.

Paul E. Glendon, Arbitrator
September 6, 2019