C-23794

REGULAR ARBITRATION PANEL

In the Matter of the Arbitration	GRIEVANT: Keala Dominski
between	POST OFFICE: Dana Point CA
UNITED STATES POSTAL SERVICE	USPS CASE NO: F98-N-4-FC01129501
and	NALC CASE NO: GTS 60719; NO. DP-383-01-C
NATIONAL ASSOCIATION OF LETTER CARRIERS, AFL-CIO	ROUTE ADJUSTMENT DISPUTE: MONETARY REMEDY

BEFORE: THOMAS F. LEVAK, ARBITRATOR

APPEARANCES:

For the U.S. Postal Service: Jay Roberts

For the Union: Randall Pocock

Place of Hearing: 24551 Del Prado, Dana Point CA

Date of Hearing: August 27, 2002

Date of Award: October 29, 2002

Relevant Contract Provision: Article 15

Contract Year: 2001

Type of Grievance: Contract

Award: Contract Dana Point management shall cease and desist violations of M-39 § 211.3. The Postal Service shall pay the Grievant $10.00 a day, six days a week, for the period of March 7, 2001 through August 15, 2001. The grievance is sustained.

Arbitrator

OPINION

I. THE ISSUE.

This case concerns a March 9, 2001 grievance which alleged that the Postal Service violated the National Agreement when it failed to adjust the Grievant's route within 52 days of a special route inspection. Ultimately, the Postal Service agreed that a violation had occurred and permanently adjusted the route with a Router on August 16, 2001, but the parties reached impasse over the appropriate remedy to be accorded the Grievant. The stipulated issue is:

> What is the appropriate remedy for the Postal Service's failure to permanently adjust the Grievant's route within 52 days after a special route inspection?

II. THE FACTS.

This case was submitted on the following stipulated facts.

Background.

This grievance arose at the Grievant's Dana Point, California office, at which she was represented by Union Branch 1100. Dana Point is a Santa Ana District Office. Angie Allum was the Dana Point OIC. Ken Devore was the Grievant's supervisor. Branch Steward Kirk Baiz represented the Grievant in her dealings with management. The Grievant was not on the overtime desired list ("ODL").

Dana Point Route Inspections.

Santa Ana District Route Inspections are done under a Joint Route Inspection Process ("JRIP"). Terry Campbell is the Union Coordinator. Dana Point has a history of delayed route counts and adjustments, and when a violation has been identified and agreed upon by the parties, historically has paid monetary penalties for delayed route count or adjustment issues at $10.00 per day/six days a week

The Events Giving Rise to the Dispute.

In January 2001 the Grievant received a special route inspection on Route 2401. The period of the inspection was January 8 through January 13, 2001. The parties resolved all procedural disputes over the route count and inspection regarding the actual evaluation of office and street. The

agreed-to time for the route was: office, 3:40; street, 5:57; total, 9:37. March 6, 2001 was the 52nd day after completion of the inspection.

On February 27, 2001, Santa Ana District Delivery Retail Analyst Craig Saxon issued a memorandum to Allum which provided, in relevant part:

> Route 2401 will not be adjusted due to extenuating circumstances. The carrier is on limited duty (6 hours a day), and is not permanent and stationary. Although the carrier is currently on extended leave, there is the possibility that the carrier will return to full duty at some point in the future.

Whether Allum received the memorandum is uncertain from the stipulated facts.

By March 9, 2001, the Union had not received a copy of the route inspection package, so Baiz initiated the Step A grievance. On March 23 Baiz met at Step A with Allum. Allum apparently advised Baiz that she could not implement the adjustment because she had not yet received the package from the District. At that meeting Baiz told her that he needed the package so he could appeal the grievance to Step B by March 30. By Friday, March 30 Baiz had not received the package and Allum was gone to a training session, so Baiz advised Devore that the package was due him and asked that it be provided by the morning of Monday, April 2. Baiz also gave Devore his cell phone number, which has voice messaging. Devore did not contact Baiz on April 2. On April 3 Baiz mailed the Step B grievance. On April 5 the Dispute Resolution Team ("DRT") remanded the grievance to Step A with direction to complete necessary documentation, including the adjustment package. The Union received the remand on April 5. Within a couple of days, Baiz contacted Allum and, sometime later in April, the Union received a copy of the inspection report. Baiz believed that he subsequently arranged with Allum to meet on the matter — that is, hold a consultation — on May 3.

On May 3, 2001, Baiz attempted to meet with Allum, who did not recall that a meeting had been set for that date. Allum was unable to answer Baiz's questions, and Baiz advised her that the Union would be taking the position that because she and Devore were taking the position that the route needed no adjustment, the Grievant was entitled to liabilities for the entire period of nonadjustment. At that meeting, Baiz and Allum agreed that Campbell would be brought to the office the following week for the consultation. However, because the Grievant was on leave on the only day that Campbell was able to meet that week, the consultation was scheduled for the following week. Baiz and Allum agreed that the grievance would be finalized that latter week.

On May 17, Baiz met with Allum, who had not discussed the inspection package with Devore. Allum called Devore into the meeting and asked him to respond to Baiz's questions about the package. Devore was unprepared to answer those questions, so Baiz asked him to review the package so that a meeting could be held. At that meeting, Devore did advise Baiz that he was using 8:17 — determined by selecting 1840B time — as a basis for what the Grievant's route was worth.

Over the next couple of weeks, Campbell was scheduled in for two to three days of discussion over the Grievant's route. During those discussions, the disputed times in the package came up, and Baiz and Allum agreed to meet after Campbell resolved those matters with her.

On June 13, Baiz and Allum held the Step A remand meeting. At that meeting, Allum raised the argument that the Postal Service should be liable for remedy only up to the first part of April because the Grievant supposedly had refused to agreed to a consultation with the local Steward. Baiz stated to Allum that they would not have been able to resolve the disputed time — that at that point, they still had not been able to even discuss the disputes. Allum continued to insist that the Postal Service should not be held liable, arguing that the route had been evaluated to 8:17 and that because of the combination of time and poor work habits of the Grievant, the route would receive no adjustment.

On August 16, Route 2401 was permanently adjusted with a Router.

The Grievant has to negotiate the amount of auxiliary assistance she gets on a daily basis. The Grievant states that the assistance she gets varies, that she encounters conflict and poor treatment from her supervisor whenever she requests auxiliary assistance, and that the delay in the adjustment is creating a stressful environment and causing her anxiety and ill feelings. Two grievances have been filed for the Grievant regarding alleged poor treatment, disrespect or harassment from the Postal Service based on disputes over her daily workload and performance. During those disputes, the Postal Service was using the 8:17 figure as a basis for what her route was worth. The Postal Service argues that it was merely managing the Grievant when she complained of harassment.

III. UNION CONTENTIONS.

In accordance with M-39 § 271.g, the Grievant received a special route inspection based on the fact she experienced at least 30 minutes of overtime or auxiliary assistance, three days a week, over a six week period. Because of the amount of overtime and/or auxiliary assistance, the Agreement required that a permanent adjustment be made to her route within eight hours. That overtime and auxiliary assistance created the disadvantageous working condition of requiring the Grievant to continuously argue and negotiate in the face of management's natural tendencies to intimidate and push the Grievant into absorbing some of the time being requested.

Unless a District Manager grants an extension — which never happened here — M-39 § 211.3 mandates that route adjustments must be placed into effect within 52 calendar days of the completion of the mail count. That requirement is re-emphasized in both a national Step 4 decision (H7N-1E-C22285) and a national pre-arbitration settlement (H7N-3A-C39011); and in another national pre-arbitration settlement the parties admonish that management is prohibited from providing relief in the form of auxiliary assistance or from requiring the Carrier to work overtime, which is exactly what management admits it did.

The new disputes resolution process is aimed at reducing, if not eliminating costly repeat offenses. In the past, the Grievant was awarded $10.00 a day for the same type of violations: a lump sum payment of $800.00. But still management continued to commit the same violation with other Carriers, resulting in the same monetary remedy. Because those remedies have not stopped the violations from reoccurring, the Arbitrator should provided a remedy for both the Grievant and the Union in this case. The Union seeks: 1) a cease and desist order or 2) the payment of $25.00 per day for the Grievant for period of March 7, 2001 through August 15, 2001 *or* an award to the Grievant of one-day of paid administrative leave for every five days for the period of March 7, 2001 through August 15, 2001. The Postal Service should also be ordered to reimburse the Union for its direct costs in bringing this matter to arbitration.

Arbitral decisions support the requested remedies. Three cases support the payment to a grievant of $10.00 to $25.00 per day: G90N-4G-C 94044445/7, Johnston, Jr., 11/21/94; E90N04E-C 94037643/598, Render, 9/9/1995; C90N-4C-C 94069025, Dileone Klein, 4/14/95. Three cases support the payment of paid administrative leave for each 10 days of delay: E90N04F0C 94066081, McCaffree, 5/28/97; F94N-4F-C 97081013, Olson, 4/24/01; F94N-4F-C 98021793, Hayduke, 11/29/01. One case supports the reimbursement of the Union's direct costs of arbitration: F98N-4F-C 01146081, Brand, 12/17/01.

IV. POSTAL SERVICE CONTENTIONS.

A monetary award is not merited under recognized arbitral authority. Compensatory damages in arbitration should correspond to monetary losses suffered and in an amount necessary to make the grievant whole. Elkouri & Elkouri, *How Arbitration Works*, 4th Ed, p. 401, pp. 401-02; Fairweather, *Practice & Procedure in Labor Arbitration*, 3rd Ed., pp. 338-39; Hill & Sinicropi, *Remedies in Arbitration*, p. 184. Moreover, while the Postal Service does not dispute the fact that the Arbitrator has the right to award compensatory damages, in the absence of wanton misconduct punitive damages are never appropriate. *Aetna Portland Cement Co.*, 41 LA 222 (Dworkin 1963); M.S. Ryder, Discussion, *16th Meeting of the NAA*, BNA, 54; *Baltimore Regional Joint v. Websters Clothes*, 509 F2d 95 (4 Cir 1979). In the instant case, there was no showing of harm or monetary loss to the Grievant.

National and Regional arbitral precedent supports the Postal Service. NB-NAT 3233, Garrett; NB-NAT 6462, Garrett; H1C-NA-C 97, Mittenthal; H7C-NA-C 36, Mittenthal; E4C-2D-C8031, LeWinter, 1986; S4N-3W-C 13100/13186, Scearce, 1987; W1C-5F-C 4734, Snow, 1987 (punitive damages not appropriate in contract cases even where the employer's breach is repeated or malicious); S4C-3A-C 12233, Marlatt, 1987 (punitive damages not appropriate even when action is in bad faith); W4N-3G-C 38512, McCaffree, 1988 (4th Circuit and US Supreme Court decision support principle that damages must relate to actual loss); E7N-2D-C 44512, DiLauro, 1991 (punitive damages not appropriate in a contract case; contract cases not akin to discipline cases); W7N-5K-C 31822, Goodman, 1992 (monetary relief where no economic injury has occurred is

limited to cases involving particularly flagrant, willful or repetitive contract violations); G90N-4G-C 9406246, Byers 1995 ($10.00 per day remedy not appropriate in the absence of monetary loss); W0N-5M-C 8965, Francis, 1997 (monetary remedies absent loss not supported by *Remedies in Arbitration*); C90N-4C-C 95063471, Powell, 1998; B94N-4B-C 98074958, Devine, 1988; E94N-4E-C 97068979, Olson, Jr., 1999 (punitive damages not appropriate no matter how reprehensible the breach); C94N-4C-C 98045940, Skelton, 2000 (punitive remedy for failure to readjust within 60 days not appropriate except in cases of continuing flagrant violations); F94N-4F-C 99035955, Parent, 2000 (punitive relief not appropriate except in cases of repetitive, egregious violations); F98B-4F-C 00246409, Snow, 2001 (only in rare instances of outrageous conduct or conduct tied to a tort are punitive damages appropriate). *See also*, F98N-4F-C 01093365, Levak, 2002; F90N-4F-C 94009200, Hutt, 1999; F94N-4F-C 98061768, Francis, 1999.

In the instant case, management did not engage in willful misconduct or deliberate malicious actions, so the relief requested by the Union is not appropriate.

V. ARBITRATOR'S CONCLUSION.

The Arbitrator concludes that the Union established that a cease and desist award and a monetary award to the Grievant of $10.00 per day for the period in question is appropriate. Accordingly, the grievance will be sustained. The following is the Arbitrator's rationale.

The Arbitrator read the cited cases with interest. In addition, he studied and reevaluated his previous awards in F98N-4F-C 01093365, (San Francisco CA, grievant Simonson)11/30/01, which summarized his general view regarding the award of noncompensatory monetary damages in contract cases, and here reaffirms that view. That view may be summarized as follows:

> While Postal Service arbitrators possess the inherent authority to remedy contract violations through cease and desist orders, monetary damage awards to an employee and monetary damage awards to a union, absent proof of loss of earnings, noncompenstory monetary damages are normally not accorded. Further, damages are never awarded for mere inconvenience, unpleasantness or stress. Accordingly, monetary damages in excess of loss of earnings ordinarily are not appropriate where management can establish that a violation is inadvertent, non-continuing, non-repetitious, is the result of mere carelessness or negligence, or is otherwise *de minimis*. And even in the case of continuing, repeated violations, where management is able to show that it has taken reasonable steps in an attempt to deal with the causes of the violations, monetary damages will not be awarded. On the other hand, damages in excess of actual monetary loss may be awarded where a violation is egregious — that is, where it is intentional *and* in bad faith — *or* where violations merely are repeated and continuous *and* where management fails to come forward with any explanation or justification whatsoever for its repetitious and continuing violations.

The Arbitrator would further note that while there is some disagreement among Postal Service arbitrators concerning the appropriateness of noncompensatory monetary remedies in contract violation cases in general, there appears to be more uniformity of opinion in cases of the type now before the Arbitrator. In that regard, Arbitrator Nancy Hutt's reflects in F90N-4F-C 94009200, 6/18/99:

> [M]any of the cases in which an arbitrator awarded damages in addition to overtime pay for improper route adjustments involved an additional violation of the 52-day requirement for adjusting a route after inspection. For example, Arbitrator Larson wrote, "I have read the 12 arbitration decisions cited to me by the parties, and most make awards for violation of the 52-day requirement for making adjustments after route inspections and mail counts." Arbitrators Walt and Hale found that there was no way to enforce the 52-day provision other than by monetary remedy. In the instant case violation of the 52-day provision was not argued by the Union.

The Arbitrator finds that, based upon the decisions provided him, a majority of Postal Service Regional arbitrators do in fact consider noncompensatory damages awardable in appropriate 52-day requirement cases.

Further, the Arbitrator deems it appropriate, in considering the remedy to be accorded the Grievant, to look to the custom and practice of the local parties within the Dana Point "shop." That custom and practice is to provide the affected Carrier with $10.00 per day for each day of violation.

In the instant case, the facts are clear: Dana Point management has continuously and repeatedly violated the National Agreement and the M-39. Further, it failed to come forward with any reasonable explanation for those violations or with any persuasive evidence that it ever took any reasonable steps in an attempt to deal with the causes of the violations. Moreover, the noted custom and practice regarding violation remedy exists at Dana Point. Accordingly, the Arbitrator deems it appropriate to award the Grievant $10.00 per day and to enter a cease and desist order.