

C# 10625

REGULAR ARBITRATION PANEL

In the Matter of the Arbitration }
 } GRIEVANT: Branch
 }
 } POST OFFICE: San Francisco
 }
UNITED STATES POSTAL SERVICE } CASE NO. W7N-5M-C 2669
 }
 }
 }
and }
 }
AMERICAN POSTAL WORKERS }
UNION, AFL-CIO }

BEFORE: ROBERT M. LEVENTHAL, ARBITRATOR

APPEARANCES:

For the U.S. Postal Service:

Aafifah Fola Muhebi

For the Union:

Dale Hart

Place of Hearing:

151 Mendell, San Francisco, CA

Date of Hearing:

October 26, 1990

AWARD: The Postal Service is not found to have properly changed the carrier schedule on April 25, 1987. Remedy is as set forth in the appended Opinion.

Date of Award: February 15, 1991



Robert M. Leventhal

AWARD IN ARBITRATION

The above captioned matter was duly processed through the parties' grievance procedure, being unresolved, appealed to, and heard before the undersigned in regular arbitration on October 26, 1990.

At the outset of the proceedings, the parties stipulated the matter was properly before me for arbitral determination and the issue for resolution to be:

1. Were the scheduled changes on April 25, May 9, and September 12, 1987 temporary?
2. If so, are the letter carriers entitled to out of schedule pay?

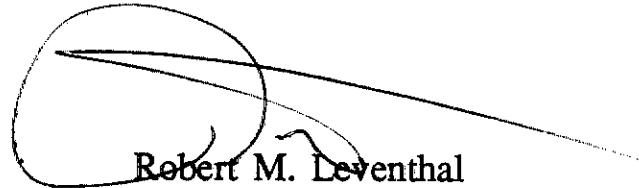
At the conclusion of the evidentiary portion of the proceedings, the parties elected to file post-hearing briefs. Upon receipt of the parties' briefs, this record was closed and the matter taken under consideration for the issuance of this award and opinion.

Having carefully reviewed the entire record in this case, it is my award that:

1. The changes were intended by the Postal Service to be permanent.
2. Based on this record, the scheduled change of April 25, 1987 is found to be temporary.

3. All letter carriers as identified in the appended opinion are to be paid out of schedule pay.

Respectfully submitted,



A handwritten signature in black ink, appearing to read "Robert M. Leventhal". The signature is somewhat stylized and includes a small circle at the beginning.

Submitted: February 15, 1991

Culver City, California

BACKGROUND

The instant case involves the Napoleon Street facility in San Francisco, California. In early 1987 Napoleon had approximately 300 employees assigned, including among other classes, routers and carriers which were assigned to a number of substations.

Pursuant to regulation, an annual route review was conducted in January 1987. That review confirmed that Station P routes were out of adjustment. Many of the routes were receiving 1 1/2 to 2 hours overtime on a daily basis.

Postal Service management reviewed the situation and a decision was made to change the carriers and router schedules. On or about March 27, 1987 the following letter was sent to the Union:

In order to provide more efficient service at Napoleon Street Facility, it is necessary to permanently change the report time of all router and carrier route positions.

Effective April 25, 1987 the router and carrier route positions at Napoleon Street Facility will be changed as follows:

All router positions with current schedule of 9:30 a.m. - 6 p.m. will change to 10:00 p.m. - 6:30 a.m.

All carrier route positions with a current schedule of 6 a.m. - 2:30 p.m. will change to 7:00 a.m. - 3:30 p.m.

In accordance with Article 6 of the Local Memorandum of Understanding, the bids will not be reposted. The effected employees will be scheduled to report at their new time on April 25, 1987.

The Postal Service's theory was the change in router schedule would provide assistance in casing morning first class mail and better service for business mail. No dispute existed the routers were upset

with what constituted a major change of shift. The carriers expressed dissatisfaction with the change for a number of reasons, primarily they believed the problem should have been corrected by territorial adjustments and secondarily, they had reservations about routers casing their first class mail.

The routers were "convinced" to accept the change. The carriers continued to voice objections for the above-stated reasons. The changes were implemented. After the change was implemented, Postal Service management observed or was informed, of misdeliveries from casing, forwardable mail, numerous customer complaints, delay of mail, and rather than a decrease in time used, more time being used despite the increased assistance.

Based on the above problems and the conclusion the routes were not being maintained as well as before, on May 9, a change was made. The router's report time was changed from 10 p.m. to 9:30 p.m. and they were taken away from working first class mail. The carriers were returned to the prior 6 a.m. start time.

Based on the Postal Service records, there was a decrease in overtime after the May 9, 1987 change.

No dispute or protests were voiced after the May 9 change and that schedule then remained in effect for several months.

The Postal Service asserted there was a change in transportation and it was determined that if the carrier start time was adjusted to 6:30 a.m. they would have 80% of their mail matter

available. The carriers were then advised of a change by memo dated September 3, 1987, to be effective September 12, 1987.

On or about October 13, 1987 the following grievance was filed:

Effective 9/12/87 carriers had schedules changed for the third time since 5/9/87 (date of first change). The Union contends that changing regular schedules three times in a period of 5 months does not constitute permanent changes. The intent of the FLSA and the ELR and contract is that regulars have permanent regular schedules. This has not been the case.

The Postal Service's Step 2 response set forth in pertinent part:

Management's Position: It is management's position that no violations exist in the instant case. Management contends that a permanent schedule change is in accordance with Article 41.184 of the National Agreement. Management is allowed to make schedule changes up to one hour on a permanent basis. Based upon contractual obligations and operational needs, employees at Station "P," Napoleon Street Facility, had permanent reporting times changes. Therefore, management contends that no violation of the National Agreement exists.

The matter was appealed with the Union restating its position, the Postal Service restating and adding some additional bases for its actions.

Without addressing the propriety of the Union filing its Step 3 additions and corrections, the Union "perfected" its position in an April 16, 1990 letter as follows:

Both Mr. Conser and yourself defend the legitimacy of the changes under Article 41, Section 1.A.4 of the National Agreement. The Union is not alleging a

violation of that provision. The Union asserts that despite calling the original changes in schedule "permanent," they were, in fact temporary changes in schedule, due to the latest "permanent change" in schedule. Since they were the initial changes were which were temporary ones, the carriers are due out of schedule overtime for all hours worked outside of their permanent schedule which they had prior to all the changes for the time frame up through the latest permanent change. This would be in accordance with Section 434.6 of the Employee and Labor Relations Manual and the appropriate provisions of the F-21 and the F-22 Handbooks. Those provisions of those handbooks are covered by Article 5 and 19 of the National Agreement, which the Postal Service violated in the instant case.

The parties were able to agree to the following fact statements:

1. The first schedule change at Station P was effective April 25, 1987.
2. Carriers were changed from a start time of 6 a.m. to 7 a.m. (see Joint Exhibit 12).
3. No dispute existed that the affected employees were properly notified.
4. May 9, 1987 was the date of the next change in schedule.
5. The May 9, 1987 schedule change moved letter carrier start times from 7 a.m. to 6 a.m.
6. On September 12, 1987 a third change occurred moving the carrier starting times from 6 a.m. to 6:30 p.m.
7. Following the September 12, 1987 change, carriers remained at the 6:30 a.m. start time for an extended

period, therefore, no dispute exists the September 12, 1987 was in fact permanent.

POSITION OF THE PARTIES

The Union

In defense of its position the instant grievance should be granted, the Union's major arguments may be summarized as follows:

1. The Union does not dispute management's rights to make schedule changes, however, if changes are to be viewed as permanent, there must be a showing of unanticipated circumstances which mandated the change.
2. When the prearbitral processing of this case is reviewed, it is clear the Union repeatedly requested Postal Service management to reveal the basis for the changes. If the information requested was provided, the Union could then investigate and evaluate the bases for the changes.

Despite repeated requests no viable explanations were proffered by management. In fact, the matter was remanded to Step 2 for the Postal Service to discuss, at a minimum, the specific operations needed to substantiate the change.

No additional substantiation was provided and many of the Postal Service's major contentions in support of the changes were divulged de novo at the arbitration.

3. Without prejudice to the fact the Postal Service should not be allowed to introduce new evidence or rationale for its decision at arbitration, there were direct conflicts in testimony as to if the route changes occurred.
4. The Union disputes that the Postal Service may use an annual route check to justify schedule changes. The procedures to adjust routes are set forth at Chapter 2 of the M-39. No six-day count was taken or the other adjustment procedures followed nor were there any adjustments to any of the routes. In fact, the number of hours of overtime worked after the change remained at 1 1/2 to 2 hours per route.
6. Individuals bid routes and are entitled to rely upon the posted hours unless there is some compelling reason that requires change. Whatever the Postal Service's opinion may have been regarding these changes, there were no compelling reasons ever proffered to the Union prior to the arbitration, the change was clearly temporary as it only lasted a few weeks.
7. Other arbitrators have addressed similar cases and when the change was found to be of short duration, the change was found to be temporary, irrespective of management's expressed intent and out of schedule pay was directed.

The Postal Service

In defense of its position the instant grievance should be denied, the Postal Service's major arguments may be summarized as follows:

1. After the route review, it was clear adjustments had to be made. The problem was discussed with the Union and carriers as well as the proposed solution.
2. While many carriers expressed "reservations" regarding management's proposed solution, and suggested "territorial" adjustments, the Postal Service was within its rights to address this problem by rescheduling the routers.
3. The change implemented on April 25, 1987 was within management's right and clearly was planned to address and relieve the problem. It was expected this change would address the problem and then remain in effect, subject to some new event which might justify an additional schedule change.
4. Postal Service management did not contemplate this change as temporary, however, due to "resistance" by the carriers, it soon became obvious the change would not solve the problem, therefore management initiated the second change which returned the carries to their former start time.
5. While it is regrettable there were three changes within a relatively short time span, the frequency of changes does

not determine permanency. Numerous other arbitrators have addressed cases where changes occurred within a short time frame and found them appropriate after examining the underling reasons.

6. Since all changes at issue were permanent, the Union's request for out of schedule pay is inappropriate as Article 41.1.4 clearly excludes permanent changes in start time for eligibility for out of schedule pay.

ANALYSIS

To address this dispute requires it be "broken" into parts. A major thrust of the Union's position was three changes within five months constituted a *prima facie* indicator these changes were temporary and not permanent.

Based on contractual language and the arbitration award cited, it is clear that frequency standing alone does not determine if a change is temporary or permanent.

I find it equally clear that the intent is not to "play" with shift start times to "see" if something might work.

Individuals accrue seniority and use that to bid positions that have fixed hours. Absent a demonstrable change in underlying conditions, Postal Service management is not to change start times. This constitutes an important protection to the employee (and a possible detriment to Postal Service management) if out of schedule pay for temporary changes must be paid.

The initial piece to be addressed is the change of April 25, 1987. The fact picture that existed prior to the April 25, 1987 change was not in substantive dispute. Many of the routes were out of adjustment, requiring 1 1/2 to 2 hours overtime on a daily basis. The "annual" route review confirmed the situation.

Not before me is if Postal Service management made a good or bad decision to change the routers' schedules as contrasted to territorial adjustments which were urged by the carriers.

Postal Service management, obligated to adjust the routes, made a decision and acted. It is also clear on this record that Postal Service management advised the carriers of the change and discussed the change with the routers at length to gain their cooperation.

While the record supports the change was discussed, it is unclear as to what extent, if at all, the underlying reasons for the change were communicated to the affected employees in general and those employees who also held Union office.

I would respectfully point out that if the Union is correct and the change of April 25, 1987 was "temporary," that change adjusted the carrier start time by one hour. On May 9, 1987 some 14 days later, the start time was changed back to 6 a.m. Therefore, to prevail and secure out of schedule pay, the Union must accept the change of April 25, 1987 was permanent and the temporary change was on May 9, 1987, therefore creating a one hour entitlement from May 9, 1987 to September 12, 1987. If the April 25, 1987 change was "temporary," all carriers were returned to their regular start time 14

days later and so remained until September 12, 1987 when their start time was again adjusted to 06:30 a.m.

The 6:30 a.m. start time remained in effect for a considerable period of time, and as I understand the Union's case, it was not challenging the September 12, 1987 change prospectively, but rather relying on the fact that three changes occurred within five months and therefore, one or more must be deemed temporary.

The above discussion illustrates why each change must be analyzed on its merits (or lack thereof) and the elapsed time between changes, while a factor to be considered, is not controlling.

Therefore, the fact picture to be addressed is if the Postal Service had a valid business reason to change the carriers' start time from 6 a.m. to 7 a.m. on April 25, 1987.

The record is clear, most if not all the routes were out of adjustment. While it is arguable the Postal Service should have acted sooner, it appears there was a valid business reason to act. The Union was put on notice as to the Postal Service's intent, the routers were totally rescheduled with the plan they would case first class mail for 30 minutes.

The Union focused on the requirements of the M-39 including among other requirements, a written notice to the Union. The Postal Service asserted all the essential elements of the M-39 had been followed and no written notice was required.

I concur with the Postal Service the essential elements of the M-39 were present. Without addressing if a written notice to the

Union was required, and if so, would that clerical error invalidate an otherwise proper action, absent errors (which occurred) the change should have reduced the amount of out of adjustment work by at least 30 minutes. The April 25, 1987 change was not planned as a temporary measure to address an operational problem or need that was believed to be limited in duration. This change was intended to address a permanent ongoing problem. The fact the change would only address a part of the out of adjustment problem does not make this a temporary change. The intent is also demonstrated by the significant change in the routers' hours. The drastic change for the routers does not give the appearance of Postal Service management intending to simply make a temporary change.

Unfortunately for Postal Service management, the change as implemented on May 25, 1987 did not work. Numerous errors in the first class mail occurred, complaints were received and Postal Service management elected to return the casing of first class mail to the carriers and, therefore, returned them to their original start time.

There were "inferences" the carriers were upset with allowing the routers to handle first class mail and their resistance may have contributed to the failure of the change.

Not before me is any question as to why the first change failed, but if the change was intended to be permanent and was based upon some underling factors such as changes in the availability of mail matter, truck schedules, etc.

Based on the record before me, the April 25, 1987 change was intended to be permanent. It did not work and after 14 days it was rescinded (as to carrier start times).

As to the change of September 12, 1987, the Postal Service asserted there were changes as to when the majority of mail was available and it was determined that point was 6:30 a.m. As I understand the Union's position, it did not sustitively dispute the change from 6:00 to 6:30 a.m. as being permanent, particularly since that changed remained in effect for a considerable period of time thereafter. Accordingly, I do not find it necessary to address the September 17, 1987 change other than it was in fact a third change within approximately five months.

The "problem" I have with this case is not if the Postal Service perhaps made a ministerial error in not sending written notice to the Union. The employees were made aware of the changes and therefore cannot claim they were disadvantaged due to lack of timely notice.

Communicating what a change will be and what it is expected to accomplish is one part of the Postal Service' responsibility.

The Union, as the representative of the individuals affected, has a right through the negotiated grievance procedure to be informed of the underlying reasons for a change so it may analyze what has occurred to determine if the change is proper or if it wishes to pursue the matter through the grievance procedure.

This record reflects the Union made requests for information to evaluate the changes and asserted the information was not provided. The case record revealed that at third step a remand occurred:

In a Step 3 meeting conducted on March 10, 1988 between your representative Dale Hart and myself, the above-captioned grievance was resolved in the following manner:

Both parties agreed to remand this issue to the local level for further development of facts, possible resolution. The parties need to discuss at a minimum the specific operations needed to substantiate the change of question. Parties are directed to the provisions of the Employee & Labor Relations Manual Section 432.441, 442, in making heir determination. No resolution is reached locally. Union may reappeal using same regional number.

Based on the above, this grievance is remanded.

During the course of the arbitration hearing, the Union pressed the Postal Service' witnesses as to what extent, if at all, they had previously "shared" the underlying reasons they were then testifying to with the Union. It appeared clear that prior to the arbitration there had been at best limited disclosure.

The intent of the grievance procedure is to ensure that both sides exchange relevant information and documents. This exchange of information is necessary so each side can evaluate their case and decide to seek a settlement, go forward, or withdraw. Specific provisions exist that prohibit the introduction of new evidence in arbitration.

Regretfully, the passage of time seriously diminishes recall ability. While the Union asserted the Postal Service was not forthcoming with information, the Union's witnesses acknowledged there were discussions, information was given but they could not recall what had been said.

What I am faced with on this record is the Postal Service had a reasonable basis to change the carrier start time on April 25, 1987. However, for unforeseeable reasons the changes implemented did not work, but it does not appear Postal Service management shared with the Union the underlying reasons for the change of April 25, 1987.

I am satisfied the Union was fully on notice as to why the April 25, 1987 change did not work and why that change, in fact, was rescinded as it affected the carriers.

The problem is an appropriate remedial order. I accept that Postal Service management intended the April 25 change to be permanent, however, the change as effectuated, was intended to address only a small part of the larger problem (30 minute assist on first class when routes were averaging 1 1/2 to 2 hours overtime). The problem had been ongoing for a considerable period before any action was taken, Postal Service management was cautioned about problems with routers casing first class mail, and within a very short period of time it became clear the change was not addressing the problem but was in reality, counterproductive. Coupled with the Postal Service' lack of full disclosure, all support a finding the April 25,

1987 change, which lasted approximately two weeks, must be deemed temporary.

The above finding moots any further analysis as to the May 9, 1987 change as the carriers were then returned to their 6 a.m. start time. Based on the above, all carriers who worked shifts between April 25 and May 9, 1987, whose start time was changed from 6 a.m. to 7 a.m. are granted one hour out of schedule pay.

This matter is remanded to the parties for identification of the affected carriers and computation of entitlement. Jurisdiction is retained for 90 days only as to any dispute which may exist to remedy.

Respectfully submitted,

Robert M. Leventhal

Submitted: February 15, 1991
Culver City, California