C# 10890

REGULAR ARBITRATION PANEL

In the Matter of the Arbitration between UNITED STATES POSTAL SERVICE and NATIONAL ASSOCIATION OF LETTER CARRIERS, AFL-CIO	GRIEVANT: Class Action POST OFFICE: Philadelphia, PA CASE NO: E7N-2A-C20095 NALC Case No. 157-333-88 GTS #3672

BEFORE: Wayne E. Howard, Arbitrator

APPEARANCES:

For the U. S. Postal Service: Bruce J. Jacobsohn, Esq.

For the Union: James J. Dolan

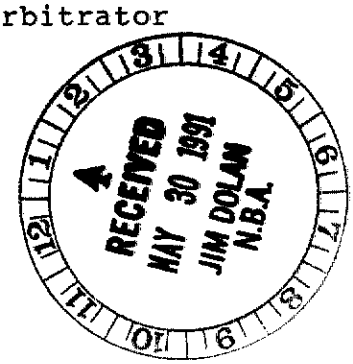
Place of Hearing: Philadelphia, PA

Date of Hearing: January 24, 1991 and February 19, 1991
Briefs received by arbitrator on May 14, 1991

AWARD: The Service is directed to award all carriers who were not on the ODL on the routes in question the difference between regular and penalty overtime rates for all hours worked over eight and one-half (8½) for the period between August 23, 1988 and the date at which their routes were implemented in August 1989.

Wayne E. Howard
Arbitrator

May 29, 1991



In the Matter of the Arbitration	CASE NO. E7N-2A-C20095
between	-
UNITED STATES POSTAL SERVICE	CLASS ACTION
and	-
NATIONAL ASSOCIATION OF LETTER CARRIERS, AFL-CIO	OPINION OF ARBITRATOR

BACKGROUND OF THE CASE

In December of 1986, the Union grieved that certain routes in Zones 32 and 33 operating out of the North Philadelphia Station should be examined in accordance with the standards of the M-39 Handbook and adjusted. The grievance was denied in the early stages, but sustained at the third step of the grievance procedure following which route examinations were conducted between September 26, 1987 and October 2, 1987. Under the M-39 Handbook, the implementation of route adjustments should be completed within a fifty-two (52) day period.

Notwithstanding significant conflicts in the testimony of witnesses, the record reveals that there was some disagreement between Service management and the Carriers, and this disagreement was attempted to be resolved through the Employee Involvement/Quality of Work Life program at the facility. (Service Ex. 2, pp. 2, 3, 5, 8 11, 12) At a Labor-Management meeting with the Union on May 19, 1988, the Union was assured that route adjustments would be made in two (2) weeks. (Service Ex. 3a, p. 3)

On August 23, 1988, in the absence of any implementation of the route adjustments, the Union filed a formal grievance

contending a violation of the Agreement and seeking a monetary penalty of $50.00 per day per route and per employee until the adjustments are accomplished. The grievance was not answered at the second step, and when appealed to the third step, the Service sustained the grievance in part stating the routes should be "immediately adjusted," but not agreeing to any monetary remedy. (Joint Ex. 2)

Strange as it may seem, the replacement Manager of North Philadelphia who took over in September 1988, as well as all the next higher level of managers, were unaware of the existence of any grievance until April 1989. The Service maintains that a meeting with Union officers resulted in an agreement to hold off the adjustment of routes in Zones 32 and 33 until an adjustment of routes in Zone 21 which had been integrated into the same facility could also be completed. The Union seemingly denies such an agreement. Finally, the unavailability of vehicles to motorize Zone 21 held up the implementation until August 1989.

Unable to adjust the grievance to its satisfaction, the Union requested arbitration of the issue, which really comes down to what remedy, if any, is appropriate in the instant case.

POSITIONS OF THE PARTIES

The Union's Position

The Service violated the M-39 Handbook, Section 211.3 integrated into the Agreement by Article 19 thereof when it

failed to implement the changes for routes in Zones 32 and 33 within the stipulated time limits. (Union Brief, pp. 4, 7)

While the Employee Involvement (EI) team was supposed to be involved in the decision-making, most of its time was spent in inquiring when the route adjustments should be made. Nor was this factor presented during the grievance procedure. (Union Brief, pp. 4-7)

The payment of monetary penalties has been upheld by a number of arbitrators.[1] (Union Brief, p. 8)

For the above reasons, the Union's request for a monetary remedy should be sustained.

The Service's Position

Compensatory damages have not been shown, and arbitrators have avoided punitive damages. Almost to a man the carriers on the routes in question were on the overtime desired list (ODL) and thus sought out any additional overtime.[2] Moreover, the

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[1]The Union cites Case W4N-5T-C2960, 1, 2, 3 (Render) dated December 3, 1988, Case W7N-5C-C5445 (Levak) dated March 10, 1989, Case W4N-5B-C8594 (Lange) dated March 21, 1989, Case W4N-5T-C36919 (Lange) dated August 23, 1989, Case N4N-1F-C30826, 2833 (Grossman) dated September 22, 1987, Case N4N-1E-C22422 (Grossman) dated December 16, 1986, Case C4N-4J-C6365, 4720, 6273 (Pribble) dated January 24, 1986, Case N4N-1E-C33973 (Grossman) dated November 12, 1987, Case N4N-1P-22802, 03, 04, 05, 11, 12, 13, 19744 (Sirefman) dated November 3, 1987, Case C4N-4J-C30920 (Dilts) dated September 1, 1987, Case N4N-1G-C35824 (Dennis) dated October 21, 1987, and Case E7N-2F-C18778 (Stoltenberg) dated June 21, 1990 in support of its position. The Union also cited some consent awards, as well as some settlements. The latter were ignored by the arbitrator because the parties had agreed not to use them as precedent in future cases.

[2]The Service cites the Sirefman decision, cited supra and that of Arbitrator Liebowitz in Case N7N-1K-C28329 dated November 30, 1990.

Union's failure to win the right to secure monetary damages in national negotiations, and the language of a Memorandum of Understanding between the Service and the Carriers on December 20, 1988 which states, in relevant part:

> There is normally no monetary remedy for a carrier improperly required to work overtime on his own route.

should compel rejection of the Union's desired remedy. (Service Brief, pp. 20-23)

The Service had an extension at least to January 1988 granted by the local Union to Area Manager Esposito, and the record shows that from January 1988 until August 1988 the matter was being dealt with through the EI process at the North Philadelphia facility, for the Union had filed no grievance. Even after the grievance was filed in August 1988, the route adjustment process was still being handled by the EI process. In late March or early April 1989, the grievance had been brought to the local manager's attention, a meeting was held with the Union at which the management believed an understanding had been reached that the local union was willing to wait until all three zones could be implemented at the same time, and the EI process should continue to be used. Management, therefore, held off making adjustments which it could have made until all three routes were ready to be implemented. Any award of money, therefore, should be denied on the basis of unjust enrichment or estoppel. (Service Brief, pp. 23-28)

Arbitrators have been traditionally unwilling to award punitive or exemplary damages, but rather to make the injured grievant whole.[3] Where granted, punitive damages have only been granted under the most egregious conduct on the part of the employer, a factor not present in the instant case.[4] (Service Brief, pp. 28-38)

For these reasons, no monetary award is warranted, and the grievance should be dismissed. (Service Brief, p. 38)

OPINION

The issue in the instant case is what remedy, if any, is appropriate in the admitted failure of the Service to implement route adjustments within the fifty-two (52) calendar day period as required by Section 211 of the M-39 Handbook. The Union essentially contends that the Service clearly violated the Agreement when it failed to make route adjustments within the stipulated time period, that there was no agreement to delay the adjustments, that the EI team had minimal involvement in the decision-making, and that the payment of monetary remedies has been directed by previous arbitrators in the instant collective bargaining relationship. The Service basically argues that any monetary penalty would be punitive, that punitive awards are avoided in arbitration, and that, under the unusual factual circumstances of the instant matter, any monetary award

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[3] The Service has cited numerous cases in support of this position.

[4] The Service has cited numerous cases in support of this position.

would constitute unjust enrichment or should be rejected on the basis of estoppel.

Until August 23, 1988, when the Union first filed a grievance, the Service's position is unassailable. The record fully supports the fact that the parties were attempting to resolve the manner in which route adjustments would take place through the EI process. (Service Ex. 2, pp. 2-10) There is no evidence in the record that the Union desired to make an issue of the delay, but rather was content to use the EI process to make its thoughts known on what it felt was the preferred manner in bringing about the route adjustments. This implicit agreement to work out its differences with the Service through the EI process should operate as an equitable estoppel on the Union's right to secure monetary damages. This view also accords with the reluctance of arbitrators in dealing with continuing grievances not bound by the time limits of the grievance procedure to grant remedies for alleged violations for long periods prior to the filing of the grievance. Otherwise the employer could be "sandbagged" by the filing of a "stale" grievance.

On August 23, 1988, however, when the Union filed a grievance over the Service's failure to adjust the routes in question in a timely manner, it placed the Service on notice that it was dissatisfied with the EI process and wished to exercise its rights under Article 15 of the Agreement. It should be noted that there is a significant difference between

the formal grievance procedure contained in Article 15 of the Agreement and the less formal procedures of the EI process. The contractual language of Article 15 takes precedence over the EI process which is integrated into the Agreement by Article 19 thereof and, therefore, cannot be inconsistent or in conflict with the grievance procedure.

In the opinion of the arbitrator, once a grievance has been filed, the grievance procedure takes precedence over the EI process in the absence of clear and unequivocal agreement on the part of the Union to suspend or waive the Union's right to further the dispute or difference through the grievance procedure. While the Service urges that indeed such an agreement was forthcoming, such an agreement would have been impossible to effectuate for all of the effective management team, Station Manager Foster and Area Managers Esposito, Winokur, and Esterline were unaware that a grievance existed until late March or early April, a period of over seven (7) months after the grievance was filed. Obviously, during this period there could be no agreement to suspend the operation of the grievance procedure.

It is unnecessary to resolve the conflict in the testimony as to whether in late March or early April of 1989, when the effective management team became aware of the existence of a grievance, an oral agreement was subsequently consummated with the Union. It should be noted that at approximately this same time period, the grievance had reached the third step of

the grievance procedure, and a third step answer by the Service stated that the routes in question "must be immediately adjusted." (Joint Ex. 2) Thus, the Service would now contradict its own written grievance answer on the basis of contradictory oral testimony. Were the arbitrator to succumb to such blandishment, the language of Article 15 of the Agreement would be accorded little meaning.

In accordance with most, if not all, of the arbitration community, the undersigned arbitrator does not believe in punitive remedies. Under certain factual situations, however, it is sometimes quite difficult to distinguish between a remedy which is compensatory from one which is punitive, particularly in situations where the adverse effects of an employer decision on his employees is difficult to quantify.[5] Merely calling a remedy punitive does not make it so.

For all of the above reasons, the Service is responsible for any and all compensatory damages due the affected carriers for its admitted failure to implement rate adjustments within the stipulated time period. First, for reasons discussed supra, monetary damages are only due for the period between August 23, 1988, the date upon which the Union first filed a grievance, and the date at which the routes were implemented in August 1989. For the period prior to its filing of a grievance, the

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[5]This is no doubt responsible for the wide-ranging remedies awarded by arbitrators in those cases which have been cited.

Union should be estopped from seeking a monetary remedy. Secondly, the only adverse impact for the failure of the Service to make a timely adjustment of routes which is compensable is the interim requirement that carriers not desiring to do so may have been forced to work overtime. This class of employees would be those carriers on the routes in question who were not during the time period in question on the overtime desired list (ODL).[6] Thirdly, since these employees would have been paid time and one-half in any event, this payment awarded them nothing for any inconvenience suffered by reason of their working undesired overtime. Thus, they should be paid at the penalty overtime rate of doubletime.[7] In the opinion of the arbitrator if each of the above factors is met, the monetary payment is not punitive but compensatory.

Therefore, the Service shall be directed to award all carriers who were not on the ODL on the routes in question the difference between regular and penalty overtime rates for all hours worked over eight and one-half (8½) hours for the period between August 23, 1988 and the date at which their routes were implemented in August 1989.[8]

Wayne E. Howard
Arbitrator

[6] See decisions of Arbitrators Sirefman and Liebowitz cited by the Union and Company respectively, supra.

[7] See decision of undersigned arbitrator in Cases E7C-2A-C31397, 31398, 31399, 31354 dated March 26, 1991.

[8] The arbitrator carefully analyzed the cases cited by the parties. Because of differences in factual matters no clear pattern emerged which he felt bound to follow, and the cases represented persuasive authority only.