

C-24167

**REGULAR ARBITRATION PANEL**

In the Matter of the Arbitration	(	Grievant:	Class Action
	)		
between	(	Post Office:	Huntsville Downtown
	)		
UNITED STATES POSTAL SERVICE	(	USPS No.	H98N-4H-C00053109
	)		
and	(	NALC No.	B4627399
	)		
NATIONAL ASSOCIATION OF	(		
LETTER CARRIERS, AFL-CIO	)		

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BEFORE: Kathy L. Eisenmenger, Arbitrator

**APPEARANCES:**

For the U. S. Postal Service:	Ed Harper
For the Union:	Lew Drass
Place of Hearing:	Huntsville, AL
Date of Hearing:	February 21, 2003
Date of Award:	April 2, 2003
Relevant Contract Provision:	Articles 15, 17, 19 and 31, M-39 Handbook
Contract Year:	1998-2000
Type of Grievance:	Contract

**Award Summary**


The grievance is timely inasmuch as the failure to object to the late Step 1 discussion was waived per Article 15.3.B. of the National Agreement. No grievance procedural defects were supported by the evidence. The evidence shows violations of Article 15.3.A. when the terms of the May 27, 1999, settlement agreement and the Step 2 agreement for grievance No. 462-54-99 were not fulfilled by the Postal Service. Articles 17 and 31 were violated when the Postal Service failed to provide the information agreed to in the May 27, 1999, settlement agreement. Article 19 and Sections 211.3 and 243.21b of the M-39 Handbook were violated when the Postal

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Service failed to effect the necessary route adjustments to Route 0152 on at least November 1, 1999. Specific remedial relief is ordered. See pages 17 and 18 of this Award.

  
Kathy L. Eisenmenger, J.D.

### **Issues**

The parties presented several different issues to be resolved. With regard to the merits of the grievance, the Union posed the following issues:

1. Did Management violate Article 15, Section 3.A. of the National Agreement by failing to comply with the Step 2 grievance settlement, Case No. 462-54-99 [reference Joint Exhibit 2, page 33] and the local agreement dated May 27, 1999 [reference Joint Exhibit 2, page 29]? If so, what should the remedy be?
2. Did Management violate Article 17 and 31 of the National Agreement by failing to provide information to the Union as called for in the parties' local agreement of May 27, 1999? If so, what should the remedy be?
3. Did Management violate Sections 211.3 and 243.21 of the M-39 Handbook, via Article 19 of the National Agreement, by failing to adjust routes at the Downtown Station to as near eight (8) hours work day as much as possible in a timely fashion? If so what should the remedy be?

The Postal Service agreed with Issue 1 above but did not agree to the latter two issues. Additionally, the Postal Service posed an arbitrability threshold issue of timeliness, specifically, that the Step 1 grievance here was untimely filed. The Postal Service also posed two procedural issues. The first is the contention that the Union can file a grievance only when it is acting on behalf of more than one employee. In this case, the Union is requesting a remedy for only one carrier and that carrier has not used the Step 1 grievance procedure. Lastly, the Postal Service contends that the Union cannot create at the Step 1 grievance procedure any binding agreements that are contrary to the National Agreement and Postal Service handbooks and manuals.

### **Arbitrability - Timeliness**

#### **Introduction**

Arbitrators receive authority from the parties to resolve disputes via the negotiated provisions of the parties' grievance procedure. In cases where the parties have agreed to strict

and articulated time limits for filing grievances, arbitrators must observe those limitations as well. Failure of the filing party to adhere to the time limits stated in the grievance procedure ultimately removes the dispute from the jurisdiction of the arbitrator to resolve the matter. The party that raises the arbitrability threshold issue relative to timeliness bears the burden of proof to show that the grievance is procedural defective to remove it from the authority of the arbitrator.

### **Facts and Argument of the Parties**

On May 27, 1999, Max Lee, Shop Steward for the Union at the Huntsville Downtown Station, and Lisa Anderson, Station Manager, entered into the following local agreement:

*We the parties mutually agree to conduct a joint review of all Routes that were inspected in March and all Route Adjustments thereafter at the Downtown Station. This joint review will take place 60 days after Route Adjustments are implemented. We further agree that all routes will be adjusted to as nears eight hours as possible per day via territory adjustments at the conclusion of this 60-day joint review of the Routes that were inspected and Route Adjustments made at the Downtown Station. It is also agreed that total time worked by the regular Letter Carrier assigned to each route inclusive of any and all auxiliary assistance will be the determining factor of whether or not each route is in need of further adjustment. The President of NALC Branch 462 or his designee will represent the NALC with respect to the 60-day joint review of the Routes that were inspected and the Route Adjustments made at the Downtown Station. The Postal Service Representatives agree that they will supply all relevant information (DSIS Reports, 3996's, 1571's, ETC Clock Rings, etc...) to the NALC prior to the 60-day joint review of the Route Adjustments at the Downtown Station.*

When the Union considered that the terms of the above agreement had not been fulfilled, the Union filed Step 1 of a grievance numbered B462-54-99 on September 10, 1999, and designated the grievance as a "Class Action." The Union's standard grievance form, prepared by the Union, stated the following as the facts giving rise to the grievance:

*Several Routes were inspected at the Downtown Station during the week 03/15/99 – 03/20/99. A meeting was held at the Downtown Station on 04/08/99 to discuss the results of the inspection. Postmaster Clark, Supervisor Grisham, Branch President Drass, and Shop Steward Lee attended the meeting. It was agreed that a mistake had been made on Route 0152. Route 0152 received auxiliary assistance on 03/20/99 which was not added into the street time for the route. The parties agreed that Route 0152 evaluated to 10 hours and 20 minutes work per day. However, the parties also agreed that Route 0152 would be adjusted from that point to 8 hours and 20 minutes work per day and that this route would*

*be reviewed 60 days after it was adjusted to determine whether or not it was adjusted to as near 8 hours work per day as possible. May 5, 1999 was the end of the 52 day period when the route adjustments were due to occur. No adjustment was made to Route 0152. During this same period, there had been a change in Station Manager at the Downtown Station. Shop Steward Lee and Station Manager Anderson discussed the situation several times during the month of May. The Union agreed to allow Station Manager Anderson reasonable time to review the situation and implement adjustments to Route 0152. On May 29, 1999, Station Manager Anderson and Shop Steward Lee signed an agreement that would ensure that all routes that had been inspected and all routes that were to be adjusted would be jointly reviewed 60 days after the adjustments were implemented. Also that further adjustments would be made at that time if warranted. At this point, the Union was told that the paper work had been sent in to adjust Route 0152. Time marched on and no adjustments were made to Route 0152. Next, the Union was told that the adjustments would be delayed 4 to 6 weeks because the National Data Base was being worked on. The Union accepted this explanation. August came along and still no adjustments. Branch President Drass began discussing the situation with Station Manager Anderson again. Station Manager Anderson assured Branch President Drass that she would contact someone in Memphis which was where the hold up was. In late August, it was finally revealed to the Union that that the Route adjustment for Route 0152 had not been approved in Memphis. A grievance was filed shortly thereafter.*

At the bottom of the grievance form is the following handwritten notation:

*"Havira will be paid \$125.00 Lump Sum. Route will be adjusted based on reverse side of 1840 no later than 10/31/99. Failure to do so may result in a new grievance on this issue."*

There was no dispute that local management agreed to the above handwritten notation and that it was initialed by Postmaster Phillip Clark and Mr. Drass.

On December 13, 1999, the Union submitted a Step 1 grievance numbered as B462-73-99 (the instant grievance) and designated it as a "Class Action" grievance. In its Step 2 grievance form, the Union repeated the facts reproduced above and articulated in its grievance numbered B462-54-99. The Union's statement of facts noted that B462-54-99 was resolved but that if the Postal Service did not comply by October 31, 1999, a new grievance could be filed. The Union contended that the grievance settlement was not complied with by October 31, 1999, and that Route 0152 continued to average over 10 hours of work per day. The Union also noted that the Alabama District Office for the Postal Service had denied the route adjustment by a

document dated November 18, 1999. In sum, the local agreement dated May 27, 1999, and the grievance settlement for grievance B462-54-99 had not been fulfilled by the Postal Service.

In his Step 2 Grievance decision dated January 6, 2000 and addressed to Mr. Drass, Postmaster Phillip Clark stated the following:

*On 01/05/00, I met with you to discuss the above subject grievance at step 2 level of our contractual grievance procedure.*

*The issue in this case is whether management violated the National Agreement by not adjusting route 0152.*

*The Union contends that management failed to adjust route 0152 in a timely manner and failed to act in good faith with respect to route 0152. Management failed to abide by a Step 2 grievance settlement for Grievance B462-54-99 and the agreement signed on May 27, 1999.*

*It is management's position that no contractual violation can be established.*

*All routes at the Downtown Station are scheduled to be inspected during the week of February 14, 2000.*

*Grievance is denied.*

The Postal Service contends that the Step 1 grievance initiated on December 13, 1999, is untimely. The Postal Service notes that Article 15 required that the initial grievance must be discussed with the employee's immediate supervisor within fourteen (14) days of the date on which the employee or the Union first learned of the issue giving rise to the grievance. In this case, the settlement agreement specifically noted a due date for compliance and that if compliance was not made the Union could file another grievance over the matter. The due date was October 31, 1999; however, the Union did not file a grievance until forty-three (43) days later. The Postal Service argues that inasmuch as the grievance in this case was filed outside the fourteen-day time frame, the grievance is fatally defective. Moreover, the employee involved in this case; i.e., Letter Carrier Havira for Route 0152, never discussed the dispute of route adjustments with his supervisor. Therefore, neither the employee nor the Union has complied with Article 15 to timely submit this grievance. The Postal Service submitted five (5) arbitration awards in support of its position.

The Union cites Article 15.3.A. and B. in its rebuttal that the Postal Service waived its right to challenge this grievance on the basis of procedural untimeliness. Section B states as follows:

The failure of the employee or the Union in Step 1, or the Union thereafter to meet the prescribed time limits of the Steps of this procedure, including arbitration, shall be considered as a waiver of the grievance. However, if the Employer fails to raise the issue of timeliness at Step 2, or at the step at which the employee or Union failed to meet the prescribed time limits, whichever is later, such objection to the processing of the grievance is waived.

In the parties' Joint Contract Administration Manual (JCAM) effective June 1998, the parties further agreed to the following explanation of Article 15.3.B:

**Timeliness:** If management fails to raise the issue of timeliness, in writing, at Step 2, or at the step at which the employee or Union failed to meet the prescribed time limits, whichever is later, it waives the right to raise the issue at a later time. Management's obligations depend upon the step at which it asserts the grievance was untimely.

- If management asserts that a grievance is untimely filed at Step 1, it must raise the issue in the written Step 2 decision (because Step 2 is "later" than Step 1) or the objection is waived. It is not sufficient to assert during the Step 1 meeting that a grievance is untimely.

#### **Decision on Timeliness**

The grievance is timely filed and, as such, is appropriate for resolution under the provisions of Article 15. Obviously, the Step 1 initiated on December 13, 1999, was outside the general provision that a grievance must be filed within a fourteen-day time frame. However, the provisions of Article 15 allow for a waiver of the time frame where the Postal Service does not express its objection to the untimely filing of a Step 1 grievance in the written Step 2 decision. The parties' agreement in the supplemental JCAM specifically states that if management does not raise the issue at that point in time it waives its timeliness challenge and its right to raise the issue at a later time. Management did not raise the issue of timeliness in its Step 2 written decision dated January 6, 2000 (reproduced in pertinent part above). Management first raised its timeliness objection in its Step 3 grievance decision dated February 17, 2000. Therefore, the timeliness objection was waived under the provisions of Article 15.

### **Procedural Considerations**

The Postal Service seeks to have the grievance dismissed on the grounds that the Union brings the grievance as a “class action” and not as an individual grievance on behalf of Mr. Havira, the former letter carrier for Route 0152. In support of its contention, the Postal Service provided the regional arbitration award of Nicholas Duda, Jr. (Case Nos. H90N-4H-C 95067864/530JA729C95, dated April 14, 2000). While the Postal Service argued in Arbitrator Duda’s case a similar procedural defect as argued here, the Postal Service also argued that the grievant lacked standing to have his grievance resolved. Specifically, the grievant was terminated for cause on January 11, 1995, but the Step 1 grievance, concerning an issue of using Transitional employees in lieu of the grievant, was not filed until January 21, 1995 – ten days after he was no longer an employee. Once the grievant was discharged, there were no other letter carriers of his category at the installation. In his award, Arbitrator Duda decided that, “Adjudicating this grievance in the grievance arbitration procedure is barred by Sections 15.1 and 15.2 because [the grievant] was not an employee at the time of the Step 1 discussion and the claim for him had not yet begun joint processing by the Parties in the grievance procedure.”

Arbitrator Duda’s case is distinguishable from the one before me. There is no dispute here that Mr. Havira was a current employee at the time the grievances over route adjustments were filed. Moreover, there were other letter carriers of Mr. Havira’s classification employed at the Huntsville Downtown Station at the time, thereby showing that a potential “class” existed. Further, Arbitrator Duda’s decision does not resolve a question of class action versus individual grievances. For these reasons, Arbitrator Duda’s regional award lacks applicability to the instant grievance before me.

Other than the above, no provision of the National Agreement or the JCAM or any other equivalent authority was presented to show that the Union’s characterization of this grievance as a class action instead of an individual grievance is a fatal procedural flaw. To find so, the arbitrator would need to graft a provision to the National Agreement. Such action would surpass an arbitrator’s authority under the specific provisions of Article 15. Therefore, the Postal Service’s contention that the instant grievance is procedurally improper and barred from arbitration cannot be sustained.

At the arbitration hearing, the Postal Service submitted a computer-generated version of what was purported to be a Step 4 decision involving a 1992 case from Sandy, Utah. The Union objected to the admission of the document because it involved an issue or defense that had not been presented by the Postal Service prior to arbitration. The objection was set aside on the basis that the document may contain precedent applicable to the Postal Service's position that the grievance was improperly filed and thus not arbitrable. However, the document was not signed by either party nor could a credible copy be produced at the hearing. The record was therefore left open for the parties to cure this matter. The Postal Service was given until February 26, 2003, to fax the arbitrator and the Union a copy of the signed document. The Union was given until March 3, 2003, to fax its response to the document and if it chose to renew its objection.

On February 27, 2003, sometime after 12:30 p.m., I received from the Postal Service a Step 4 agreement dated June 23, 1992, involving a class action grievance in Dallas, Texas. To date, I have not received the Sandy, Utah document purported to be a Step 4 decision. On February 28, 2003, I sent the Dallas, Texas Step 4 decision to the Union for the Union's response with a new deadline of March 4, 2003, for the Union's response. A copy of the notice was also faxed to the Postal Service. On March 4, 2003, the Union responded and requested that the document presented at the hearing be excluded from consideration inasmuch as the Step 4 decision of June 23, 1992, was unrelated to the faulty document produced at the arbitration hearing. The Union's objection is hereby sustained. On March 4, 2003, I closed the record of the arbitration. Moreover, I have not considered the June 23, 1992, document. It was not presented at the arbitration hearing. There was no request or explanation for its submission to me. Therefore, it would be improper to accept the document given the circumstances.

The second procedural defect the Postal Service claims is that the Union cannot create at Step 1 of the grievance procedure any binding agreements that are contrary to the National Agreement and the handbooks and manuals of the U. S. Postal Service. The Postal Service posited that Manager Anderson's authority under Article 15 is limited, referring to the settlement agreement she signed dated May 27, 1999. The Postal Service noted that a 60-day review, as called for in the May 27, 1999, settlement agreement, is contrary to the provisions of the M-39 Handbook.

An important distinction must be understood between memoranda of understanding that are left to local discretion and gap-fill the National Agreement and settlement agreements that



are designed to resolve a particular grievance. The first type of agreement may modify the terms of the National Agreement, under well-established principles. The latter type of agreements pertains solely to the circumstances of the disputes immediately at hand and once the terms of the settlement agreements are fulfilled, the agreements expire on their own design.

The agreement dated May 27, 1999, belongs in the second category. It does not purport in its language to supplant completely the time frames or manner by which route inspections reviews and route adjustments are to be conducted under M-39. On the contrary, the settlement agreement recognizes that route inspections were conducted in March [1999] but that route adjustments had not been implemented. The settlement agreement thereafter provides a time table for joint review and resolution of the perceived problem; i.e., that some routes were in need of adjustment.

The Postal Service cited no provision of the settlement agreement that was in direct contravention of any M-39 provision. The sole possible inferences were two-fold. One was that the M-39 states at Section 211.3 that all route adjustments must be placed in effect within 52 calendar days of the mail count. No evidence was presented to show that any route adjustments were made within the 52-day time limit after the end of the route inspection on March 20, 1999. The settlement agreement served to give the Postal Service additional time to comply with the M-39 for that particular situation or the grievance would be pursued further. This type of agreement is typical of settlement terms in attempts to resolve grievance disputes. It cannot be said that it rewrote the M-39.

The second inference is that only the affected letter carrier could request a route inspection which infers that it is improper for the Union to grieve what it considers to be a problem. While the M-39 provides direct access to an employee to request a route inspection, there was no citation to an M-39 provision that barred a grievance over the matter. The M-39 is a handbook brought under the enforcement mechanisms of the National Agreement via Articles 15 and 19. Adherence to the M-39 has many implications concerning the letter carriers' bargaining unit and their working conditions. Route inspections eventually lead to how many letter carrier jobs will be authorized and how many work hours are to be worked by each letter carrier on average. Inasmuch as working conditions for letter carriers and security of letter carrier positions are appropriate matters to bring under the negotiated grievance procedure, it is

appropriate to address concerns about the application of the M-39 to the Huntsville Downtown Station's mail counts and route inspections but lack of route adjustments as a grievance.

In view of the foregoing, I do not find that the Union's grievance here contains procedural problems that remove it from the negotiated grievance-arbitration procedure.

### **Merits of the Grievance**

The facts articulated in the Union's grievance reproduced above provide the basic elements of the grievance. Forms 1840, Summary of Count and Inspection Letter Carrier Route, show that Route 0152 averaged for the period of March 15, 1999 to March 20, 1999, ten (10) hours and twenty (20)<sup>1</sup> minutes per day whereas Route 0183 averaged 8:11 hours, Route 0114 averaged 7:59 hours, Route 0153 averaged 7:39 hours, Route 0158 averaged 8:19 hours, and Route 0175 averaged 8:37 hours for the same period. A Workhour/Workload Report for Route 0152 for the period of March 15 through 20, 1999, and dated March 30, 1999, showed that the average total route hours were 10.73. On a copy of the Form 1840 for Route 0152, Mr. Drass wrote on April 8, 1999, that the parties agreed that the route checked out at ten hours and twenty minutes, that the route would be adjusted to eight hours and twenty minutes and the parties would jointly review the situation in sixty (60) days.

Manager Anderson acknowledged in her testimony that she signed the May 27, 1999, settlement agreement. Her representations that she did not intend to fully agree to its contents cannot be credited. While the settlement agreement was prepared by Mr. Lee, Ms. Anderson was given sufficient opportunity to read and discuss the contents of the agreement. Manager Anderson testified that she came to the Downtown Station in May 1999.

On June 4, 1999, Manager Anderson submitted to the Alabama District Office a proposed realignment of carrier routes for the Huntsville Downtown Station. Ms. Anderson testified that the information presented during the arbitration hearing was not the totality of the proposed change. Manager Anderson testified concerning documentation provided in the grievance package, specifically, Joint Exhibit 2, pages 29 through 31. The document, a Workhour/Workload Report for Route 0152 for the period of September 18, 1999 through December 18, 1999, shows the total hours of work for each work day on the route as well as the

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<sup>1</sup> The original Form 1840 shows ten (10) total work hours for Route 0152, but the parties shortly thereafter agreed that an error in calculation on March 20, 1999, raised the figure to ten (10) hours and twenty (20) minutes.

total number of hours of auxiliary street time that was granted to Route 0152. On occasion, Route 0152 was also given auxiliary office time. An average for the period shows that the total route hours were 10.13 and the average auxiliary street time given was 1.66 hours. Manager Anderson testified that in October 1999 the Station removed two (2) streets from Route 0152 and that by that time management had attained Route 0152 to a level of about eight (8) hours.<sup>2</sup> For example, Henry Street Southwest and Penn Street Southwest were taken from Route 0152 and given to Route 0153. Later, Humes Avenue Northeast was taken from Route 0152 and given to Route 0108 on October 7, 2000. In addition to alleviating the route of two (2) streets, Route 0152 received assistance from two (2) collection carriers. Manager Anderson claimed that these actions caused the route to generally be within the eight (8) per day range and that the scheme changes reflected by the change of Henry, Penn Streets and later Humes Avenue were actually made.

By an e-mail dated November 18, 1999, the District Coordinator, Paul Denham, informed the Huntsville Downtown Station Management that he was denying the route adjustments proposed for Route 0152, as well as for Route 0130. Mr. Denham noted some fluctuations in the two carriers office work practices and asked that local management look into the matter. Mr. Denham advised that while the adjustment package was not approved, that it could be resubmitted once the "bad habits" had been corrected. There is no evidence that Mr. Denham's advice was observed on either the issue of office work habits or resubmission of the adjustment package. As indicated above, the Union filed an enforcement grievance on December 13, 1999.

Both Manager Anderson and Carrier Havira testified that the latter never carried an area referred to as the Parkway. Carrier Havira estimated that it took about an hour to deliver the Parkway. However, Mr. Drass testified that his calculations noted on April 8, 1999, that Route 0152 was ten (10) hours and twenty (20) minutes long had nothing to do with the time spent to deliver Parkway.

The Union argues that this grievance concerns the fact that the terms of the May 27, 1999, were not fulfilled nor was the agreement that Route 0152 be adjusted no later than October

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<sup>2</sup> The Union objected to any information presented by the Postal Service relative to route adjustments for Route 0152 and to any documentation submitted other than in Joint Exhibit 2. Some of the testimony concerning route adjustments was based on documentation provided by the Union, therefore, the element of surprise was not applicable in this case. Also, route adjustments made to Route 0152 were known to Mr. Havira and therefore were not an element of surprise. Inasmuch as this case involves whether route adjustments were made or not, information pertaining to such actions must be considered.

31, 1999, per the Step 2 settlement agreement of grievance B462-54-99 fulfilled. The Union asserts that if the adjustments had been made the Postal Service would so have stated in its Step 2 and subsequent decisions. The Union opines that the adjustments were never made because the Postal Service never said that they were made, until the arbitration hearing.

The May 27, 1999, settlement agreement contained an agreement between the parties that the Postal Service would supply all relevant information to the Union prior to the joint review of the route adjustments. Apparently, because no joint review was conducted, the Postal Service did not provide this information. This same type of information is lacking from the arbitration record. The only information in the hearing record that shows whether adjustments were actually made is the Workhour/Workload Report for Route 0152 for the period of September 18, 1999 to December 18, 1999, that was printed on December 23, 1999. It is granted that this information may not be the most accurate method for determining whether the route adjustments claimed to have been made in Manager Anderson's testimony actually took effect, but it constitutes the only self-reliant documentary evidence left available to this arbitrator. Had the provisions of Article 17.3 and 31.3 been fulfilled as indicated in the May 27, 1999, the Union would most likely have had available the necessary information for making this determination from more complete data.

The workload report referenced above shows very little difference between the hours allocated to Route 0152 between the periods prior to October 30 vice the period subsequent to October 30, 1999. Of the forty (40) work days from November 1, 1999 through December 18, 1999, Route 0152 averaged 10.03 total work hours and 1.47 hours of auxiliary street time. On only twelve (12) of those forty (40) days was Route 0152 not given auxiliary street time. However, on two of those twelve days mail was curtailed. Additionally, on only three (3) of those twelve days were the work hours for Route 0152 at eight (8) hours or slightly higher. From this analysis it can be determined that whatever adjustments were made they were not sufficient to bring Route 0152 within the goal stated by M-39 that routes be as near eight (8) hours of work per day as possible.

The information cited above shows that Route 0152 was overburdened and in excess of "as nearly an 8-hour daily" work day as possible. Manager Anderson acknowledged the situation and testified that even Mr. Denham acknowledged to her that Route 0152 was an overburdened route. The route was in need of relief after the March 20, 1999, route inspection.

The May 27, 1999, attempted to resolve this matter for Route 0152 and for all other routes that had workload daily averages in excess of nearly eight (8) hours total. It appears from the record that Routes 130 and 156 also had excesses, although the record is not clear on what those excesses were.

The Postal Service argued that the May 27, 1999, settlement agreement "went away" when the parties agreed to a settlement for grievance B462-54-99 when it stated that Mr. Havira would be paid \$125.00 lump sum and that his route would be adjusted based on the reverse side of the Form 1840. As found above, Route 0152 was not adjusted sufficiently to bring the total route workday on average to as near eight (8) hours as possible. Therefore, the settlement agreement for grievance B462-54-99 was not fulfilled by the Postal Service. The effect of non-compliance is that the terms of the May 27, 1999, settlement agreement as they relate to Route 0152 remained active and in force. Until the Postal Service discharged its commitments under the May 27, 1999, settlement agreement, it was not relieved of those terms despite a subsequent agreement that also remained unfulfilled. It would be against any tenet of fairness to allow a different result. A party would be able to circumvent its prior obligations by merely entering into a new agreement and ignoring that new agreement as well. For this reason, it has been well-established in industrial relations that should a party not comply with the terms of a joint settlement agreement the party seeking enforcement may do so by filing a complaint and returning to the original dispute subject. The terms of the settlement agreement do not "go away" but are in essence renewed until compliance is made or sanctions for non-compliance are taken.

In view of the foregoing, I find that the May 27, 1999, document was a valid settlement agreement and that as of the Step 2 grievance settlement for grievance B462-54-99, the matter of a route adjustment for Route 0152 was the remaining issue at dispute. The May 27, 1999, agreement also called for a joint review to follow the route adjustments once they had been in place for sixty (60) days and that the Union would be given the necessary information prior to the joint review. These latter two terms were also not fulfilled. The May 27, 1999, settlement agreement was brought under the enforcement mechanism available to the Union; i.e., the negotiated grievance-arbitration procedures set forth in Article 15 of the National Agreement. Inasmuch as the May 27, 1999, settlement agreement has not been met with full compliance, the Postal Service has violated Article 15.

The Union also posed that Sections 211.3 and 243.21.b. of the M-39 Handbook were violated in this grievance. The select provisions are reproduced below, in pertinent part:

211.3            In selecting the count period, remember that all route adjustments must be placed in effect within 52 calendar days of the completion of the mail count, and no major scheme changes should be made between the period November 15 and January 1. Exceptions must be approved by the district manager in accordance with the Memorandum of Understanding dated July 21, 1987, related to Special Count and Inspection – City Delivery Routes. The local union will be notified promptly of any exception(s) granted. An important item to consider when granting an exception is the different types of relief laid out in section 243.21b.

243.21            **Routes of More than 8 hours.** If, after correcting improper practices, a route still shows a total daily time consistently in excess of 8 hours on most days of the week, plan to provide permanent relief by transferring the workload or providing temporary relief on heavy days, as follows:

\* \* \* \*

- b.            Permanent relief may be provided by reducing carrier office or street time. Consider items such as additional segmentations, use of routers, hand-offs, relocating vehicle parking, withdrawal of mail by clerks or mailhandlers, providing a cart system for accountable items, etc. . . . Where actual transfer of territory is necessary, see 243.23. If a hand-off is the method selected for providing relief on the street, the time value associated with the delivery of the hand-off must be deducted from the route getting relief and transferred to the gaining route.

In addition to the above provisions, Section 242.122 of the M-39 Handbook informs that the proper adjustment of carrier routes means an equitable and feasible division of the work among all of the carrier routes assigned to the office and that all regular routes should consist of as nearly 8 hours daily work as possible.

The evidence, as discussed above, shows that Route 0152 was not in conformance to Section 242.122 of the M-39 Handbook. The evidence also shows that route adjustments claimed to have been made by the end of October 1999 did not bring the Route 0152 into conformance with Section 242.122. Route adjustments were necessary to bring Route 0152 to as

nearly eight (8) hours daily work as possible. However, those necessary route adjustments were not placed in effect within 52 calendar days of the completion of the mail count from the route inspections completed as of March 20, 1999. It is unclear if those route adjustments to comply with Section 242.122 have yet to be made. Inasmuch as this information is within the possession of the Postal Service and was properly requested by the Union under the provisions of Articles 17 and 31, it is appropriate that an adverse inference be drawn that the route adjustments needed to Route 0152 have not been made for the purposes of this award. In any event, the provisions of Section 211.3 of the M-39 have been violated with respect to Route 0152 beginning May 11, 1999.

I also find that Section 243.21 of the M-39 was violated. The evidence does not show that permanent relief by transferring sufficient workload was made as required by 243.21. I note that Mr. Denham advised that bad office habits be corrected before proceeding with a route adjustment for Route 0152. However, the record is devoid of any evidence that Mr. Havira engaged in any poor office habits. Manager Anderson did not allude to any such condition in her testimony and gave this arbitrator the distinct impression that Mr. Havira was a competent letter carrier in the office. Therefore, there is no evidence to show that any practices were in need of correction. The evidence shows that some transfer of workload was made from Route 0152 to Route 0153 on October 30, 1999. Nevertheless, as discussed above, this hand-off was insufficient to bring Route 0152 into conformance with Section 242.122; i.e., to consist of as nearly 8 hours daily work as possible. Therefore, Section 243.21 was also violated.

Having found violations of the National Agreement at Articles 15 and 19 and Sections 211.3 and 243.21 of the M-39 Handbook, the matter of an appropriate remedy needs attention. In its Step 3 Appeal, the Union sought the following corrective action:

“That Management fully comply with the MOU dated May 27, 1999. That all Letter Carriers involved be granted an appropriate monetary award for Management’s failure to fully comply with the MOU dated May 27, 1999. That Route 0152 be adjusted to as near eight hours work per day as possible via a territory adjustment. That Letter Carrier Havira be paid 1 hour of overtime at the penalty overtime rate of pay for each hour of overtime worked and for each hour of auxiliary assistance used to complete Route 0152 plus \$25.00 each day beginning November 1, 1999, and continuing each day until Route 0152 is adjusted to as near 8 hours as possible. Lastly, that the same monetary remedy be applied proportionately to the T-6 assigned to Route 0152 on Letter Carrier

Havira's non scheduled days, or whatever remedy an Arbitrator deems appropriate."

The parties stipulated that Mr. Havira bid off Route 0152 in November 2001. The identity of the carrier(s) who succeeded Mr. Havira was not provided in the record.

The Union provided several arbitration awards and two (2) Step 4 decisions in support of its positions in this grievance, many of those awards dealt with remedial action in similar cases. None of the awards were National awards. The Postal Service also provided an arbitration award concerning remedial relief. All material submitted at the hearing has been carefully considered.

Remedial relief under a negotiated grievance-arbitration procedure generally consists of placing the affected bargaining unit employee(s) in as near a position as possible but for the contractual violation. Oftentimes, the remedy includes some form of compensatory payment. Rarely does remedial relief under grievance arbitration procedures consist of punitive damages. An award of punitive damages; i.e., monetary payments intended to punish or deter the breaching party, are generally not appropriate in the arbitral forum. Punitive sanctions have been upheld as a deterrent to recurrent violations, such as when there were repeated breaches of a collective bargaining agreement and actual damages were only nominal.

The record here lacks evidence to show how or in what way Carrier Havira was individually harmed, monetarily or otherwise, by the violations of Article 15 and 19 and the M-39. It was inferred that Carrier Havira worked overtime as part of the resolution to his route being in excess of the general 8-hour rule. However, it was also undisputed that Carrier Havira was on the overtime desired list, thus signifying his agreement to work overtime when called to do so.

Generally when contract violations are proven that have no direct pecuniary impact the appropriate arbitral remedy is a cease and desist order. A monetary remedy may be appropriate where a similar violation has occurred in the past and for which a cease and desist has already been imposed. Such circumstances exist in this case. The Union provided the arbitration award of Arbitrator J. Reese Johnston for Huntsville, Alabama are (Case No. H94N-4H-C-97088642), dated February 4, 2000. In Arbitrator Johnston's case, the violation of failure to effect route adjustments occurred on or about April 22, 1997. Arbitrator Johnston held that, "In order to make some equitable adjustment due to the Grievant's rights being deliberately trampled upon under the facts and circumstances in this case, I grant the corrective action requested and direct



the Postal Service to compensate the Grievant . . . at the rate of forty (40) minutes at his overtime rate of pay for each day beginning April 22, 1997, until the Grievant transferred to another route.” Arbitrator Johnston also awarded interest for the back pay ordered. By virtue of Arbitrator Johnston’s award, the Huntsville, Alabama office and the Alabama District Office of the Postal Service was on notice that a violation of Sections 211.3 and 243.21b. could result in a monetary award for the affected employee. In essence, the Johnston award serves a similar purpose as a cease and desist order.

In addition to the Johnston award, the same Postal Service organizational entities received an arbitration award from Arbitrator Norman Bennett (Case Nos. H94N-4H-C-97115000/B462000239) dated March 21, 2001. The dispute involved a Letter of Demand and an issue that Management had violated Article 31.3 when it failed to produce documents requested properly by the Union. Arbitrator Bennett specifically imposed a cease and desist order from such conduct and advised the parties that an arbitrator in any future case may impose monetary remedies as a result of future violations. As found above, the Postal Service violated Articles 17 and 31 when it failed to provide the information agreed upon by the parties in the May 27, 1999, settlement agreement. The parties were well aware of the issues in dispute in this case when Arbitrator Bennett’s award was rendered. Reference the Union’s Step 3 appeal wherein the Union stated, “The Union has added Article 17 and 31 Violations to this case because of Management’s failure to supply the Union with the information as called for in [the May 27, 1999, settlement agreement].” Therefore, a second occurrence of a violation occurred in this case which was in contravention of the Bennett cease and desist order.

### **Remedial Relief**

In view of the foregoing, the following remedial relief is ordered.

First, the Huntsville Downtown Station is to immediately review the work hours of Route 0152 and to bring them to eight (8) hours average per day as near as possible by making the appropriate route adjustments articulated in Section 243.21b. This order for route adjustment is not subject to disapproval from the Alabama District Office inasmuch as a full and fair opportunity was given to the Postal Service to show that a route adjustment was not necessary and no such showing was made. On the contrary, the evidence of record shows that such a route

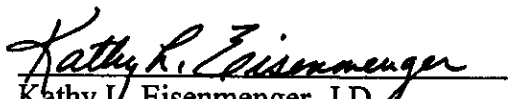
adjustment is necessary to comply with the M-39. The only possible question is how much of a route adjustment needs to be made to bring the route into compliance with the 8-hour rule.

Second, all letter carriers who worked Route 0152 beginning from November 1, 1999, until the route adjustments are made as ordered above are to receive penalty overtime pay for any overtime worked on either Route 0152 or another route that incurred overtime due to a hand-off from Route 0152. Penalty overtime will be calculated at the rate authorized in Article 8.4. The Postal Service will conduct an audit of the overtime usage for the above period (from November 1, 1999, until the route adjustments are made) within thirty (30) days from receipt of this award, make the necessary documents available to the Union for the Union's review, and calculate the penalty overtime amounts. Penalty overtime payments as ordered herein will be disbursed to the affected employees, one of whom includes Mr. Havira, on the first pay day that follows from sixty (60) days of the receipt of this award. Should the Postal Service fail to have made the route adjustments by that point in time, penalty overtime payments will be made on a continuing basis for each hour of overtime worked because Route 0152 exceeds on an average an eight (8) hour work day. Only one employee per day is eligible for the penalty overtime, unless the Postal Service splits the workload so that the excess workload was carried by more than one carrier and those carriers each worked overtime due to the excess of Route 0152. This is to be construed as compensatory relief and not misconstrued as a windfall for carriers not affected directly by the excess workload of Route 0152.

#### **Award**

The grievance is sustained. The Postal Service will effect the remedial relief specified immediately above. The Postal Service is also ordered to immediately cease and desist from future violations of Articles 15 and 19 and Sections 211.3 and 243.21b.

Date: April 2, 2003

  
Kathy L. Eisenmenger, J.D.  
Labor Arbitrator