

C# 13793

A+B

NATIONAL ARBITRATION PANEL

In the Matter of the Arbitration ) GRIEVANTS: C. L. DeWeese  
                                      ) R. L. Webber  
                                      )  
                                      between  
                                      )  
UNITED STATES POSTAL SERVICE ) CASE NOS.  
                                      ) H7N-3C-C 34861  
                                      ) H7N-2J-C 37210  
                                      -  
                                      )  
NATIONAL ASSOCIATION OF LETTER )  
CARRIERS )

BEFORE: Richard Mittenthal, Arbitrator

APPEARANCES:

For the Postal Service: Patricia A. Heath  
                                      Labor Rels. Spec.

For the NALC: Keith E. Secular  
                                      Attorney (Cohen Weiss  
                                      & Simon)

Place of Hearing: Washington, D.C.

Date of Hearing: May 13, 1994

Date of Post-Hearing Briefs: July 13, 1994

AWARD: The grievances are disposed of in accordance with the findings in this opinion. They are remanded to the local parties for development of more detailed facts and for resolution of the problem. Should the parties be unable to settle their differences, their dispute can be placed in regional arbitration for a final decision.

Date of Award: August 31, 1994

  
Richard Mittenthal  
Arbitrator

## BACKGROUND

These grievances involve two full-time city carriers who were summoned as members of National Guard units to assist local law enforcement authorities in attempts to eradicate marijuana crops. The issue is whether they were entitled to a "law enforcement allowance" under the "military leave" provisions of the Employee & Labor Relations Manual (ELM). NALC says they were; the Postal Service says they were not.

Growing marijuana is unlawful in Tennessee and Kentucky. Both states passed laws providing for the eradication of marijuana crops. Pursuant to these laws, the State Governors created a "task force" or a "strike force" to eliminate such crops. This effort involved the state police and at least in Kentucky law enforcement officers of the Forestry Division of the Department of Agriculture. Because the states believed additional law enforcement personnel were necessary, they called upon members of their National Guard units to assist.

C. L. DeWeese is a letter carrier in Kentucky; R. L. Webber is a letter carrier in Tennessee. They belong to their respective state National Guard units. They were ordered to active duty in connection with this program to eradicate marijuana. They were not present at the arbitration hearing. Hence, it is not clear what their duties were. A National Guard letter states that DeWeese was involved in cutting, removing and burning of marijuana crops, providing physical security to those engaged in this work, and observing these crops from the air. He was authorized to carry firearms and to arrest or detain civilians as necessary. Webber evidently had somewhat similar duties.

Both men were placed on "military leave" for the initial 15 calendar days of their National Guard duty. They received their National Guard pay plus their regular pay from the Postal Service during this period. They claim they were entitled to an additional 22 workdays of paid "military leave" under Section 517 of the ELM.

The relevant provisions of Section 517 read in part:

517.11 Definition. Military leave is authorized absence from postal duties without loss of pay, time, or performance rating, granted to eligible employees who are members of the National

Guard or Reservists of the armed forces.

\* \* \*

517.121 Duty Covered

b. Service providing military aid for law enforcement purposes.

517.122 ...Duty Not Covered

c. Service with the National Guard if ordered by the State Governors without authority of the Department of Defense except when such service is in connection with regular annual encampment or for law enforcement purposes as specified in 517.53.

\* \* \*

517.3 Policy

Any employee desiring to serve in a Reserve Guard Unit is allowed to do so and no action to discourage either voluntary or involuntary participation is permitted. The U. S. Postal Service allows employees:

c. To perform any other active duty ordered by the National Guard and Reserve Units of the armed forces. Eligible employees are also entitled to paid military leave for such duty as and to the extent provided in 517.

\* \* \*

517.5 Military Time Allowances

517.51 General Allowance. Eligible full-time and part-time employees are granted military leave as follows:

a. Full-time Employee - 15 calendar days...each fiscal year.

517.53 Law Enforcement Allowance. Eligible full-time and part-time employees are granted additional military leave over and above 15 calendar days if they are ordered by appropriate

authority to provide military aid to enforce the law for their state...Law enforcement military leave is granted as follows:

a. Full-time Employee - 22 workdays...each fiscal year. (Emphasis added)

#### DISCUSSION AND FINDINGS

Because grievants DeWeese and Webber are full-time career employees and because they are members of National Guard units, they are eligible for "military leave." They received the "general allowance" for their initial 15 calendar days of "military leave." That subject is dealt with in Section 517.51 of the ELM.

Four separate conditions must be satisfied before either grievant is entitled to a "law enforcement allowance" under 517.53. He must (1) be "ordered" (2) by an "appropriate authority" (3) to provide "military aid" (4) for the purpose of "enforc[ing] the law for their state..." Both grievants were "ordered" to report for duty by an "appropriate authority", namely, their respective state National Guard units. They plainly met the first and second conditions.

The parties' disagreement concerns the third and fourth conditions. NALC maintains that the grievants were summoned to assist law enforcement officers in destroying marijuana crops pursuant to state statute. It believes this purpose meets the requirements of 517.53 in that the grievants were providing "military aid in order to enforce the law for their state..." The Postal Service insists, however, that 517.53 was intended to cover only employees who, after being called for service, are "involved directly in the suppression of riots, violent assembly, looting, civil disorder or other specifically identified violations of state law in relation to emergencies." It alleges that the grievants' activity in helping to destroy marijuana crops in their states did not fit this description and that they therefore are not entitled to the "law enforcement allowance."

#### I - Management Rights

To begin with, the Postal Service says the test in Section 517.53 - "to provide military aid to enforce the law..." - is a "general term" which refers to a "category of

activities." It asserts that because these words do not constitute a "definition", Management was free to "establish parameters...for determining the circumstances under which..." the 517.53 "law enforcement allowance" shall be granted. It states that the "parameters" Management developed do not encompass National Guard service to assist in the destruction of marijuana crops.

This contention is not persuasive. The ELM creates a great many rules which govern Management's behavior. These rules, to the extent to which they concern "wages, hours or working conditions", are made binding on Management through Article 19 of the National Agreement. The "law enforcement allowance" rule in 517.53 is a "definition", expressed in "general terms", of the conditions under which an employee is entitled to such an "allowance." The ELM left open the question of how that "definition" should be applied to specific cases. Management was free, of course, to announce "parameters" to help its labor relations and compensation specialists in administering the "allowance." But these "parameters" simply constitute Management's opinion as to the proper scope of the "allowance" in light of the language, purpose and history of 517.53. Those "parameters" do not have the status of an ELM provision. They do not preclude NALC from prevailing here if its argument as to how the 517.53 "definition" should be applied to the facts of this case is more compelling than the Postal Service's argument.

## II - Origin

The origin of Section 517.53 cannot be ignored. Public Law 90-588 was enacted in October 1968. It was a response to pay inequities resulting from federal employees being called back to military service to control and suppress the civil disorders then occurring in cities throughout the country. These employees received their regular federal pay for the first 15 calendar days of service. Thereafter, if they wished to continue to receive such federal pay, they had to use their annual leave. Otherwise, their federal employers placed them on military furlough without pay and their only income was the salary they received from their military unit. That meant, for the vast majority of those affected, a substantial decline in income. Congress concluded that these arrangements were unfair and created a right to regular federal pay for an additional 22 workdays where the employee was being used "for the purpose of providing military aid to enforce the law..."

Postal workers were then federal employees and Public Law 90-588 applied to them. Regulations were written by postal Management in 1969 incorporating the relevant features of the law. Those regulations remained in effect until Section 517.53 of the ELM appeared several years after the Postal Reorganization Act of 1971. The "law enforcement allowance" in 517.53 closely tracks the law and the subsequent postal regulation. It is significant that nowhere in the law or in 517.53 is the scope of the "law enforcement allowance" limited to riots, civil disorders, and the like.

Given this history, it appears that 517.53 was intended to apply to National Guard (or armed forces reserve) duty in support of state or local authority to maintain order at a time when the security of a community is threatened by riots, civil disorder or other unlawful activity. The Postal Service itself recognized in its post-hearing brief that the scope of 517.53 is not limited to riots and civil disorder but could in appropriate circumstances cover "other specifically identified violations of state law in relation to emergencies."

### III - The Text

The language of 517.53 is equally important - "military aid to enforce the law for their state..." Some National Guard activity, although prompted by emergencies, does not appear to involve "enforc[ing] the law..." This would most likely be true when guardsmen are engaged in fighting a forest fire or placing sandbags on a river bank to prevent flooding. Indeed, even when an activity can fairly be described as "enforc[ing] the law...", it may not involve "military aid." The latter words suggest the kind of work characteristic of, or typically performed by, soldiers. Directing vehicular traffic, for instance, may concern enforcement of traffic laws but it would not ordinarily be considered "military aid." The mere fact that National Guardsmen in uniform perform a given function does not necessarily transform that function into "military aid." One must evaluate the duty performed.

With these observations in mind, I turn to the present case. Given the legislative declaration that marijuana use is unlawful, marijuana crops in a state pose a threat to the security of the community. Tennessee and Kentucky sought to eliminate that threat by passing laws calling for the destruction of such crops. Hence, the cutting, removing and burning of marijuana crops was done to "enforce the law..."

These tasks, however, are agricultural in nature. They do not involve "military aid." Nevertheless, as Management's compensation specialist pointed out in her testimony, "crop eradication in and of itself doesn't explain the duties performed." If the grievants did nothing more than cut, remove and burn marijuana crops, their claim here would have to be denied. But, as noted earlier in this award, there is no hard evidence as to what exactly the grievants did. They were authorized to carry firearms and to arrest and detain civilians. If they engaged in police-type activity a meaningful part of the time, similar to what "military police" do in the armed forces, they would have provided "military aid to enforce the law..." and would be entitled therefore to the "law enforcement allowance."

This question of fact must be returned to the parties for further investigation. Once it becomes clear what the grievants did, the parties should be able to resolve the matter on the basis of the findings in this award. If not, they can return the dispute to regional arbitration for a final ruling.

#### IV - Practice

Past practice does not demand a more restrictive interpretation of 517.53.

Over the years, the Postal Service made a number of internal policy statements which would limit the scope of 517.53 to riots, civil disorder, and the like. Notwithstanding the policy, it acknowledged in a May 1989 opinion letter that even absent these conditions, 517.53 could properly be invoked whenever guardsmen are truly engaged in "actual law enforcement." That idea was further expanded upon in its post-hearing brief. There, to repeat again, Management noted that 517.53 coverage can extend to work associated with "other specifically identified violations of state law." Thus, it seems clear that 517.53 is capable of reaching beyond riots and civil disorder.

In any event, policy statements do not always translate into practice. The Postal Service observed in a July 1982 opinion letter that the compensation section had researched this issue and had found Management "has no consistent national past practice with regard to granting 22 days additional military leave", that is, with regard to the application of 517.53. As for the specific problem in the instant grievances, there is no evidence that guardsmen invoked 517.53 prior to mid-1989 on account of their being

used to help destroy marijuana crops. There were roughly twelve such claims between July 1989 and December 1992, including the present claims filed by the grievants in September and October 1990. All of these requests for a "law enforcement allowance" were denied. But there is no evidence as to what the circumstances were behind each of these claims. We simply do not know what duties were performed. It may be that the grievants were among the very first employees to enter such a claim. The record fails to show a meaningful practice as to the application of 517.53 to guardsmen engaged in the elimination of marijuana crops. There certainly is no practice so uniform and so widely accepted as to warrant denying these grievances.

#### AWARD

The grievances are disposed of in accordance with the findings in this opinion. They are remanded to the local parties for development of more detailed facts and for resolution of the problem. Should the parties be unable to settle their differences, their dispute can be placed in regional arbitration for a final decision.

  
Richard Mittenthal  
Richard Mittenthal, Arbitrator