

C#17985

REGULAR ARBITRATION PANEL

In the Matter of Arbitration)
between) Grievant: J. Grincavitch
United States Postal Service) Post Office: Holyoke, MA
and) Case No: B94N-4B-C 97087642
National Association of) GTS: 23702
Letter Carriers, AFL-CIO)

Before: GEORGE R. SHEA, Jr.

Appearances:

For United States Postal Service: J.D. Wallace

For National Association of
Letter Carriers (Union): J. Weissman

Place of Hearing: Springfield, MA

Date of Hearing: December 2, 1997

Date of Award: February 16, 1998

AWARD SUMMARY

For the reasons more fully set forth in the attached Opinion, the Arbitrator determines that (a) the underlying grievances in these matters are arbitrable and (b) the Service violated the Agreement when it did not adjust the subject routes on or before January 2, 1997. The Arbitrator further determines that the following remedy is the most appropriate in the circumstances of this matter.

The Arbitrator orders the Service to cease and desist from such violations in the future. The Arbitrator awards each Grievant, whose route was adjusted as a result of the Route Inspection occurring during the Spring of 1997 by one half an hour or more, one hour of compensation at his/her normal rate of pay for each day his/her route exceeded eight hours during the period between March 17, 1997, fourteen days prior to the Union's filing of the grievances, and fifty-two days after the Spring 1997 Route Inspection or the date on which his/her route was adjusted to be an eight hour route, whichever occurred first.

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George R. Shea, Jr.
George R. Shea, Jr.

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PAUL DANIELS, NBA
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OPINION

STATEMENT OF PROCEEDINGS:

The National Association of Letter Carriers, AFL-CIO [Union], in accordance with the parties' National Agreement [Agreement], appealed the above captioned matter to arbitration. The undersigned was designated as the Arbitrator to hear and decide the matter. The Arbitrator held a hearing on and at the previously referred to date and location. The parties' representatives appeared. The Arbitrator provided the parties with a full and fair opportunity to be heard, to present evidence and argument, and to examine and cross examine witnesses. The parties agreed to consolidate the following matters for purposes of hearing and disposition: B94N-4B-C 97087642, Grincavitch; B94N-4B-C 97087636, Clifford; B94N-4B-C 97087637, Grasso; B94N-4B-C 97087638, Mekal; B94N-4B-C 97087639, Boyle; B94N-4B-C 97087640, Radwanski; B94N-4B-C 97087641, Bishop; B94N-4B-C 97087643, Tallman.

The Union called E.W. Minkley, A. Grasso, J. Grincavitch and P.R. Tallman as its witnesses. The Service called J.M. Brunelle and D. Colello as its witnesses.

BACKGROUND and CONTRACT PROVISIONS:

1. Article 8.1. of the Agreement, in parts relevant to this matter, provides the following:

"The work week for full-time regulars shall be forty (40) hours per week, eight (8) hours per day within ten (10) consecutive hours ..." (J-#1, p.g. 18)

2. The parties' National Memorandum of Understanding dated July 21, 1987, in parts relevant to this matter, provides the following:

"The United States Postal Service and the National Association of Letter Carriers, AFL-CIO, agree that it is in the best interest of the Postal Service for letter carrier routes to be in proper adjustment..."

"Therefore, where the regular carrier has requested a special mail count and inspection, and the criteria set forth in Part 271g of the Methods Handbook, M-39, have been met, such inspection must be completed within four weeks of the request, and shall not be delayed. If the results of the inspection indicate that the route is to be adjusted, such adjustment must be placed in effect within 52 calendar days of the completion of the mail count in accordance with Section 211.3 of the M-39 Methods Handbook. Exceptions may be granted by a Division General Manager only when warranted by valid operational circumstances, substantiated by a detailed written statement, which shall be submitted to the local union within seven days of the grant of the exception. The union shall then have the right to appeal the granting of the exception directly to Step 3 of the grievance procedure within 14 days. (J-#1, p.g. 179)

3. The **Methods Handbook, M-39 [M-39]** an Article 19 Handbook, in parts relevant to this matter, provides the following:

"Section 141.111, The routes must be maintained in reasonable adjustment throughout the year. In order to fulfill this requirement, local managers may find it necessary to make minor route adjustments, to provide relief, add deliveries, capture overtime, etc."

"Section 211.1, Advance Preparations, Selecting Period for Mail Counts and Route Inspections: In order to achieve and maintain an appropriate daily workload for delivery units and routes, management will make at least annual route and unit reviews consisting of an analysis of items listed in Section 214, and workhours, volumes, and possible deliveries. Items listed in section 213 may also be utilized in the review. These reviews will be utilized to verify adjustments which have been taken by management, or need to be taken by management, in order to maintain efficient service. The results of the review will be shared with the local NALC President, or designee, and the regular letter carrier(s) serving the route(s) that require adjustment. In some units it may be necessary to proceed with mail counts and route inspections on one

or more routes. These inspections will be conducted the first week of September and May 31, excluding December."

"**Section 242.121, Evaluation and Analysis, Basic Standards:** Work schedules of carriers must be in conformity with the National Agreement. The ideal route begins and ends as near as practicable to the delivery unit, with the greatest volume of mail delivered on the first part of the route. Auxiliary assistance or overtime should be necessary only on extra heavy days. The mail should be delivered with the least possible amount of handling and travel."

"**Section 242.122, Evaluation and Analysis, Basic Standards:** 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. All regular routes shall consist of as nearly 8 hours daily work as possible."

"**Section 243.21, Providing Relief to Routes, 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:

(a) Temporary relief must be provided in the most efficient and economical manner, either by using auxiliary assistance in the office or on the street or by authorizing necessary overtime.

(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. When routes require a current adjustment and Delivery Point Sequencing will commence within 6 months, management will adjust using non-territorial, non-scheme change adjustments. 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." (J-#4)

ISSUE:

The parties agreed to the following statement of the issue before the Arbitrator:

Are the underlying grievances in this matter non-arbitrable by reason of the Union's failure to initiate the grievances within the time limits required by Article 15 of the National Agreement [Agreement]? If the matter is arbitrable, did the Service violate the Agreement when it did not adjust the subject routes within 52 calendar days of the completion of their Special Inspection? If the Service violated the Agreement, what shall be the appropriate remedy?

FACTS:

The parties' representatives entered into the following written and signed stipulated statements of facts: (J-#3)

1. Three full-time positions were eliminated after an April 1996 General Inspection [of the Letter Carrier routes at the Holyoke, MA Post Office].
2. The Grievants' routes were built up and they [Carriers] immediately experienced the inability to deliver their new routes in eight hours.
3. Their routes qualified for Special Route Inspections, which they requested and were granted [for] the week of October 26, - November 1, 1996.
4. Management conducted the steps of [a] Route Evaluation [as set forth] in Chapter 2 of the M-39 up to providing Form 1840-Front.
5. Each route evaluated at over 8 hours and qualified for Permanent Relief, as defined by the M-39, section 243.21.
6. The total relief needed on these routes was 14:35 hours.

7. Management did not conduct a pre-adjustment consultation with the Grievants.
8. Management did not complete the "1840 Back" for each route.
9. The due date for adjusting the routes to 8-hours daily work was December 23, 1996 ("Day 52") or January 2, if "major scheme changes" were necessary.
10. The routes were never adjusted to the results of the Special Inspections.
11. The Grievants were not consulted by Union President, Ed Minkley, regarding entering any agreement not to adjust their routes.
12. They [Grievants] did not enter such an agreement.
13. Throughout the period of the grievances, they [Grievants] repeatedly asked for Auxiliary Assistance but usually worked the overtime on their routes, except for Walter Bishop, who has medical limitations and Chris Boyle who was not on the Overtime Desired List.

The events regarding this matter were described in the varying testimony of the parties' witnesses and in the documentary evidence offered by the parties. Based upon his review of that evidence, including his personal observation of the witnesses during their testimony, the Arbitrator determines that the preponderance of that evidence supports the following findings of fact.

1. The Grievants, at times relevant to this matter, were assigned to the Holyoke, MA Post Office [Post Office] as regular City Letter Carriers. Each of the Grievants requested and received a Special Inspection of his/her route between October 26 and November 1, 1996. The Special Inspections indicated that the routes needed permanent adjustments. The needed adjustments involved major scheme modifications; consequently, the deadline for implementing the needed adjustments was January 2, 1997. The Service did not consult with the impacted Letter Carriers, or complete the Back of Form 1840 as part of the Special Inspections. All the Grievants, except two were on the Overtime Desired List [OTDL] at the Post Office. There is

- insufficient evidence to make a determination as to whether or not any of the Grievants removed themselves from the OTDL.
2. On December 19, 1996, the Union's local president, Minkley, [Minkley] and J. Weissman representing the Union met with Postmaster Brunelle [Brunelle] to discuss the improprieties of the March, 1996 General Inspection of the routes at the Post Office, a future inspection of the Letter Carrier routes at the Post Office, and the proposed date of the new inspection of April 1, 1997.
 3. The Union and the Service agreed to a special joint Labor-Management team to re-evaluate the results of the March, 1996 General Inspection of the Letter Carrier routes at the Post Office. The members of the re-evaluation team were M. Harazmus and T. Grasso representing the NALC and D. Colello representing the Service. The re-evaluation team submitted its report to the Postmaster and the President of NALC, Branch 46 on February 14, 1997. (U-#1) The report indicated that: (a) the routes in general needed approximately 15 hours of some form of router relief to maintain thirty-four eight hour routes at the Post Office. (U-#1)
 4. Between January 2, 1997 and March 31, 1997, the Union's local president, Minkley, met with Postmaster Brunelle approximately thirty times to discuss the implementation of the needed route adjustments. The Postmaster indicated to the Union that he was attempting to acquire Part-Time Flexible employees and Casual employees to provide the Grievants with "Routing Assistance." During this period the Service authorized overtime for the Grievants. The Union did not initiate a grievance protesting the delayed implementation of the route adjustments during this period.
 5. On March 31, 1997, the Union, in the person of E. Minkley, filed the underlying grievances in this matter. The grievance alleged that the Service violated the Agreement when it failed to timely adjust the routes found overburdened during the Special Inspection and when it did not interview the impacted

Letter Carriers. Minkley met with J.H. Bonafilia on the grievances. The Service denied the grievances maintaining that they were untimely and alternately that the challenged delay in the route adjustments was consistent with a settlement agreement reached by the parties at the local level.

POSITIONS OF THE PARTIES:

National Association of Letter Carriers, AFL-CIO [Union]

In response to the Service's claim that the instant matter is not arbitrable, the Union maintained that: (a) the grievance was initiated within fourteen days of the date when the parties' grievance-settlement-discussions ended; and (b) the Service's violation of the Agreement is a continuing violation and the Union could grieve the last occurring violation and did so in this matter. Based upon these factual assertions and contractual contentions, the Union requested the Arbitrator find the matter arbitrable and determine that the period of appropriate remedy commenced on January 2, 1997.

The Union maintained that the Service violated the Agreement, including applicable sections of the M-39 Manual, when it failed to adjust the Grievants' routes on December 23, 1996, within fifty-two calendar days of the completion of the Special Inspections of the impacted routes, or by January 2, 1997, if major scheme changes were required. The Union contended that the Service's claim that the Union agreed to the postponement of the required route adjustments is an affirmative defense for which the Service must bear the burdens of proof and persuasion. The Union argued the Service did not meet either of these burdens.

The Union maintained that it should be compensated for the damage it incurred in the form of diminished employee confidence in the Union resulting from the Service's flagrant violation of the Agreement. The Union argued that the Service's violation of the Agreement harmed the Grievants; in that, (a) it caused the Grievants to work excessive overtime; and (b) the excessive

overtime impaired the Grievants' health and interrupted their family life.

Based upon these factual assertions and contractual contentions, the Union requested the Arbitrator (a) find the Service's actions violative of the Agreement, (b) sustain the grievance, (c) order the Service to cease and desist from similarly violating the Agreement in the future, and (d) award each Grievant one hour's pay at the overtime rate for each day his/her route remained improperly out of adjustment. The Union asserted that the requested remedy is compensatory, not punitive, and is within the Arbitrator's contractual authority. The Union submitted extensive arbitral authority (25 Regional and National Awards) in support of this contention.

United States Postal Service [Service]

The Service maintained that the instant matter is not arbitrable; in that, the Union waived the grievances when it failed to initiate them within the time limits prescribed by Article 15 of the Agreement [Article 15]. The Service, in response to the Union's assertions, further maintained that there were no settlement discussions between January 2, 1997 and March, 1997, as claimed by the Union and that the instant matter does not constitute an on-going grievance; therefore, no mitigating circumstances existed for the Union's failure to initiate these grievances within the time limits set forth in Article 15.

In the alternative, the Service argued that the Union agreed to the delay in the adjustments of the Grievants' routes; therefore, no violation of the Agreement occurred.

Based upon these factual assertions and contractual contentions, the Service requested the Arbitrator find the matter not arbitrable. The Service further requested that, if the Arbitrator determines the grievances are arbitrable, he deny them on the merits of the Union's contentions.

DISCUSSION:

The Service maintained that the instant matter is not arbitrable; in that, the Union failed to initiate the underlying grievances within the time prescribed by Article 15. The Service, as the moving party on this argument, must bear the burdens of proof and persuasion regarding this affirmative defense to the Union's grievances. The Service asserted that the evidence establishes that the Union knew, or should have reasonably known, that the Service did not implement the route adjustments resulting from the Special Inspections within the contractually required time limits on January 2, 1997 and that the Union failed to initiate the underlying grievances until March 31, 1997, significantly past the fourteen day deadline for filing the grievance at Step One. (J-#1, p.g. 66) The Service further maintained that the evidence establishes that it raised the timeliness of the grievances at Step One of the grievance procedure, as required by the Agreement.

The Arbitrator cannot concur with the Service's assertions on this issue. Section 3.B. requires the Service 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..." (Emphasis added by the Arbitrator) The Section provides that the Service's failure to raise the timeliness issue as required by the section constitutes a waiver of that objection to the grievance. While the evidence establishes that the Service raised the untimeliness of the grievances at Step One and at Step 3 of the grievance procedure, the evidence does not establish that the Service raised the issue at Step 2 of the grievance procedure. Additionally, the Arbitrator determines that the Service is incorrect in its assertion that the filing period commenced on January 2, 1997. In the Arbitrator's opinion, the Service's violation of the Agreement re-occurred on March 31, 1997, when the Union ended the discussions with the Service regarding the implementation of the route adjustments and the Service failed to implement the required route adjustments. Finally, the Arbitrator determines that the Union timely filed the underlying grievances on

March 31, 1997 and that the damages resulting from the Service's failure to implement the route adjustments within the contractually required time, if any, must be calculated for a period commencing no earlier than fourteen days prior to the Union's initiation of the grievances.

The Union, as the moving party in this matter, must bear the burdens of proof and persuasion regarding its allegation that the Service violated the Agreement when it failed to make the route adjustments necessitated by the Special Inspections in a timely manner. If the Union is to prevail in this allegation, it must establish that (a) the Special Route Inspection resulted in a need for permanent adjustments to the Grievants' routes; (b) the Agreement, including the M-39 Handbook, required the implementation of the needed route adjustments within the fifty-two days subsequent to November 1, 1996, or by January 2, 1997, if they involved major scheme changes; (c) the Service failed to implement the needed route adjustments within the contractually required time period; (d) the Service failed to acquire a proper postponement of the implementation of the needed adjustments, as authorized by the M-39 Manual.

The evidence indicates that the Grievants properly requested Special Route Inspections, the Service acknowledged these requests and commenced the requested Special Inspections. The evidence does not establish that the Service properly completed the Special Inspections. The record does establish, however, that the Special Inspection progressed far enough to indicate that adjustments were required to bring the Grievants' routes to eight hour routes. This need was further established by the Route Adjustment Team's subsequent analysis of the Letter Carrier routes at the Post Office.(U-#1) Finally, the evidence establishes that the Service did not adjust any of the Grievants' routes as a result of the Special Inspections. Based upon these factual determinations, the Arbitrator determines that the Union established a *prima facie* case that the Service violated the Agreement when it failed to implement

the route adjustments found necessary by the Special Inspection with the required fifty-two day period, or by January 2, 1997.

The Service's obligation to complete the required route adjustments within fifty-two days could have been modified by the District Manager pursuant to Section 211.3 of the M-39 Manual. The evidentiary record does not establish that the Service requested an extension of time to adjust the Grievants' routes or that any modification of the 52-day requirement was approved by the District Manager. The Service could have declared the results of the Special Inspection as inaccurate and could have used an alternative method of determining any need for route adjustments pursuant to the provisions of Section 242 of the M-39 Manual. (J-#4, pg 129-138) The record does not support a finding that the Service exercised these options regarding the results of the Special Inspection.

The Service argued that at a meeting between the representatives of the Union and the Postmaster on December 19, 1996, the Union agreed to the Service's delay of route adjustments necessitated by the Special Route Inspection until the Spring of 1997. Extrapolating from this factual assertion, the Service maintained that the Union waived its right to grieve the Service's failure to implement those route adjustments within fifty-two days of the completion of the Special Inspection. The alleged agreement is a fundamental element of the Service's affirmative defense. The Service has the burden of establishing the existence of the alleged agreement. After carefully considering the directly conflicting testimony of the parties' witnesses regarding the December 19, 1996 meeting and all the subsequent meetings of the parties' representatives on related matters, the Arbitrator determines that insufficient evidence exists to support a finding that the parties agreed to postpone the implementation of the needed route adjustments beyond the fifty-two day deadline, or until the Spring of 1997. Accordingly, the Arbitrator must determine that the Service failed to establish the essential element of this affirmative defense.

REMEDY:

The parties stipulated that the Grievants' routes when viewed collectively needed 14.35 hours of assistance to make them eight hour routes and that all the Grievant's routes needed some adjustment to meet this contractually required status. The evidence does not establish, however, the amount of time adjustment each route needed to reach this goal.

The weight of the arbitral authority cited to the Arbitrator indicates that a monetary remedy is appropriate to correct the Service's violations of the Agreement which are similar to those at issue in these matters. Some arbitrators in the cited cases awarded the grievants one hour of pay at their regular rate or at their overtime rate for each day their routes were out of adjustment and they were required to work overtime. Other arbitrators have awarded the grievants a fixed amount of compensation for similar violations. These remedies were awarded to Letter Carriers whether or not they were on applicable Overtime Desired Lists.

Based upon the findings and reasoning set forth in this Opinion, the Arbitrator makes the attached Award.