

C#08727

REGULAR ARBITRATION PANEL

In the Matter of the Arbitration

between

UNITED STATES POSTAL SERVICE

and

NATIONAL ASSOCIATION OF LETTER
CARRIERS

GRIEVANT:

POST OFFICE: Venice, CA.

CASE NO: W7N-5C-C 5445

BEFORE: Thomas F. Levak,

ARBITRATOR

APPEARANCES:

For the U. S. Postal Service:

Wanda B. Sanders

For the Union:

Thomas H. Young, Jr.

Place of Hearing: Venice, CA.

Date of the Hearing: 2/22/89

AWARD: The Service violated the National Agreement and has failed to comply with the May 15, 1986 Step 3 decision letter in Case No. W4N-5B-C 16163.

Date of Award: 3/10/89


Arbitrator

BEFORE THOMAS F. LEVAK, ARBITRATOR

REGULAR WESTERN REGIONAL PANEL

In the Matter of the Grievance
Arbitration Between:

W7N-5C-C 5445

U. S. POSTAL SERVICE
THE "SERVICE"

DISPUTE AND GRIEVANCE
CONCERNING ROUTE
ADJUSTMENTS/MONETARY
REMEDY

(Venice, CA.)

ARBITRATOR'S OPINION
AND AWARD

and

NATIONAL ASSOCIATION OF
LETTER CARRIERS, AFL-CIO
THE "UNION"

This matter came for hearing before the Arbitrator at 9:00 a.m., February 22, 1989 at the offices of the Service, Venice, California. The Union was represented by Thomas H. Young, Jr. The Service was represented by Wanda B. Sanders. Testimony and evidence were received and the hearing was declared closed following oral closing argument. Based upon the evidence and the arguments of the parties, the Arbitrator decides and awards as follows.

OPINION

I. THE ISSUE.

This case concerns the Service's failure to comply with the terms of a Step 3 decision directing special route inspections under M-39 Section 271. The parties are in agreement as to the facts, and the only issue before the Arbitrator is the appropriate remedy to be awarded to rectify the Service's failure. The Arbitrator frames the issue as follows:

The parties have stipulated that the Service failed to comply with the May 15, 1986 Step 3 decision in Case No. W4N-5B-C 16163. What award is appropriate to remedy that failure?

II. FINDINGS OF FACT.

Background.

This case concerns the Venice, California office of the Service. In early 1988, Carl R. Zaptiff was serving as the Venice Officer-In-Charge. Later in that year, Lorene R. Berry

became the Venice Postmaster, and has continued to serve in that capacity to date. At all times relevant, J. A. Perlongo has served as the Venice Local Union Executive Vice President.

Case No. W4N-5B-C 16163: The Step 3 Decision.

In 1986, 38 Letter Carrier routes existed at the Venice office. On March 8, 1986, all of those Letter Carriers requested special 6-day route counts and inspections under M-39 Section 271. All those Letter Carriers were qualified for those route inspections under the M-39. The Letter Carriers' requests were not granted within the required 4-week period following those requests. Therefore, on April 11, 1986, the Union initiated a Step 1 grievance. The grievance was denied.

On April 11, 1986, the Union filed its Step 2 appeal, which provided in relevant part:

FACTS: WHAT HAPPENED On 3-8-86 at the Annex, the regular carriers assigned to the following routes requested special 6 day route counts and inspections, for which they qualified in accordance with the M-39: 1,3,4,6,7, 8, 9, 12, 15,17, 18, 20, 21, 22, 23, 24, 25, 26,28,29,30,33,35,36,38,40,41,42, 43,44,45,46, 50, 56, 57, 52, and 70. By 4-9-86 after the four week period following the requests, Management had failed to grant the requests. Therefore, the requests were not granted within the allowable time limits.

UNION CONTENTIONS: REASONS FOR GRIEVANCE The grievants' properly requested the Special Route Inspections for which they qualified according to the Union's investigation. Management has unreasonably denied requests, and this denial violates the cited provisions.

CORRECTIVE ACTION REQUESTED: Immediately grant the grievants' requests for a Special 6 day Route Inspection on the subject 38 routes to be conducted in accordance with the applicable provisions of the M-39. Pay individuals compensatory time for all overtime hours worked as the result of the routes being out of adjustment and the inspections being denied.

The Union's Step 2 appeal was denied, and the case was appealed by the Union to Step 3. The Step 3 settlement letter dated May 15, 1986 from David. H. English, Regional Labor Relations Executive to Brian Ferris, Union National Business Agent, provides:

This will confirm the Step 3 hearing on May 9,

1986, between your designee Tom Young and myself concerning the above grievance.

The route review information is in the process of being gathered and should be completed by May 30, 1986. The adjustment, if any, is to be implemented on or before July 7, 1986. If the Carrier is dissatisfied with the adjustment and qualifies for a special route inspection, such will be given during the month of September 1986.

Based upon the above, this grievance is settled.

The Facts Giving Rise to the Grievance.

The Service did not comply with the Step 3 settlement. No route inspections were made during the month of September 1986, and in fact, no route inspections have been made to date. On September 30, 1986, the Union initiated the instant grievance. The grievance was denied, and on October 17, 1986, the Union filed its Step 2 appeal.

In approximately September 1986, Lorene Berry became the Venice Postmaster. The Union and Berry entered into discussions concerning the Service's failure to comply with the Step 3 settlement, and ultimately the Union agreed to grant Berry a "year's grace" in which to effect satisfactory route adjustments.

On July 2, 1987, Berry wrote a letter to Perlongo that purported to resolve the matter by effecting a number of route adjustments, assigning Routers to assist Letter Carriers, and by adding 5 new full-time regular routes and 3 auxiliary routes.

Berry's action did not rectify the situation. While both parties agree that she made a good-faith attempt to remedy the situation, factually, the Service remained out of compliance with the Step 3 settlement. All routes remained out of adjustment, with 22 routes remaining substantially out of adjustment. The assignment of Routers to Units 2 and 3 had virtually no effect on the situation. Unit 1 never received a Router, and the Unit 2 Router was typically assigned to come to work 3 1/2 hours early and case routes on Units 1 and 3.

Berry attributes the continuing situation to be due to a high employee turnover problem coupled with severe budgetary limitations. She testified that at all times a high turnover rate has existed, and that while she has hired replacements, transfers, retirements and other employee movements have prevented a resolution of the matter. She further noted that the Venice office has not been budgeted with funds to rectify the situation in accordance with the Step 3 settlement.

The effect of the Service's failure to comply with the Step

3 settlement is that all Venice Letter Carriers have regularly and continuously been required to work mandatory overtime.

III. UNION CONTENTIONS.

The Union does not dispute that Berry has made good-faith efforts to comply with the Step 3 settlement. However, this case cannot be decided upon her efforts. The fact is that the Service has had 3 years to comply with the Step 3 settlement and to budget the Venice office so as to effect that compliance.

The Service has admitted to both a violation of the National Agreement and to failure to comply with the Step 3 settlement. Under those circumstances, it is appropriate for the Arbitrator both to order the Service to cease and desist from those violations, and also to award monetary damages to affected Letter Carriers.

The position of the Union is supported by arbitral precedent. Case No. W4N-5T-C 2960, and others, 12/3/88, Edwin R. Render; No. C4N-4J-C 6365, and others, 11/16/85, Edward D. Pribble; No. N4N-1E-C 22422, 12/16/86, Harry Grossman; No. N4N-1K-C 32218 and 34724, 8/6/87, Harry Grossman; No. N4N-1K-C 33514 and 33522, 7/7/87, Johathan S. Liebowitz.

IV. SERVICE CONTENTIONS.

The Service does not dispute the facts of this case. We agree that the National Agreement was violated and that the Step 3 settlement was not complied with by the Service, and we also agree that the 38 routes need adjustment. However, the Service's interpretation of the facts is different than that of the Union. The most important fact is that a good-faith effort was made to comply with the Step 3 settlement. As is shown by the July 2, 1987 route adjustment letter, a number of routes were adjusted, Routers were assigned, and 5 new routes were established.

The reasons why routes remain out of adjustment is due to both budgetary constraints and a continuing employee retention problem.

The Service does not object to conducting route inspections as per the M-39. The only real issue in this case is whether Letter Carriers should be accorded damages. The Service believes that because a good-faith effort was made to comply with the Step 3 settlement, damages are inappropriate.

Further, it is well-established that in a public employer arbitration case, the interest and welfare of the public and the employer's ability to pay should be a consideration. The fact is that Letter Carriers have been paid overtime, as required by the Agreement; and the fact is also, that the Venice office is limited to a specific budget. Therefore, an onerous monetary

award to employees who have already been compensated for working overtime is not equitable, but rather is punitive. In any event, if the Arbitrator determines that an award of damages is appropriate, such award should be delayed until a clear picture of the Service's overtime obligation at the Venice office can be had.

V. ARBITRATOR'S CONCLUSION.

The Service has violated the National Agreement and the terms of the May 15, 1985 Step 3 settlement in Case No. W4N-5B-C 16163. Accordingly, the grievance must be sustained and an appropriate remedy ordered. Under the facts of this case, the following remedy is deemed appropriate by the Arbitrator.

First, M-39 Section 271 6-day route inspections shall be performed and completed on all Venice routes no later than July 1, 1989.

Second, any needed adjustments indicated by those route inspections to bring all routes to 8 hours regular work shall be made by permanent adjustments to take effect no later than the commencement date of the next fiscal year on or about October 2, 1989.

Third, the Service is ordered to pay to all Letter Carriers who have worked, and will continue to work, overtime until their routes are finally adjusted, 1 extra hour's pay at their regular rate for each and every day of overtime worked. Payment is to be delayed as set forth below.

The following is the reasoning of the Arbitrator.

Preliminarily, the Arbitrator wishes to note that the commencement of the arbitration hearing was delayed for approximately two hours while the parties attempted to mutually decide upon an appropriate remedy. The parties were unable to settle the matter and the hearing convened.

As a second preliminary matter, the Arbitrator wishes to state that it is clear from the evidence that local Venice management has made every attempt within its power to comply with the Step 3 settlement. Be that as it may, the Service's violation of the National Agreement and the Step 3 decision letter require that the Arbitrator render an award sufficient to remedy the Service's continuing violation. Stated another way, the Arbitrator believes that the National Agreement mandates that he must effect an appropriate monetary remedy.

It is, of course, well-settled under Service National and

Regional decisions that the Arbitrator possesses authority to fashion an appropriate monetary remedy, and that breaches of the type before the Arbitrator necessarily call for such a remedy. See, e.g., National Case No. NC-S-5426, 4/3/79, Howard G. Gamser; National Case No. NA-NA-0141, 7/7/80, Richard Mittenthal; Regional Case No. W8N-5K-C 13928, 2/10/83, William Eaton; Regional Case No. C4N-4J-C 6365, and others, 1/24/86, Edward D. Pribble; and Regional Case No. W4N-5T-C 2960, and others, all cited by the Union. The Service has cited no authority to the contrary. Neither has the Service cited any authority in support of its argument that good faith attempts to rectify the situation should be a consideration. Further, the Service has cited no authority to support its argument that "public interest/ability to pay" principles applicable to an interest arbitration should be applied to a grievance arbitration.

Further, the Arbitrator's jurisdiction to render an award of damages in route adjustment cases of the type now before the Arbitrator has clearly been established by the decisions of Regional arbitrators above-cited in the Union contentions. Of particular relevance is the fact that the Render decision involved the Service's failure to comply with a Step 3 settlement.

The type of remedy to award in these types of cases is always difficult for an arbitrator to determine. Awards range from certain set cash amounts, such as \$500 per employee, the imposition of penalty pay, and compensatory administrative leave time off. The Arbitrator believes that in establishing a remedy for a particular case, the basic principle to be applied is to render an award that will both fairly compensate affected employees, as well as serve as a detriment to continued violations, without becoming punitive. The Arbitrator believes that his award in this case will satisfy that principle.

Further, in every case, the Arbitrator welcomes suggestions concerning appropriate remedy from the parties. In many cases, the Service will argue in closing that it does not feel that the Union has proved a breach of the National Agreement, but will state that, assuming a breach, it feels that a certain type of remedy is the more appropriate end. Often, the Arbitrator will be able to determine from such suggestions the type of remedy that will be the most palatable to the Service in a lost case. In this case the Service has made no suggestions.

Accordingly, to both effect an appropriate remedy and to avoid a punitive effect, the Arbitrator has decided to give the Service until the commencement of the next fiscal year both to make the permanent route adjustments and to make payment to affected Letter Carriers. This will allow the Service the opportunity to budget the effects of this award as a specific line item in the next fiscal year's budget. However, it should be stressed that there is nothing to prevent the Service from reducing the amount of damages it ultimately will have to pay by conducting inspections and performing adjustments at an earlier

date.

AWARD

The Service has violated the National Agreement and has failed to comply with the May 15, 1986 Step 3 decision letter in Case No. W4N-5B-C 16163. The following Award is deemed appropriate to remedy those violations.

First, M-39 Section 271 6-day route inspections shall be performed and completed on all Venice routes no later than July 1, 1989.

Second, any needed adjustments indicated by those route inspections to bring all routes to 8 hours regular work shall be made by permanent adjustments to take effect no later than the commencement date of the next fiscal year on or about October 2, 1989.

Third, the Service is ordered to pay to all Letter Carriers who have worked overtime to date, or continue to work overtime until their routes are finally adjusted, 1 hour's extra pay at their regular rate for each and every day of overtime worked. Payment shall be as follows.

Fourth, no later than sixty (60) days after all route adjustments are effected or December 1, 1989, which ever occurs first, the Service shall provide the Union with a computation of the amounts it deems due to Letter Carriers under this Award, and shall post that list at the Venice Main Office and the Venice Terminal Annex. On the same date, the Service shall mail a copy of individual computations to all Letter Carriers who are entitled to compensation under this Award, but whom have transferred to another office, retired or otherwise severed their employment.

Fifth, any Letter Carrier who wishes to challenge the Service's computation shall provide the Union with corrections no later than thirty (30) days after the the date of the above posting or January 1, 1990, whichever occurs sooner. The Union shall unilaterally determine the validity of any employee corrections, and shall provide the Service with such corrections that it deems appropriate no later than thirty (30) days after the date it receives employee corrections or February 1, 1990, whichever occurs sooner. No grievances shall be processed to dispute those Union computations or acceptance by the Union.

Sixth, payment shall be made by the Service of all uncontested and finally resolved computations no later than thirty (30) days after it receives those computations from the Union, or within thirty (30) days after it receives notice from the Union that the Service computations are accepted, or March 1, 1990, whichever occurs sooner. In the event that the Service

challenges any Union computation, it shall not delay payment of uncontested computations. Disputes concerning contested computations shall be submitted to the Arbitrator, who retains jurisdiction to resolve them.

Seventh, no interest shall be awarded on any pay due under this Award, unless the Service fails to comply with the timelines set forth hereinabove. In the event of such alleged lack of compliance, the Arbitrator retains jurisdiction to resolve any dispute concerning interest. Such failure to comply likely will result in an award of interest dating from the timeline failure in the amount customarily awarded by the National Labor Relations Board.

DATED this 10th day of March, 1989,



Thomas F. Levak, Arbitrator.