

C#09327

REGULAR ARBITRATION PANEL

In the Matter of the Arbitration) GRIEVANT:
) GARY L. CHRISTENSON
)
-Between-) POST OFFICE:
) Palmdale, California
UNITED STATES POSTAL SERVICE)
) CASE NO: W4N-5T-C 36919
)
-And-)
)
NATIONAL ASSOCIATION OF) NALC GTS NO: 3829
LETTER CARRIERS, AFL-CIO)
)

BEFORE: C. B. A. LANGE III, Arbitrator

APPEARANCES:

For the U.S. Postal Service: DAVID H. ENGLISH
Regional Labor Relations Executive
13031 West Jefferson Boulevard
Inglewood, CA 90311-9207

For the Union: THOMAS H. YOUNG, JR.
Regional Administrative Assistant
3636 Westminster Avenue, Suite A
Santa Ana, CA 92703-1445

Place of Hearing: 38560 9th Street East
Palmdale, California

Date of Hearing: June 27, 1989

AWARD:

The parties agreed that a violation of the National Agreement had occurred and that the matter of a Remedy for the violation was to be determined by the Arbitrator. The appropriate Remedy is that the Grievant shall receive one additional hour of pay at his straight time rate for each overtime hour worked from January 2, 1987, to the implementation date of his route adjustment in November 1988.

(Background and Analysis attached)

Date of Award: August 23, 1989

CARL B. A. KANGE III

BACKGROUND
(Christenson - Route Adjustment/Remedy)

Pursuant to the National Collective Bargaining Agreement ("National Agreement") between the UNITED STATES POSTAL SERVICE ("Service" or "Employer"), and the NATIONAL ASSOCIATION OF LETTER CARRIERS ("NALC" or "Union"), the undersigned was selected from the Western Region Regular Arbitration Panel to serve as the Arbitrator in this matter.

This matter arises as the result of the failure of the Palmdale Post Office to conduct a special route inspection on route #1 as requested by the Grievant on October 4, 1986. A Step 2 grievance was filed on October 22, 1986, alleging a violation of Article 19 of the National Agreement and Section 271g of the M-39 "Management of Delivery Services" manual in that the required special route inspection had been neither conducted nor scheduled. The Step 2 decision issued by the Postmaster and dated November 14, 1986, indicated that route #1 "has been scheduled for a one-day count and inspection on November 19, 1986." The one-day count took place as scheduled. In mid-January 1987, the Palmdale Post Office began route inspections on several routes, including route #1. Branch 4430 filed a separate grievance on certain procedural and technical issues relating to those inspections. That grievance was sustained at Step 2. A Step 2 decision letter dated March 3, 1987, stated that route #1, and others, "will be rescheduled for count and inspection; notification pursuant to the M-39 will be made." All data relating to the January route inspections was destroyed. Thereafter, no special route inspection was made for over a year and a half. However, in November 1988, the Grievant's route was adjusted by one hour as a result of a second one-day mail count and route analysis. An April 1989 special route inspection resulted in a further adjustment to route #1.

The evidentiary hearing commenced on January 23, 1989 at the postal facility located at 38560 9th Street East, Palmdale California. On that date, a request for a continuation was granted. The hearing recommenced on June 27, 1989. The Service was represented by Dave English, Regional Labor Relations Executive. The NALC was represented by Tom Young, Regional Administrative Assistant. The parties agreed that there were no issues of substantive arbitrability to be resolved and that the matter was properly before the Arbitrator. The parties further agreed that a violation of Article 19 of the National Agreement and Section 271g of the M-39 had occurred and that the matter of a Remedy for the violation was before the Arbitrator for determination. The issue was to be stated as:

"What is the appropriate Remedy for the failure of the United States Postal Service to conduct the special route inspection and

to make a timely route adjustment in this matter?"

During the course of the hearing, the parties were afforded a full and complete opportunity to be heard, to call, examine, and cross-examine witnesses, to develop arguments and to present relevant evidence. Witnesses appearing before the Arbitrator were duly sworn. Gary Christenson ("Grievant" or "Employee") was present at the hearing and testified on his own behalf. An official transcript of the hearing was not made. The parties made written closing arguments. Both arguments were received by the Arbitrator on August 9, 1989. The matter was deemed submitted for decision as of August 9, 1989.

The parties stipulated several facts into the record of this matter. Those stipulations that are germane to a determination of the Remedy in this matter beyond those encompassed by the general statements above are as follows:

1. The route inspection called for in Section 271g of the M-39 is a six-day inspection. By mutual agreement, the parties may, but are not required to, substitute a one-day mail count.

2. Assistance for the Grievant's route in the form of a regular hand-off of certain streets was put in effect from April 1987 through November 1988.

3. The regular hand-off was terminated when the Grievant's route received a one-hour adjustment in November 1988.

4. Although the November 1988 adjustment was implemented following a one-day mail count, no grievance was filed.

5. The effective date of the one hour route adjustment in November 1988 constitutes the end date for purposes of the Remedy in the instant matter.

6. The City of Palmdale has experienced a growth explosion that began in the early 1980's. As a result, the demands on the Postal Service have increased annually.

Due to the limited nature of and scope of this proceeding, it is unnecessary to cite the provisions of the National Agreement or the M-39 beyond the general observation that the M-39 requires both special route inspections and route adjustments to an eight-hour route when certain criteria are met. The inspection must be completed within four weeks of a valid request. If an adjustment is justified, it must be made within 52 calendar days of the completion of the route count, unless an exception is approved. The provisions of the M-39 are

incorporated into the scope of the National Agreement and subject to enforcement by operation of Article 19.

The Union's Position

At the hearing and in its brief, the Union requests that the Arbitrator award administrative leave to the Grievant in an amount equivalent to the overtime that he worked from October 4, 1986, through the effective date of the November 1988 route adjustment. In the alternative, the Union requests any other remedy that the Arbitrator deems appropriate. Additionally, the Union submitted the decision of Arbitrator Letter in case no. W4N-5G-C 3589, Lancaster, California (12/15/86). That decision was relied on by the Service at Step 3. The Union argues that the Letter decision was inappropriately applied to the facts of this case.

The Service's Position

In general, the Service argues that although it has a responsibility to conduct route inspections, it is not required to implement route adjustments. Specifically, the Service notes that the requested special route inspection should have commenced by "November 4, 1989" (actually 1986) in order to satisfy the four-week requirement. Since the month of December is excluded from any route inspections, the Service points out that the January route inspection mentioned earlier was "approximately 43 days late." The Service does not suggest any specific date as an appropriate starting point for calculation of the Remedy in this matter except to mention the period between November 4, 1986, and the completion of the January 1987 route inspections. The Service argues that any consideration of whether or not the April 1989 special route inspections were timely pursuant to the March 1987 Step 2 decision letter is a separate issue and not within the purview of this Arbitrator.

With regard to the Remedy itself, the Service urges the Arbitrator to consider its good-faith efforts to assist the carrier. The Service did provide one-day mail counts and a regular hand-off of parts of route # 1 was instituted. The Service argues that the Grievant was neither unduly nor materially harmed by the Palmdale Post Office's failure to provide a six-day route inspection in a timely fashion. The Service alleges that, for at least some of the time between the filing of the instant grievance and November 1988, the Grievant was on the Overtime Desired List ("ODL"). The Service strenuously objects to the Union's requested Remedy of administrative leave on several grounds. First, the only Remedy requested in the grievance process was for double time pay for all overtime hours worked, commonly called "penalty overtime." Second, the Service avers that there must be a showing that management acted arbitrarily or capriciously in order to justify the severe penalty of administrative leave. In this case, administrative leave would constitute pay at two and one-half

times the Employee's regular pay. Further, administrative leave impacts well beyond the extra pay for the time off granted to the affected employee. Other employees must make up the time lost from the employee on administrative leave. Usually that time has to be paid at the overtime rate, sometimes at the penalty overtime rate. Such awards of administrative leave are excessive and punitive and would constitute an unjust enrichment of the Grievant.

The Service agrees that the Arbitrator may fashion a remedy, but only as long as that remedy is drawn from the National Agreement. The Service then suggests that if there is to be a monetary remedy, it should be limited to half-time pay, thereby treating the time worked as penalty overtime. In support of this position, the Service submitted the decision of Arbitrator Eaton in case nos. W4N-5T-C 42292, 42296, 42300, and 42301, Thousand Oaks, California (6/29/89).

ANALYSIS AND CONCLUSION

The Appropriate Time Period

Since a valid request for a special route inspection was made on October 4, 1986, the completion date (not the "commencement" as suggested by the Service) pursuant to the M-39 was November 4, 1986. Contrary to the Service's argument, if a route adjustment is indicated by the results of the special route inspection, the adjustment must be made. That adjustment must be implemented within 52 calendar days of completion of the route inspection. Since the 52 calendar day period from November 4, 1986, would have caused the adjustment to occur in late December 1986, the application of section 211.3 of the M-39 would have postponed the adjustment until at least January 2, 1987. The Service offered no convincing evidence or argument that would justify a later implementation date. Thus, the period covered by this Remedy shall be from January 2, 1987, to the effective date of the Grievant's route adjustment in November 1986.

It should be noted that the Branch 4430 grievance over the mid-January 1987 special route inspections has no bearing on the determination of this Grievant's right to a special route inspection that should have been completed in early November 1986, and an adjustment that should have been implemented on January 2, 1987. Had the Service conducted the January 1987 special route inspection in compliance with the provisions of the M-39, this issue might have been settled. The Union might have been persuaded to forgive the time lapse between January 2, 1987, and the implementation date for the results of the January special route inspections - approximately two months later. At worst, the Service's potential dollar liability to this Grievant would have been limited to that period between January 2, 1987, and 52 days following completion of the January special route inspections.

The Remedy

Where it is possible to do so, a remedy for a contract violation should be provided. Arbitrators determine the appropriate remedy for a contract violation based to a large extent upon the degree of management's culpability. An honest mistake or misreading of the contract might call for a minimal remedy, where arbitrary or capricious acts clearly in violation of the contract would support a more substantial remedy. Thus, remedies range from a declaration that a violation has occurred or a simple cease and desist order up to what would essentially be characterized as punitive damages, depending upon the impact and severity of the violation.

In an earlier route inspection/adjustment decision, case no. W4N-5B-C 8594, Palos Verdes, California (3/21/89), this Arbitrator concluded that an award of one-half hour of administrative leave for each overtime hour worked was appropriate. In that matter, the violation impacted 27 Letter Carriers. Local management, after nearly a year of prodding by the Union, acted properly to implement route inspections and adjustments. The MSC then arbitrarily withheld administrative approval and delayed implementation for almost six more months. Within that context, the violation was so egregious that no consideration was given to any affected employees' status on the ODL.

In the Thousand Oaks route inspection cases cited above, Arbitrator Eaton concluded that an award of one-half hour of pay for each overtime hour worked was appropriate where each of the four grievants was on the ODL. Arbitrator Eaton found that the grievants had "legitimately requested special route inspections, and that request was wrongfully denied." He specifically determined that "the extreme remedy (penalty) of administrative leave" was not appropriate "in the circumstances of this dispute." The Eaton decision in Thousand Oaks, and the other decisions cited therein, essentially have vitiated the remedy created by Arbitrator Letter and relied upon by the Service at Step 3 of the instant grievance. Arbitrator Letter required the payment of penalty overtime, but only when the affected employee satisfied the work requirements of Article 8, Section 5F of the National Agreement for the payment of such overtime. The subsequent decisions have usually applied the penalty overtime, or double time, rate or other remedy to all overtime hours worked within an applicable time period.

A failure or refusal to respond to a legitimate request for a special route inspection has a greater impact on an employee who is not on the ODL than on an employee who is on the ODL. In the Eaton decision, status on the ODL was a major consideration in awarding the additional one-half hour of pay. Arbitrator Eaton stated:

"This surely presents a different situation when it comes to remedy than would a situation in which the grievants were content with the normal workday, and did not wish any overtime. These Grievants have not been harmed as grevioulsy as an employee would be who was not on the ODL, and did not want to work overtime."

It is this Arbitrator's view, and it seems to be that of Arbitrator Eaton, that a non-ODL employee would be entitled to a remedy greater than the penalty overtime rate of pay. Whether that remedy would consist of administrative leave (full or partial), a monetary remedy at more than the penalty overtime rate, or other remedial structure, depends upon the degree of management's culpability for the violation.

The abbreviated record in the instant matter is insufficient to support a finding that the Palmdale Post Office's inaction on the Grievant's special route inspection request was so arbitrary or capricious as to justify "the extreme remedy (penalty) of administrative leave." The route assistance provided between April 1987 and November 1988 indicates a recognition of the overloaded route and an attempt to mitigate the Grievant's workload. (Also, by directly reducing the Grievant's overtime hours, it lessens the amount of any monetary remedy.) At the same time, however, the Service's inaction violated the procedural guarantees in Section 271g of the M-39 as well as the Grievant's right to an eight-hour route. Since the Grievant was not on the ODL, it is the opinion of this Arbitrator that an award of an additional hour of pay for each hour of overtime worked during the appropriate time period is justified. Although the Service alleged that the Grievant had been "both on and off the Overtime Desired List during the time periods involved," it was unable to offer copies of the ODL or other evidence to support that contention. This Remedy recognizes that an employee's status on the ODL is an appropriate factor for consideration and protects the Service against the operational and economic effects of administrative leave where the record does not support its imposition. In the instant matter, the imposition of administrative leave would have an adverse impact on the Palmdale Post Office in excess of what is necessary to appropriately address the violation of this Grievant's rights.

AWARD

The appropriate Remedy in the instant matter is that the Grievant shall receive one additional hour of pay at his straight time rate for each overtime hour worked from January 2, 1987, to the implementation date of his route adjustment in November 1988.

Respectfully submitted,


CARL B. A. LANGE III