C#03228
A.B

UNITED STATES POSTAL SERVICE

and

NATIONAL ASSOCIATION OF LETTER CARRIERS, AFL-CIO

CASES NC-C-15708-D
NC-NAT-13212

ISSUED:

August 20, 1979

BACKGROUND -

These two cases raise questions about the current USPS policy under which Carriers are required to cross certain lawns in the course of delivering their city routes. They were heard by the Impartial Chairman in Cincinnati on November 20 and 21, 1978. The parties' briefs then were filed as of April 23, 1979. 1

NC-NAT-13212 is a national level grievance presenting interpretive issues with respect to (1) the term "obvious shortcut," as it appears in the M-39 Handbook, and (2) an "official" USPS policy in respect to the crossing of lawns by city Carriers. NC-C-15708-D involves the discharge of Carrier Richard Boehl at the Mt. Healthy Station (Cincinnati, Ohio) because of the failure to cross a large number of lawns during inspection of his route on May 19, 1978. The two grievances were consolidated for arbitration largely because the discharge serves to illustrate practical considerations relevant to the national level interpretive grievance. 2

A. NC-NAT-13,212

This is the third major case to arise under the July 21, 1975 National Agreement involving a USPS requirement that Carriers cross certain customer lawns. In NC-C-178 Associate Chairman Fasser handled an earlier grievance which had originated in the Mt. Healthy Station of the Cincinnati Post Office. It also involved Grievant Boehl. The Fasser decision in NC-C-178 was issued December 23, 1976. On May 3, 1978 a decision was issued by the Impartial Chairman in NC-C-7851. This case arose in St. Louis and, for the first time, the controlling significance of the M-39 Handbook in respect to lawn crossing was pointed out in the Opinion of the arbitrator. 3

Relevant provisions in the July 21, 1975 National Agreement include: 4

"ARTICLE III
MANAGEMENT RIGHTS

"The Employer shall have the exclusive right, subject to the provisions of this Agreement and consistent with applicable laws and regulations:

A. To direct employees to the Employer in the performance of official duties;

B. To hire, promote, transfer, assign, and retain employees in positions within the

"Postal Service and to suspend, demote, discharge, or take other disciplinary action against such employees;

C. To maintain the efficiency of the operations entrusted to it;

D. To determine the methods, means, and personnel by which such operations are to be conducted;

* * *

"ARTICLE XVI
DISCIPLINE PROCEDURE

"In the administration of this Article, a basic principle shall be that discipline should be corrective in nature, rather than punitive. No employee may be disciplined or discharged except for just cause such as, but not limited to, insubordination, pilferage, intoxication (drugs or alcohol), incompetence, failure to perform work as requested, violation of the terms of this Agreement, or failure to observe safety rules and regulations."

* * *

"ARTICLE XIX
HANDBOOKS AND MANUALS

"Those parts of all handbooks, manuals and published regulations of the Postal Service, that directly relate to wages, hours or working conditions, as they apply to employees covered by this Agreement, shall contain nothing that

"conflicts with this Agreement, and shall be continued in effect except that the Employer shall have the right to make changes that are not inconsistent with this Agreement and that are fair, reasonable, and equitable. This includes, but is not limited to, the Postal Service Manual and the F-21 Timekeeper's Instructions."

"Notice of such proposed changes that directly relate to wages, hours, or working conditions will be furnished to the Unions at the national level at least thirty (30) days prior to issuance."

* * *

"ARTICLE XLI
LETTER CARRIER CRAFT

* * *

"N. Letter carriers may cross lawns while making deliveries if customers do not object and there are no particular hazards to the carrier."

(Underscoring added.)

As will be noted in the Findings below certain portions of the M-39 Handbook (incorporated into the National Agreement under Article XIX) also are relevant. 5

The present problem arises from an NALC request that--because of the St. Louis decision--the USPS should revise an "official" statement of policy concerning the crossing of lawns. This policy statement is dated March 10, 1977; and was issued after the Cincinnati decision. Nonetheless it was not in evidence in Case NC-C-7851, nor did either party there refer to its existence. While distinctly unclear, the March 10, 1977 6

policy statement seems to say that a Carrier may be required to cross all lawns except those which are deemed to be unsafe. When the request to revise this "official" statement was refused, the grievance herein was filed by the then NALC President, Joseph Vacca.

B. NC-C-15708-D

7 Grievant Richard Boehl had been a Letter Carrier at the Mt. Healthy Branch of the Cincinnati Post Office for about 12 years at the time of his discharge.

8 His route was inspected on May 19, 1978. During the week prior to the week of May 15, 1978 (when the count and inspection of Grievant's route commenced) all Mt. Healthy Carriers were told by Station Manager Barnhart that they were expected to cross lawns during inspection of their routes. On May 19 Grievant Boehl was accompanied by Michael Sherman, a Route Examiner from another office in the Cincinnati area. Sherman also instructed Boehl as to the requirement to cross lawns during the inspection. He did this by reading aloud from a document stating that Carriers were to "cross lawns where the owner does not object and there are no hazards." This document had been provided to Sherman at a USPS Route Examiner training session. It read:

> "I have been instructed to read you some excerpts from the arbitration decision of January 6, 1977.
>
> "In the arbitrator's judgement, the Carrier should be anxious to deliver his route in the most efficient manner reasonably possible. Thus, proper short cuts should be taken.
>
> "The carrier will utilize the most efficient method of travel to effectuate delivery of the mail of his route. To accomplish this, it may be necessary for you to cross lawns where the owner does not object and there are no apparent hazards.

"Failure to do this will be viewed by management as an obvious attempt to expand your street time and a disregard of instructions previously given, and will be dealt with accordingly."

(Underscoring added.)

Boehl made 401 deliveries on May 19. Sherman listed approximately 230 addresses where Grievant did not cross the lawn and Sherman felt that there were no obstructions to prevent him from doing so. After the Form 3999 which had been prepared by Sherman was returned to the Mt. Healthy Station, Branch Operations Superintendent Dunn prepared a notice of proposed removal from service for "unsatisfactory performance of assigned duties" on the basis that Boehl had "failed to cross lawns of at least 200 patrons during (his) route inspection." The removal notice was prepared solely on the basis of the Form 3999 and given to Boehl on June 23, 1978. 9

The Notice of Charges stated: 10

"On May 19, 1978, your route was inspected by Supervisor M. Sherman. Mr. Sherman instructed you to take all obvious short cuts, including the crossing of lawns where the owner does not object and there are no apparent hazards.

"The week prior to inspection of your route Mr. Paul Barnhardt, Manager, Mt. Healthy Branch Post Office made announcements on two consecutive days, that all carriers at this branch were expected to take all obvious short cuts, specifically crossing lawns.

"You failed to cross lawns of at least 200 patrons during this route inspection.

"Your explanation for not crossing these lawns is unacceptable."

(Underscoring added.)

On July 12, Boehl presented the following reply to the charges: 11

"This is a written response to your notice of removal given to me on June 23, 1978.

"On May 19, 1978, I made 401 out of a possible 422 deliveries. Therefore, it is quite evident that I cross half of the lawns.

"I obeyed the instructions of Mr. Sherman and Mr. Barnhardt to the letter. I crossed all lawns that I considered safe. I did not cross lawns that presented a safety hazard or where a patron objected.

"I was not instructed by Mr. Sherman to tell him why I did not cross a particular lawn. Had I been instructed properly I would have done so. At no time have I been told to cross any particular lawn. Not one address has been given to me to state that I should cross that particular lawn.

"Many times that day Mr. Sherman did not observe my crossing lawns and I had to bring his attention to it. And on checking the list of addresses listed by Mr. Sherman of those I did not cross, I find many errors. Many I crossed just as I cross them every day.

"I would certainly appreciate Management telling me what lawns I should cross so as to determine the line of travel of my route. Absent these instructions, I have been making my route as outlined in the M-41, Section 915. I did my route on May 19, precisely the way I have been doing it the past year. You-yourself, stated you have seen me crossing lawns during the past year on my route. And, I may add that you have never stated I was not performing my duties in an unacceptable manner this past year."

(Underscoring added.)

Throughout the grievance procedure, Grievant Boehl and the Union unsuccessfully sought to have Management identify, specifically, which lawns Boehl had been instructed to cross. Instead, the basis for the disciplinary action, according to Superintendent Dunn, was that not crossing 200 lawns was "just too many." As Dunn stated at the hearing: 12

"... I know in my own mind that there just couldn't be two hundred that were dangerous, that were unsafe." (Tr. 215.)

It was on this basis that Boehl was advised on July 27, 1978 that his discharge would become effective as of August 7, 1978. 13

FINDINGS

Each party has filed a comprehensive and incisive brief, but these need not be summarized here. The basic positions of each party already have been elaborated in the Cincinnati and St. Louis decisions. In addition, appropriate reference will be made in the present findings to specific portions of each party's analysis. 14

A. Case NC-NAT-13212

1. A Context for the Interpretive Issue

This case apparently reached arbitration because of the parties' disagreement concerning a relatively narrow issue which was not settled in the St. Louis Case. An appropriate context for the present findings thus is found in the following excerpts from the Findings in NC-C-7851: 15

> "This brings us to the heart of this case. Some USPS officials appear to have read a portion of the Opinion in Case NC-C-178 out of context so as to distort the real significance of that decision. Careful reading of the entire Opinion by Associate Chairman Fasser leaves no doubt that the inclusion of Article XLI, Section 3-N in the parties' 1975 Agreement

"was found not to have changed the long standing USPS policy as to lawn crossing, as enunciated in a January 9, 1969 letter from POD Labor Relations Division Director Werner to NALC Vice President Lewis. The full text of that critically important letter is worth repeating here--

'January 9, 1969, to Mr. J. Stanly Lewis, Vice President, National Association of Letter Carriers, 100 Indiana Ave., N.W. Washington, D. C. 20001.

'Dear Mr. Lewis: Reference is made to your letter of December 12, 1968 and attachments, addressed to Mr. E. V. Dorsey, Deputy Assistant Postmaster General, Bureau of Operations, relative to Item #30 on the December Labor Management Agenda.

'The item requested the Department's policy on the mandatory walking on patron's lawns by letter carriers and asked if the Department approves of blanket instructions to letter carriers that they must walk across lawns unless the patron objects.

'The policy of the Post Office Department with respect to the walking on patron's lawns by letter carriers is set forth in XiiO-E of Regional Instructions 353-0-91, Filing No. 331-1, Amendment #3, dated December 2, 1968 which states:

"Carrier may cross lawns while making deliveries if patrons do not object and there are no particular hazards to the carrier."

'This policy does not provide for a mandatory requirement that carriers cross patron's lawns nor does the Department approve the issuance of either individual office or blanket instructions to cross lawns. The department does, however, encourage this practice where (1) the patron does not object; (2) it is not hazardous for the carrier to do so, and (3) it is advantageous to the Department.

'In connection with the above, it should be noted that Section 225.311 of the M-39 Handbook, Supervision of City Delivery Service, states:

"The carrier should be instructed to serve and travel his route (on day of inspection) in precisely the same manner as on any other day."

'The Regional Director is being furnished a copy of this letter with instructions to amend any Regional policy on this matter to make it consistent with the policy stated above.

'We trust the above disposition will satisfactorily resolve the situation.

'Sincerely yours, John Werner, Director, Labor Relations Division.'

"Case NC-C-178 came to arbitration primarily because the NALC had interpreted Article XLI, Section 3-N to give the Carrier discretion as to whether to cross any given lawn. Article XLI, Section 3-N appeared for the first time in the parties' 1975 Agreement. While the NALC interpretation of Article XLI, Section 3-N was rejected in Case NC-C-178, neither party there was found to have gained any particular advantage from the inclusion of this new provision in the 1975 Agreement. In respect to lawn crossing, the Opinion and Award of Associate Chairman Fasser left the parties precisely where they had been since at least 1962.

"In view of the persistent misunderstanding between the parties on the subject, as graphically illustraded here and in Federal District Court, further clarification now seems essential. The January 9, 1969 Werner letter accurately emphasized that the subject of lawn crossing was treated in the M-39 Handbook. It still is treated in the M-39 Handbook.

"Both parties in this case have overlooked the critical significance of this basic fact. The Employer's authority to direct Carriers in the performance of their duties, under Article III, not only must be 'consistent with applicable laws and regulations,'

"but also is specifically, and initially, 'subject to the provisions of' the National Agreement. One such provision is Article XIX, which states in relevant part:

> 'Those parts of all handbooks, manuals and published regulations of the Postal Service, that directly relate to wages, hours or working conditions, as they apply to employees covered by this Agreement, shall contain nothing that conflicts with this Agreement, and shall be continued in effect except that the Employer shall have the right to make changes that are not inconsistent with this Agreement and that are fair, reasonable, and equitable. This includes, but is not limited to, the Postal Service Manual and the F-21 Timekeeper's Instructions.
>
> 'Notice of such proposed changes that directly relate to wages, hours, or working conditions will be furnished to the Unions at the national level at least thirty (30) days prior to issuance. At the request of the Unions, the parties shall meet concerning such changes.'
>
> (Underscoring added.)

"It would seem elementary that before a constitutional challenge to an 'applicable law' may be seriously considered at the instance of the USPS, the Management

"policy in question must represent a legitimate exercise of authority within the limitations of the National Agreement itself. In respect to lawn crossing, the M-39 Handbook sets forth a term and condition of employment for Carriers. This term and condition of employment is fully protected under Article XIX and must be respected by all concerned until modified or replaced in accordance with the requirements of Article XIX."

* * *

(The St. Louis Findings then proceed to quote at length relevant M-39 Handbook provisions with respect to route inspection and adjustment.)

* * *

"The Form 3999 (to be completed by each route examiner) is set forth in the M-39 Handbook. It includes the following specific questions:

> Is the line of travel the safest possible?
>
> Are travel pattern, relay and park points set up efficiently?
>
> Does carrier take obvious short-cuts?

(Underscoring added.)

"Presumably the M-39 Handbook spelled out all detail which the USPS believed necessary, in respect to the crossing of lawns by Carriers, when it last was revised prior to negotiation of the 1975 National Agreement. As matters now stand, therefore, the official USPS policies and procedures in respect to lawn crossing by Carriers appear to include at least the following basic elements:

1. When a route is inspected the Carrier should perform his duties in 'exactly the same manner as he does throughout the year.'

2. The route examiner does not direct the Carrier, before or during a route inspection, to change the manner in which the Carrier normally performs his duties.

3. The route examiner makes appropriate notations 'of all items that need attention' (such as failure to take an obvious short-cut by crossing a given lawn) and lists any 'suggestions' he has for 'improving the service on the route.'

4. All such written suggestions should be in sufficient detail for subsequent discussion with the Carrier by the Postmaster or designated manager prior to effecting any adjustment in the route.

5. The route examiner is required specifically on Form 3999 to answer the question 'Does carrier take obvious short-cuts?'

"6. Adjustment of a given route properly may be made only after completion of the route inspection and an evaluation in accordance with the M-39 Handbook.

"There is no suggestion here that the Service has undertaken since 1975 to change any of the basic policies and procedures in the M-39 Handbook insofar as the crossing of customers' lawns is concerned. If any such change were to be made, it could only be accomplished in accordance with the requirements of Article XIX. Clearly, then the St. Louis Post Office unilaterally adopted policies in early 1977 which conflict with official USPS policies embodied in the M-39 Handbook. This local action was not authorized under Article III, since it violated Article XIX of the National Agreement.

"A possible question remains, of course, as to whether the St. Louis trespass ordinance might be interpreted in such manner as to interfere with, or prevent, the execution of a proper Management directive to a Carrier, such as to take an 'obvious' short-cut. As to this, the Impartial Chairman can see no proper basis in this proceeding to seek either to interpret the amended ordinance or to express any opinion concerning the extent to which it might run afoul of the Supremacy Clause in the U.S. Constitution. Such questions may better be left to the appropriate courts.

"The situation is different as to the original ordinance. On its face this recognizes that the consent of an owner to walk upon his real property may be

"'implied.' There is no suggestion that, over the years the original ordinance was in effect, it ever was applied to challenge the use of an 'obvious' short-cut by a Carrier employed by the Post Office Department or by the USPS. Arguably, at least, a short-cut across a customer's lawn hardly would be 'obvious,' within the meaning of the M-39 Handbook, in the absence of observable conditions which reasonably might imply that the owner would not object to the Carrier's use of the short-cut. No final opinion need be expressed here on this possible interpretive issue, nor properly could be at this time, since the parties never have considered it nor made any presentations thereon to the Impartial Chairman.

"As its post-hearing brief emphasizes, however, the NALC deems this case to present an inherent question of--'whether the Postal Service generally can assume patron's consent to having their lawns crossed without first ascertaining that consent?' It would seem that, in posing this question, the NALC has overlooked the controlling significance of relevant M-39 Handbook provisions. Nothing can be found in the M-39 to establish that it is official USPS policy to require a Carrier to cross a customer's lawn in the absence of either express or implied consent by the owner."

As noted in the last of the above quoted paragraphs, the NALC, in the St. Louis Case, sought to have the Impartial Chairman rule on whether "the Postal Service generally can 16

assume patrons consent to having their lawns crossed without first ascertaining that consent." The Impartial Chairman refrained from passing on this question since there was nothing in the presentations in NC-C-7851, or in the M-39 Handbook, to show an "official USPS policy to require a Carrier to cross a customer's lawn in the absence of either express or implied consent by the owner." At that time, of course, the Impartial Chairman remained unaware that an "official" USPS policy statement on the matter already had been issued as of March 10, 1977.

2. Nature of the Interpretive Issue.

The March 10, 1977 "official" statement of the USPS position in respect to lawn crossing was issued after the Associate Impartial Chairman's decision in the Cincinnati Case and is an exhibit here. In relevant part it reads: 17

"D. COMMENTS AND INSTRUCTIONS

"As a result of the arbitrator's decision in the 'lawn-crossing' arbitration case, the following constitutes the Postal Service's official position on the question whether management may require city letter carriers to cross lawns and use shortcuts, generally, while delivering their routes.

"A letter carrier must perform his duties and travel his route in precisely the same manner on inspection day as he does throughout the

"year. Therefore, if a letter carrier normally crosses a particular lawn, or normally uses any other available shortcut, in the course of delivering his route, management may adjust his route on the assumption that the carrier will normally cross that lawn or take that shortcut, and may require and order such carrier normally to cross that lawn or use that shortcut.

"In the circumstance where the carrier has not normally crossed all or some lawns or used all or some shortcuts during the previous year, management may, in adjusting routes, require and order the carrier to use the correct travel pattern, including crossing lawns and using shortcuts, where appropriate. During route inspection, if the carrier believes that a particular lawn or shortcut is likely to present a permanent hazard, the carrier shall notify his supervisor of his belief as to the hazard likely to be presented permanently by the particular lawn or shortcut, and specify the reasons therefor. If, after investigation of the conditions, management reasonably believes that a hazard is not likely to be presented by the particular lawn or shortcut involved, management may adjust the carrier's route on the assumption that the lawn normally will be crossed and the shortcut normally used. If the carrier disagrees with management's determination in this regard, he may file a grievance challenging the correctness of management's determination as to the hazard likely to be presented by the lawn or shortcut involved.

"Similar rules apply if questions concerning lawn crossing or use of shortcuts arise at time other than during route inspections. While delivering the route on any given day, the carrier may decline to cross a particular lawn, or use a particular shortcut, if he believes, in good faith, that crossing the lawn or using the shortcut would be hazardous that day. In this sense, the carrier determines, in the first instance, whether to cross a particular lawn or use a particular shortcut. If the carrier believes, in good faith, that the hazard is likely to be permanent, he shall so inform his supervisor, and shall also inform the supervisor of his reasons for believing that a permanent hazard is likely to be presented. If, upon investigation of the condition, management reasonably believes that a permanent hazard is not likely to be presented, management may require the carrier normally, to cross that particular lawn or use the particular shortcut involved. If the carrier disagrees with management's determination in this regard, he may file a grievance challenging the correctness of management's determination as to the hazard presented by the lawn or shortcut involved.

"Management may not issue blanket orders requiring letter carriers to cross every lawn or use every shortcut, because the arbitrator has found that it cannot be assumed that every lawn or shortcut will always be safe. On the other hand, the arbitrator found that carriers may not refuse

"generally to cross lawns or use shortcuts on the grounds that such lawns or shortcuts are inherently unsafe.

"Accordingly, management may require and order carriers to use the correct travel pattern, including crossing those lawns and using those shortcuts which, Management, in good faith, believes are safe. Carriers who disobey such an order may be disciplined if the overall circumstances warrant such action.

"Finally, if a customer objects to a carrier crossing the customer's lawn, or objects to the carrier's use of a shortcut across the customer's property, the carrier shall inform his supervisor of that fact. If, upon investigation, management ascertains from the customer that the customer has such an objection, the carrier shall not cross the lawn, or use the shortcut involved. Carriers may not solicit such customer complaints, and may be disciplined for doing so, if the overall circumstances warrant such action."

While this USPS policy statement was not mentioned in the St. Louis presentations the NALC seemingly was aware of its existence. After the St. Louis case was decided on May 3, 1978, NALC President Vacca, wrote Assistant Postmaster General James Gildea, stating in relevant part: 18

"Since the national-level policy regarding lawn crossing, as evidenced by page 4, paragraph 2 of the March 10, 1977 Memorandum to 'All Regional Directors Customer Services Department and Employee and Labor Relations Department' and the numerous grievances at Step 4 regarding that matter, is in all material respects identical to that now-voided St. Louis policy, and since Impartial Chairman Garrett's Opinion and Award represents a final and binding definitive interpretation of controlling provisions of our National Agreement, it is imperative that the Postal Service now announce an appropriate nationwide change in its 'lawn crossing' policy. Moreover, such an appropriate change would, under the Garrett Opinion and Award, have to reflect: (1) that the Postal Service may not infer any implied customer consent to lawn crossing unless the shortcut across the lawn is obvious, i.e., there is a worn path across the lawn or other observable conditions that would lead a person reasonably to believe that the customer does not object to such a shortcut; (2) that the consideration of whether an 'obvious' shortcut across a lawn exists has to be made, and appropriately noted in comments by a route examiner, on a lawn-by-lawn basis; and (3) that any claimed time savings due to a carrier's failure to take such an 'obvious' shortcut must be based on, and appropriately noted in comments by a route examiner, the particular 'obvious' shortcut in question.

"Should the Postal Service disagree with the position stated above, I shall be forced to conclude that there exists between us a dispute as to the interpretation of Articles III, XIX, and XLI Section 3.N. of our National Agreement as construed in Case No. NC-C-7851, and hereby raise the same as a grievance at the national level. In the event that such a dispute does exist, I am requesting a Step 4 meeting on May 16, 1978 to attempt to resolve the same."

(Underscoring added.)

On June 15, 1978 William E. Henry, Jr. of the Labor Relations Department replied on behalf of Assistant Postmaster General Gildea stating, in relevant part: 19

"As stated during our meeting, Postal Service policy does not advocate that management issue blanket orders requiring letter carriers to cross every lawn or take every shortcut. In this regard, consideration must be given to whether 'obvious' shortcuts across lawns exist, and appropriate comments must be made by the route examiner in accordance with the pertinent provisions of the M-39 Handbook as interpreted through arbitration. We agree that any claimed time savings due to a carrier's failure to properly take an obvious shortcut cannot be based on fixed 'standard' time. Time savings must be considered on the basis of conditions existing

"at the particular 'obvious' shortcut(s) in question, the comments and recommendations of the route examiner, and the knowledge and evaluation of the manager making the adjustment.

"We do not agree that the national-level policy on lawn crossing is in all material respects identical to the 'St. Louis lawn crossing policy.' Accordingly, your assertion that the Postal Service should 'announce an appropriate nationwide change in its "lawn crossing" policy' is rejected as being unwarranted and unnecessary."

(Underscoring added.)

Upon receipt of this reply President Vacca appealed the matter to arbitration, and it was docketed as Case NC-NAT-13212. The NALC brief states the interpretive issue, thus raised, as follows: 20

"Whether a shortcut across a customer's lawn is 'obvious' within the meaning of Article XIX of the National Agreement and Methods Handbook M-39 in the absence of observable conditions which reasonably might imply that the customer would not object to the Letter Carrier's use of the short-cut?"

This statement, of course, essentially reflects the position stated in the Vacca letter of May 3, 1978. It is 21

worth noting, however, that the Vacca letter also specifically identified, as objectionable, the paragraph in the official policy statement which reads:

> "Similar rules apply if questions concerning lawn crossing or use of shortcuts arise at time other than during route inspections. While delivering the route on any given day, the carrier may decline to cross a particular lawn, or use a particular shortcut, if he believes, in good faith, that crossing the lawn or using the shortcut would be hazardous that day. In this sense, the carrier determines, in the first instance, whether to cross a particular lawn or use a particular shortcut. If the carrier believes, in good faith, that the hazard is likely to be permanent, he shall so inform his supervisor, and shall also inform the supervisor of his reasons for believing that a permanent hazard is likely to be presented. If, upon investigation of the condition, management reasonably believes that a permanent hazard is not likely to be presented, management may require the carrier normally, to cross that particular lawn or use the particular shortcut involved. If the carrier disagrees with management's determination in this regard, he may file a grievance challenging the correctness of management's determination as to the hazard presented by the lawn or shortcut involved."
>
> (Underscoring added.)

The USPS brief avoids defining the issue in terms of the March 10, 1977 official USPS policy statement. Instead, it quotes a single question included in the extensive M-39 Handbook instructions to Route Examiners (for purposes of completing the Form 3999) which reads-- 22

> "Is the travel pattern followed by the Carrier the most advantageous for both the Carrier and the delivery service?"

The USPS brief then says--

> "Thus the issue before the arbitrator is not whether the established line of travel is 'obvious', but rather whether it involves crossing lawns where customer objections may be inferred?"

The USPS brief further asserts that Article XLI, Section 3-N already has been "authoritatively interpreted" in the earlier Cincinnati decision. It quotes a portion of Marginal Paragraph 67 from the Opinion in that case reading-- 23

> "The right of the Postal Service to expect Letter Carriers to use the correct travel pattern is not denied. Use of the correct travel pattern means that the Carrier will utilize the most efficient method of travel to

"effectuate delivery of the mail on his route. In order to accomplish this it may be necessary for him to take a shortcut across a lawn if the owner does not object and there are no apparent hazards to him or to the customer's property."

(Underscoring added.)

3. Disposition of the Issues in Case NC-NAT-13212.

While the parties do not agree as to precisely what interpretive problems now should be settled, this occasions no serious difficulty. It should be obvious by now that both parties have long needed an authoritative exposition of basic principles to guide them in dealing with the crossing of customer lawns. 24

For whatever reasons, both parties heretofore have failed since July 21, 1975 to approach this matter realistically under relevant provisions of the National Agreement. Those provisions include Articles III, XIX, and XLI, Section 3-N. As already made plain in the St. Louis decision, all relevant M-39 Handbook provisions also apply since they are continued in effect under Article XIX. 25

Some of the current confusion can be traced to the Opinion in Case NC-C-178 where both parties advanced interpretations of Article XLI, Section 3-N which were unwarranted. The Opinion in that case expressly so found and the Associate 26

Chairman Fasser correctly ruled that the long standing USPS policy in regard to crossing of lawns, as enunciated in a January 9, 1969 letter from the POD Labor Relations Division Director Werner to NALC Vice President Lewis was consistent with the National Agreement and specifically with Article XLI, Section 3-N. The January 9, 1969 letter was quoted in full in the Fasser Opinion, and again in that portion of the St. Louis Opinion which appears in Marginal Paragraph 15 of this Opinion.

In retrospect it seems that the interpretive ruling in Case NC-C-178 was somewhat blurred by a failure to develop adequately the precise facts presented by the individual grievance in that case, and to consider the applicability of the M-39 Handbook to those detailed facts. It is unclear, in any event, whether the Supervisor who accompanied the Grievant on his route on September 23, 1975 did so as part of a special route inspection or was simply performing routine street supervision. The supervisor was said to have instructed the Carrier to cross all lawns that he considered safe, and the Carrier apparently did so without incident. Next day, however, the grievance was filed requesting Management to "rescind the order ... requiring him to cut lawns." It was this request to "rescind" the order "to cut lawns" which reached arbitration before Associate Impartial Chairman Fasser. The parties were preoccupied with their arguments as to the meaning of Article XLI, Section 3-N in that case, and the possible application of the M-39 Handbook to the precise factual situation was overlooked entirely. Since Associate Impartial Chairman Fasser saw no merit to the NALC argument based on Article XLI, Section 3-N, the underlying grievance was denied. 27

It may be that the denial of the grievance in NC-C-178 provided an opportunity for issuance of the March 10, 1977 28.

official policy statement even though an objective reading of the Fasser Opinion could not reasonably be thought to have supported the substance of the new policy.

Whatever confusion may have been engendered by these events continued up to the time the St. Louis Case was heard. Neither party was concerned particularly, however, with the March 10, 1977 policy statement when they presented the St. Louis Case. It was only in addressing other, and central issues in the St. Louis Case that the May 3, 1978 Opinion made plain that the parties had failed to appreciate the controlling significance of M-39 Handbook provisions. The parties remained at loggerheads over lawn crossing despite the St. Louis decision. The NALC promptly found several equivocal sentences in that Opinion and held them to constitute a binding interpretation of the term "obvious shortcut," as set forth in the Vacca letter urging withdrawal of the March 10, 1977 USPS policy. The USPS, of course, saw no reason to modify the statement or refer to the applicability of the M-39 Handbook. 29

It is apparent here, as it was in both earlier cases, that each party's arguments are insupportable. Before elaborating on this proposition further, however, it seems essential to lay out some basic propositions for the parties' future guidance: 30

1. Article III of the National Agreement recognizes the USPS authority, and responsibility, to assure that its operations are conducted efficiently, subject only to compliance with other provisions in the National Agreement and consistent with applicable laws and regulations. 31

2. Article XLI, Section 3-N says only that Carriers "may" cross lawns where (a) customers do not object and (b) there are no particular hazards. This is an ambiguous provision which does not provide a clear rule for determining when a Carrier may be ordered to cross a lawn. 32

3. Under Article XIX those provisions of the M-39 Handbook which affect the working conditions of Carriers are continued in effect, subject to change only in the manner provided in Article XIX. 33

4. The M-39 Handbook contains principles and procedures which provide adequate guidance for determining the circumstances under which a Carrier may be required by Management to cross a particular lawn in the exercise of its authority under Article III. 34

5. The M-39 Handbook contains separate and detailed provisions dealing with (a) Street Supervision and (b) Route Inspections. These separate provisions serve essentially different purposes and must be sharply differentiated insofar as they relate to the crossing of lawns by Carriers. 35

6. During street supervision it is the responsibility of the supervisor to make certain that a Carrier (a) does not use "time-wasting delivery patterns" and (b) follows the "prescribed line of travel." (Part 135.41) The Handbook also plainly states that "Managers should act promptly to correct improper conditions." (Part 135.12) These provisions leave no doubt that where a Carrier does not use an obvious shortcut in the judgment of the supervisor, he or she may be required to do so by a specific order or instruction. 36

7. On the day a Carrier's route is inspected the Carrier must be instructed to deliver the route "in exactly the same manner as he does throughout the year." (Part 231.5) 37

8. During inspection the Route Examiner observes but does not supervise. The Examiner is required to make notations of "all items that need attention" and list "any comments or suggestions for improving the service on the route." (Part 232.1.d) 38

9. The Route Examiner must complete Form 3999 for each route inspection and for this purpose consider generally whether the "present travel pattern" is the most advantageous "for both the Carrier and the delivery service." The Form 3999 requires a specific answer by the Route Examiner to the question: "Does Carrier take obvious shortcuts?" 39

10. A Carrier cannot, in light of the foregoing, be directed on the day of a route inspection to take any shortcuts which the Carrier does not normally use throughout the year. 40

In light of these basic propositions, no extended analysis of the March 10, 1977 "official" policy statement is required. It (1) fails to recognize the controlling significance of the M-39 Handbook, (2) overlooks the fundamental distinction between route inspections and street supervision, and (3) wrongly suggests that the only criterion to apply in ordering a Carrier to use a shortcut is whether it appears to be safe. It follows that the March 10, 1977 policy statement represents a unilateral effort to amend and supplant the carefully drawn and comprehensive provisions of the M-39 Handbook without complying with the requirements of Article XIX. Under Article XIX of the June 21, 1973 National Agreement, moreover, the only changes permissible in the earlier M-39 Handbook were those which were "fair, reasonable, and equitable" and USPS Management was obliged to provide the Union with notice of any changes that directly related to working conditions, for discussion and possible resort to the grievance procedure. The 41

March 10, 1977 statement should be withdrawn without prejudice to the right of the Service to revise the M-39 Handbook in accordance with the terms of Article XIX.

It is equally clear that there is no occasion to embrace the NALC argument that the term "obvious shortcut" (as used in Form 3999) must be interpreted to apply only where there are "observable conditions which reasonably might imply that the customer would not object." Whether such an elaboration of the meaning of the term "obvious shortcut" might appear reasonable, for purposes of day to day administration, is not the problem here since there is no reason to believe that the M-39 Handbook does not already cover the subject adequately. The M-39 Handbook was not written in a vacuum in 1974--the problem of when (and how) a Carrier might be required to cross a customer lawn had concerned the NALC and Postal Management at least as far back as 1962. The careful statement by Director Werner, of the Labor Relations Division, in January of 1969 also reflects that the matter had received top level consideration long before the 1974 revision of the M-39 Handbook was conceived. 42

It can only be concluded that the M-39 Handbook provisions which relate to the use of "shortcuts" were drafted meticulously by persons well familiar with Postal Service operations. They saw no need to embrace a detailed definition of an obvious shortcut, since the provisions with respect to street supervision provide adequate opportunity to deal with each individual lawn or shortcut in light of the observable conditions which are relevant. 43

On this score, it may be useful to quote from one USPS exhibit here. While offered to show that the March 10, 1977 "official" policy statement simply reflected long standing practice in the field, this exhibit actually shows the opposite--namely, that in at least one Region the distinction between street supervision and route inspection was clearly understood and respected. Delivery Services Newsletter No. 1, issued by the Southern Region Headquarters on July 21, 1973, includes the following on the subject of "Crossing of Lawns by City Letter Carriers": 44

"Some postal managers are under the impression that the Postal Service has changed the policy regarding carriers crossing lawns. The fact is that there has been no change in policy. A letter carrier should not be required to walk across a customer's lawn to deliver his mail if the customer objects, or if doing so would involve a safety hazard.

"However, management has the right to expect and the responsibility to insure that carriers take all reasonable shortcuts. This includes the requirement for carriers to walk across any lawn if the customer does not object and no safety hazard exists. The line of travel, in the final analysis, must be set by management.

"Carriers are required to serve their routes during the week of count and inspection in the same manner that they serve them the rest of the year. If certain lawns are crossed by a carrier throughout the year, the carrier should follow that line of travel when being inspected. If you have provided ample street supervision all year, you will know whether carriers are deviating from their regular practices.

"Supervision of a carrier's work on his route is one of your most important duties as a delivery supervisor.

"The delivery supervisor determines what constitutes an acceptable pace, a safety hazard, proper line of travel, whether or not mail is curtailed, etc. To allow the individual carrier to determine these things for himself is relinquishing your authority and allowing a major portion of your job to go undone."

(Underscoring added.)

As the Southern Region Newsletter recognizes, the time to determine whether a Carrier should cross a particular lawn is during street supervision. (Similar instructions were issued in the Eastern and Western Regions.) While in the first instance a Carrier may be instructed broadly that he or she should take all obvious shortcuts in delivering the route, the determination of what constitutes an obvious shortcut, or whether a hazard exists, can be made only in light of the specific conditions which prevail at the location involved. Moreover, what seems "obvious" to one person, in the sense that customer consent may be implied (or no objection anticipated) will not be "obvious" to another. Where a Carrier does not use a shortcut which appears to be safe to the supervisor, and the supervisor concludes that there is no reason to believe that the customer might object, then the supervisor properly may order the Carrier to use that specific shortcut. The Carrier is obliged to comply with such a direct order, but may file a grievance protesting any apparent unreasonable supervisory action in applying the principles enunciated in the M-39 Handbook. 45

In these circumstances there is no reason for an arbitrator to strive now to develop detailed definitions of such M-39 Handbook terms as "obvious shortcuts," or "correct travel pattern," "apparent hazard," or "time-wasting delivery patterns." These criteria can only be applied meaningfully during street supervision, on a case-by-case basis in light of all known and observable facts. While the initial judgment in each instance may be that of the Carrier, the supervisor bears full responsibility to give appropriate instructions whenever 46

it appears to the supervisor that a Carrier is not using an obvious shortcut, or otherwise is following a time-wasting delivery pattern.

One final matter may be worth comment. At the hearing, USPS counsel asserted that-- 47

> "We submit, and past practice will indicate, that customer objection has always been something that's affirmatively voiced by the customer, and that absent that affirmative customer objection we may, as a matter of law, and as a matter of past practice, infer that the customer does not object." (Tr. 31-32.)

There is no showing of any applicable "law" which would support this broad assertion. As for "past practice," the USPS presented a number of exhibits showing that "Guidelines for Street Supervisors" had been issued from time to time in the Western, Eastern, and Southern Regions commencing in late 1973 and running through 1975. These generally ran 3 or more pages in length and included the following relevant questions-- 48

> "Does he take all available shortcuts?
>
> "Can shortcuts be taken that will not endanger the Carrier's safety?
>
> "Is he cutting all lawns where customers do not object?"
>
> (Underscoring added.)

The USPS seemingly contrues these questions in its guidelines for supervisors to reflect the existence of a uniform national policy of requiring Carriers to cross all lawns except where the customer already has objected to the use of such a shortcut. It is unclear how internal Management 49

instructions of this sort can give rise to a practice which is binding upon the Union, however, especially when the instructions do not in fact clearly support the interpretation now being suggested. Moreover, if such a requirement of affirmative customer objection (in advance) indeed did come to represent the USPS policy on a national basis, it would have been in clear conflict with the M-39 Handbook and thus violative of Article XIX.

B. Case NC-C-15708-D

1. The Arguments

The NALC challenges Grievant Boehl's discharge primarily on the ground that it contravened principles enunciated in the earlier Cincinnati and St. Louis lawn crossing decisions. The Opinion of Associate Impartial Chairman Fasser, it says, made clear (in Marginal Paragraph 70) that (1) it was a Management function to determine through street supervision whether a Carrier was delivering his or her route efficiently, and that (2) the Carrier necessarily determined, in the first instance, whether it was proper to take a particular shortcut. 50

Thus the NALC stresses that Mt. Healthy Management never directed Boehl to cross any specific lawn:--The only "orders" he ever got were general directives. Indeed, the Union was unable--in the grievance procedure--to obtain any specification of lawns which Boehl was obliged to cross. Superintendent Dunn's decision to discipline was made solely on the basis of a list of addresses provided by the Route Examiner, without any discussion with Boehl or other effort to verify the accuracy of the listing. The later decision to discharge was based simply upon Superintendent Dunn's belief that 200 lawns were too many to have been "unsafe." 51

The NALC asserts that Boehl was justified in deeming it unsafe to cross many lawns because rainy conditions through most of the week prior to May 19, 1978 had left the grass wet and the ground soggy. Finally, it notes that other Mt. Healthy Carriers did not cross substantial numbers of lawns during their 1978 route inspections (one for "moral" reasons) and were not disciplined. 52

The USPS urges that Boehl was discharged because he refused to cross 200 or more lawns on May 19, 1978. It suggests that Boehl had no basis to claim that he did not know which lawns to cross on May 19, because on September 23, 1975 Superintendent Dunn had told Boehl to cross all lawns that he considered safe. Boehl apparently crossed many more lawns on that date than he did on May 19, 1978 (Dunn estimated approximately 400 were crossed on September 23, 1975). Over the years since 1975, moreover, Dunn frequently saw Boehl crossing lawns while delivering his route. Mt. Healthy records indicate that Boehl's street time averaged 5.47 hours per day between March 11 and April 21, 1978, compared with 6 hours, 33 minutes during the week of the inspection. On Monday of the inspection week the replacement Carrier delivered the route in 5 hours, 26 minutes. 53

The USPS also stresses testimony by Route Examiner Sherman that, before delivering his route, Boehl had stated flatly that--"I will not touch any grass on my route." (Tr. 171) 54

Boehl's subsequent basic explanation for not crossing lawns (that the grass was too wet up to the last 3 relays) is not believable in the USPS view. Official National Weather Service records show that the temperature reached 83° on May 19, 1978, with no actual precipitation over the two prior days. Other reasons advanced by Boehl for not crossing individual lawns are equally unbelievable in the USPS view. Finally, the USPS urges that Boehl's disciplinary record reflects serious problems which strongly support the imposition of discharge. 55

2. Propriety of the Discharge

During a tour of Boehl's route, conducted as part of the hearing, it was obvious that most of the lawns which he did not cross on May 19, 1978 could be crossed safely under good weather conditions. Other lawns (including some selected by Dunn as illustrative of lawns which Boehl should have crossed) manifestly could not have been crossed because of fences, shrubs, flower gardens, embankments and other obstructions. In any event, it is impossible now to ascertain exactly what the relevant conditions may have been in respect to most of the lawns which Boehl did not cross on May 19, 1978. 56

By the time Superintendent Dunn had decided to impose discipline (as of June 23, 1978) it probably was too late to reconstruct accurately the extent to which lawns might have been wet or lawns soggy up to noon on May 19. Boehl knew, from his 1977 inspection, that Management did not question his right not to cross a lawn which was wet. He asserted that rain earlier in the week, plus morning dew on May 19, left the ground wet, and soggy in some places. Wet grass, he said, made small hills and banks slippery. 57

The USPS presented National Weather Service data which showed that 2.34 inches of rain had fallen on May 12 through about 9:00 p.m. on May 16. May 17 was characterized by heavy fog and haze. Indeed, there was fog on May 12 through the 16th and again on May 18. The highest temperature between May 13 and 18 was 59°. The high was 77° on May 18 and 83° on May 19. 58

According to Boehl and another Mt. Healthy Carrier, dew does not normally disappear at this time of year until about 11:00 a.m. The only USPS witness who disputed Boehl's testimony as to the wet conditions, was Route Examiner Sherman but he never was consulted by Dunn as to how wet conditions were on May 19 and did not become aware that Boehl had been 59

discharged until a week before the hearing. By hearing time it was dubious that Sherman could recall accurately the ground conditions on the morning of May 19.

The real difficulty with the USPS reliance on Sherman's testimony, however, lies in the fact that Dunn in fact never investigated Boehl's explanations before imposing discharge. Superintendent Dunn actually was unaware of Boehl's possible explanations when he prepared the June 23, 1978 Notice of Charges--he had not discussed the situation with either Boehl or Sherman. The failure to question Boehl immediately is difficult to understand since Dunn testified that he knew from frequent personal observation that Boehl long had crossed lawns "on a normal basis." (Tr. 197) 60

In fairness to Superintendent Dunn, it should be noted that he did not see the Form 3999, which Route Examiner Sherman had prepared, until about May 27 or later. Apparently such forms are sent initially to the Cincinnati Post Office for processing. While Sherman testified that Boehl had said he would not cross any lawns on May 19, he apparently saw no reason to report this to Dunn. Indeed, Sherman never told Dunn that such a statement had been made, and it could not have been a factor in the decision to discharge. 61

Whatever might have been said by Boehl on the morning of May 19, 1978, in any event, was in relation to improper instructions given him by Sherman. Under the M-39 Handbook the Carrier must be directed to deliver his or her route, on the day of inspection, in "exactly the same manner" as throughout the year. Instead of so instructing Boehl, Sherman broadly advised him to (1) take all "proper" shortcuts, (2) utilize the "most efficient method of travel to effectuate delivery," and, in so doing, to cross lawns "where the owner does not object and there are no apparent hazards." These loose and ambiguous instructions (as they had been given to Sherman by higher USPS Management specifically for use at the outset of inspections) 62

also implied that discipline would follow in the event a Carrier failed to comply to the satisfaction of Management. The giving of such instructions at outset of a route inspection constituted a clear deviation from the M-39 Handbook. No Carrier properly can be disciplined simply because a Supervisor later concludes that such Carrier did not comply adequately with such improper instructions, during a route inspection.

In an apparent effort to overcome this fatal deficiency the USPS in effect now urges that Boehl deliberately refused to deliver his route on May 19, 1978 in the same manner as he customarily had delivered it through the rest of the year. This indeed would constitute a serious infraction if (1) Boehl had been instructed properly on May 19, 1978 (2) the USPS had presented specific evidence to support this particular charge, and (3) such misconduct in truth had constituted the reason for the discharge. 63

Here, however, Boehl consistently has maintained that wet grass and soggy lawns accounted for his failure to use most of the 200 odd shortcuts which Sherman and Dunn thought he could have used safely. He also listed numerous other addresses where he had reason to believe that customers might object to his crossing their lawns. He specified still other lawns which he deemed to be unsafe because of embankments or other potential hazards and obstructions. Finally, Boehl tabulated 45 or more lawns (of the 230 odd noted by Sherman) that he actually had cut or partially cut. 64

Even after having been provided with this detailed explanation, Dunn elected not to specify which lawns Boehl improperly had failed to cross. The discharge, he testified, was based instead on Dunn's conviction "that there just couldn't be two hundred (lawns) that were dangerous, that were unsafe." (Tr. 215) 65

It thus is apparent that Boehl was discharged because he had not crossed all lawns that were safe to cross during his route inspection, in the opinion of a supervisor who was not present at the time and who had no first hand information as to the actual condition of the various lawns in question. Finally, Dunn was not concerned at all with whether some customers might object to having their lawns crossed. 66

Given the manifest failure to comply with controlling provisions of the M-39 Handbook, the lack of any specific orders for Boehl to cross any particular lawns, and the basic failure to investigate the facts adequately before imposing discipline, it is apparent that the discharge must be set aside. 67

Nothing in these findings, however, should be construed, by Boehl or the NALC, as indicating that in the future a Carrier may disregard a proper Management order to cross a specific lawn or lawns with impunity. As already noted in Case NC-NAT-13212, a Supervisor is entitled to issue (except when the route is being inspected) broad instructions to a Carrier to cross all lawns where there is no reason to believe the customer will object, and no apparent hazard. In complying with such an instruction, the Carrier obviously must exercise discretion, in the first instance, and there is no proper occasion to invoke discipline if the Supervisor later concludes that some lawns could have been crossed but were not. On the other hand, the Supervisor properly may direct the Carrier to use a specific shortcut, or shortcuts, which the Supervisor concludes--after personal observation and discussion with the Carrier--should be utilized. No Carrier can, with impunity, refuse to comply with or disregard such an order. 68

AWARDS

1. Case NC-NAT-13212

a. The grievance is denied to the extent of ruling that there is no proper basis in this proceeding to define the term "obvious shortcut" for purposes of applying the M-39 Handbook in the future. 69

b. The grievance is sustained to the extent that the USPS March 10, 1977 policy statement conflicts with the M-39 Handbook and was issued without complying with the requirements of Article XIX of the July 21, 1975 National Agreement. 70

c. The March 10, 1977 policy statement must be withdrawn promptly in compliance with this Award. 71

d. Article III of the National Agreement and the M-39 Handbook provide all necessary criteria and procedures for dealing with any issue which may arise as to whether a Carrier should be directed to cross some specific lawn or use a particular shortcut. The grievance procedure is available to any Carrier who believes that such a directive is unwarranted, or otherwise invalid under the M-39 Handbook as interpreted in the Opinion in this case. 72

2. Case NC-C-15708-D

a. The grievance is sustained. Grievant Boehl shall be reinstated and made whole for all lost earnings. 73

Sylvester Garrett
Impartial Chairman