C#07569
A-G

REGULAR ARBITRATION PANEL

In the Matter of the Arbitration between UNITED STATES POSTAL SERVICE and NATIONAL ASSOCIATION OF LETTER CARRIERS, AFL*CIO	Grievants: R. Karoghlanian, J. Russo, P. Melo, J. Yadisernia, C. Tracy, C. Koch, R. Hines Post Office: Franklin, MA 02038 Case Nos: N4N-1F-C 30826, 30828-30833, inclusive

Before Harry Grossman, Esquire, Arbitrator

Appearances:

For US Postal Service: William T. Evans, Sr., Manager, Labor Relations USPS, Boston, MA 02205

For Union: John Pimentel, Jr., Regional Admin. Assistant, NALC, New England

Date of Hearing: September 22, 1987

Place of Hearing: Franklin, MA

Award: 1. The grievances are sustained with respect to the stipulation between the parties that the National Agreement was violated when the grievants' requests for special mail counts and inspections were not accorded to them and required route adjustments were not timely made.

2. The seven grievants shall be compensated for such violations by cash payments of five hundred ($500.00) dollars to each.

3. The Employer is ordered to cease and desist from such violation in the future.

Date of Award: OCT 27 1987

USPS and NALC
Case Nos. 30826, 30828,
30829, 30830, 30831,
30832, 30833
Grievants: Karoghlanian et als.

OPINION AND AWARD

The Issue

These grievances, consisting of a class of seven (7) in number, arose at the Franklin, Massachusetts, Post Office as a result of the grievants' requests for special route inspections submitted on or about September 30, 1986, which the Employer failed or refused to conduct. The Union and the Employer agreed that these routes met the Employer's criteria for special mail counts and inspections. The Union claimed that the Employer violated Articles 3, 5, 19, and 41 of the National Agreement between the parties, 1984-1987.

In its grievances, the Union requested that:
(1) special route inspections be conducted immediately; and
(2) each grievant be made whole by the payment of one (1) extra hour's pay for each day after October 31, 1986 that the grievant's route had not been inspected or adjusted.

The grievances were denied at the respective steps of the contractual grievance procedure, whereupon the Union timely requested arbitration of the disputes under Article 15 of the National Agreement, Section 4.

The matter was duly assigned to the undersigned member of the Regular Regional Arbitration Panel. Both parties appeared at the hearing before the Arbitrator held at

Franklin, Massachusetts on September 22, 1987, and were given full opportunity to present their proofs. The Employer's advocate requested and was granted time to submit a post-hearing memorandum or brief. None was received postmarked not later than October 6, 1987, the deadline set by the Arbitrator, whereupon the record was closed.

On October 10, 1987, the Arbitrator received a copy of a letter dated October 6, 1987, from the Employer's advocate to its Manager, Grievance/Arbitration Section, Northeast Human Resources Service Center, requesting that these grievances be submitted to Step 4 of the grievance procedure (National Level), preliminary to entitlement to arbitration at the National level. The Arbitrator heard nothing further on this request to October 17, 1987. However, the Arbitrator notes that at the Step 3 grievance decision the Employer's view was that its judgment was that the grievances did not meet the criteria of Article 15, Section 2, Step 3, paragraph (e), i.e., the grievance involves an interpretative issue which may be of general application. The record was then closed and this Arbitrator proceeded toward adjudication.

The Issues

The statement of the issues to be arbitrated, as submitted by the Union and agreed to by the Employer read:

> Did the Postal Service violate the National Agreement by refusing to conduct and implement timely Special Route Inspections and adjustments on the routes of the grievants? And, if yes, what is the appropriate corrective action, including a financial remedy?

Positions of the Parties

The Employer's advocate accepted the following stipulations offered by the Union at the outset of the Arbitration hearing:

1. The grievants requested Special Inspections on (or about) September 30, 1986.
2. The grievants at that time had met the criteria for a Special Inspection under 271(g) of the M-39 Handbook.[1]
3. The contract was violated when the inspections were not completed within thirty (30) days of the request.
4. The decision in this case will apply to all of the below listed seven (7) grievants. (The names and case numbers of the seven grievants followed.)

In its opening statement at the Arbitration hearing the Union requested the Arbitrator to order the following actions by way of remedy for the Employer's acknowledged violation of Section 271(g) of the M-39 Handbook:

1. M-39 Handbook is titled Management of Delivery Services. Section 271 appears under the caption 270 SPECIAL ROUTE INSPECTIONS, and is headed WHEN REQUIRED. Under 271 there is a prefatory paragraph stating: "Special route inspections may be required when one or more of the following conditions or circumstances is present:" Seven sets of "conditions or circumstances" are then listed lettered a to g.

1. Inspect the grievant's routes immediately and adjust them to eight hours.

2. Award the grievants one hour at double time rate for each workday from September 30, 1986 until the date the adjustments are implemented.

3. Award the grievants twice their normal rate for all overtime hours worked from the date the Special Inspections were requested until the date the adjustments are implemented.

4. Management be instructed to abide by the mandates of the National Agreements.

5. A strong reprimand to Management advising them that continued violation of Section 271(g) of the M-39 will subject them to more severe financial penalties and/or to sanctions under Article 5 of the National Agreement which incorporates the National Labor Relations Act (NLRA).

The Employer's Advocate expressed the Employer's acceptance of the first and fourth of the Union's proposed remedial actions, but opposed totally the other three. It was to that end that the Employer was given additional time to furnish the Arbitrator any authorities and/or arguments to support its opposition but, as stated above, none was forthcoming in the time allowed.

The Union argued that its requested relief rested on authoritative awards of a number of arbitrators at the National and Regional Levels, some of which addressed the same violations as were admitted to by the Employer in this arbitration. Among them were two awards of the undersigned,

one a consent award involving M-39, Section 271(g) inspections.

Some of the other awards, while not involving a violation of M-39, Section 271(g), were offered to illustrate the Arbitrator's inherent power to fashion an appropriate punitive award remedy, including imposition of monetary penalties and sanctions, and to support its position that Section 8(d) of the National Labor Relations Act (duty to bargain) is part of the National Agreement by virtue of the Article 5 prohibition of unilateral actions inconsistent with the Employer's obligations under law.

Responding to the Employer's objection to the Union's requested remedies numbered 2, 3, and 5, above, the Union argued that the Postal Service is estopped from taking its position in the light of the previous arbitration awards involving the same issues between the same parties. The Employer, however, argued that the Union's cited Arbitration awards were not applicable to the Franklin, Massachusetts Post Office.

The Employer further contended that there is no provision in the National Agreement for punitive damages and that the grievants received eight hours pay for eight hours work and received overtime pay for overtime work in accordance with Article 8 of the National Agreement.

Analysis and Findings

Article 19 of the National Agreement in effect incorporates by reference "(t)hose parts of all handbooks, manuals and published regulations of the Postal Service, that directly relate to wages, hours or working conditions. . . ." Thus, M-39, Section 271 becomes a contractual provision of the National Agreement.

While the Section opens with a listing of the conditions or circumstances which may require special route inspections (underlining added), the conditions "g", with which this dispute is concerned, reads:

> If over any 6 consecutive week period (where work performance is otherwise satisfactory) a route shows over 30 minutes of overtime or auxiliary assistance on each of 3 days or more in each week during this period, the regular carrier assigned to such route shall, upon request, receive a special mail count and inspection to be completed within 4 weeks of the request. . . (underlining added). (Union Ex. 13).

The Postmaster at Franklin Post Office certified on August 6, 1987, that the seven carrier routes involved in these grievances qualified for Special Route Inspection under § 271(g) for the six week period prior to September 26, 1986. The grievance appeal record, Joint Ex. 2, showed that each of the seven grievants did in fact submit a written request for such inspection on or about September 26 or 30, 1986.

As indicated above, it was stipulated that the Employer did not conduct any special mail counts and inspections in the four weeks of the request nor thereafter.

Handbook M-39, Section 272 is captioned MANNER IN WHICH CONDUCTED. Referring to Special Route Inspections under § 271, it reads: "When special inspections are made because of conditions mentioned in 271, they must be conducted in the same manner as the formal count and inspection." Chapter 2 of M-39, governs the subject of MAIL COUNTS AND ROUTE INSPECTIONS. § 211.3 sets forth a time limit of 52 calendar days of the completion of the mail count for placing necessary adjustments into effect, with approval of the district manager required for any exceptions. § 242.122 of M-39 sets as a standard the following: (Union Exs. 11, 13)

> The proper adjustment of carrier routes means an equitable and feasible division of the work among all of the carrier routes. . . . All regular routes should consist of as nearly 8 hours daily work as possible. (Union Ex. 12)

The mandatory nature of the M-39, §§ 271(g), 272, 211 and 242 provisions were brought to the attention of Postal Service field managers by the Service Headquarters, Washington, D.C., and by the Northeast Regional Office memoranda of April 14 and 22, 1982, respectively. (Union Exs. 7, 8)

The Northeast Regional Office further apprised its Managers in its jurisdiction on March 24, 1986 of three Arbitration awards in recent Central Region cases in which the Arbitrator had granted Union requests that special route inspections be conducted and management pay a monetary penalty to the grievants in these cases where the criteria for special inspections were met but the inspections were not performed nor any permanent adjustments made to bring the routes to eight hours. (Memorandum NE220: M. Miller: 83:0220 citing cases numbered C4N-4J-C-6365, 4720, and 6273, January 24, 1986) (Union Ex. 9). The memorandum cautions managers:

> . . . It is apparent that we must make sure that we do not get into the same situation.
>
> By the use of the route review process, opportunities to improve route structure will be identified. Then prompt action must be taken to relieve overburdened routes or improve inefficient routes. If a special route inspection is warranted, it is to be conducted in accordance with the M-39 and, if the results indicate, adjustments made.

Thus, it is clear from the foregoing documentary material that in these seven grievances, the Employer did knowingly violate the applicable provisions of the National Agreement without good and sufficient reason or excuse.

It remains for the Arbitrator to fashion a proper remedy or remedies for the violations, as the facts warrant and the Arbitrator's best judgment dictates within his

authority and the parameters of Article 15, Section 4A(6) of the National Agreement:

> All decisions of Arbitrators shall be limited to the terms and provisions of this Agreement, and in no event may the terms and provisions of this Agreement be altered, amended, or modified by an arbitrator. . . .

As the Employer submitted, the Agreement makes no provision for "punitive damages" or penalty payments for violations. Arbitrator H.G. Gamser, as member of the National Level Panel was presented with the question in a grievance where the Postmaster provided the grievant with "less than an equitable opportunity to work overtime." (Case No. NC-S-5426, April 3, 1979) The NALC took the position that the Postal Service was obligated to compensate the grievant by paying him for the overtime opportunities that were not given to him.

Noting that there was nothing in the Collective Bargaining Agreement concerning the remedy to be fashioned, either by only a make-up opportunity as contended by the Postal Service, or by monetary compensation at overtime rates, as the Union desired, Arbitrator Gamser looked to other arbitration awards for guidance on the particular question. He concluded that monetary compensation was in order when "special circumstances" dictated, that that was the only effective means of correcting the breach of an obligation to the adversely affected employee or employees.

It was his view that even where no specific provision defining the nature of such remedy is to be found in the agreement, to provide for an appropriate remedy for breaches of the terms of an agreement "is found within the inherent powers of the arbitrator." As Arbitrator Gamser added, "No lengthy citations or discussion . . . is necessary to support such a conclusion." This Arbitrator is in agreement with Arbitrator Gamser's conclusion and observation on his "inherent authority."

A 52 page opinion of Arbitrator C.J. Snow dated July 25, 1983, Case No. WIN 5D-C 4230, involving implementation of a local agreement on annual leave was offered by the Union also on the matter of an arbitrator's obligation to provide an appropriate remedy for a breach of the bargain entered into by the Employer.

To the same effect was the Union's submission of an award of Arbitrator W. Eaton, dated February 10, 1983, Case No. W8N-5K-C 13928,[2] and one of Arbitrator W.J. Le Winter, February 23, 1983, Case No. E8N-2P-C1386.[3]

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2. ". . . it flies in the face of equitable consideration, as well as good faith enforcement of contractual requirements, to deny a remedy where a violation has occurred. As the common law maxim has long had it, 'There is no right without a remedy.' Nor is the party who has violated the Contract . . . given much incentive to observe it in the future if the violation is allowed to occur without penalty."

3. ". . . the Union is quite correct in arguing that a sustained grievance without any remedy renders the

The other arbitration awards submitted by the Union were by Arbitrator H. Letter, December 15, 1986, Case No. W4N-5G-C3589; Arbitrator E.D. Pribble, January 24, 1986, C4N-4J-C6365, 4720, 6273; Arbitrator H. Grossman (the undersigned), December 16, 1986, Case No. N4N-1E-C 22422; Arbitrator J.S. Liebowitz, July 7, 1987, Case No. N4N-1K-C 33514, 33522, inclusive (By consent); Arbitrator H. Grossman, August 6, 1987, Case No. N4N-1K-C 32218, 34724 (By consent); Arbitrator R.L. Stutz, August 22, 1987, Case No. N4N-1J-C 36001 (By consent); Arbitrator E.W. Schedler, Jr., January 11, 1981, Case No. S8N-3Q-D 18523; Arbitrator D.A. Dilts, September 1, 1987, Case No. C4N-4J-C 30920; Arbitrator I. Sobel, March 7, 1987, Case No. S4N-3R-D 35445.

All but the Schedler and Sobel awards were particularly on point on the propriety of an Arbitrator's providing a penalty payment where the facts deem it to be an appropriate remedy. In view of the consent awards where such damages were agreed to by the Postal Service as well as the others in which the arbitrators, including the undersigned, decided to award monetary compensation as penalties for the violations, it is my view that it is too late for the Employer to contest the logic of such awards when the Employer consistently disregarded its obligation to keep

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grievance-arbitration procedure worthless when such remedy is possible under the circumstances. . . ."

routes to as close to eight hours as possible. (M-39, 242.122)[4]

Arbitrator Schedler's award noted that "when the same issue arises that requires the interpretation of the identical contract provisions of the National Agreement, then every principle of common sense, policy, and labor relations demands that the prior award(s) stand until the Employer and the Unions annul the prior award by newly worded language in the National Agreement." This Arbitrator agrees.

Arbitrator Sobel's award involved a disciplinary matter (removal/suspension). The point on which it was submitted was the arbitrator's right to fashion a remedy to make the grievant "whole" when the grievance is sustained. This was apparently offered for the purpose of persuading this Arbitrator to reject the Employer's reasoning expressed in its Step 3 grievance decisions, denying the Union's requests for: (1) immediate special inspections; and (2) one hour's pay to each grievant after October 31, 1986 for each day that his route was not inspected or adjusted. The Employer's Step 3 reasons for denying the Union's requests

4. In saying this, I am not simply invoking the legal doctrine of collateral estoppel, which by implication, at least, was suggested by the Union's advocate. I do so after careful thought and research into the subject of punitive or exemplary damages in arbitration.

in the cases before me were that the routes were adjusted in February 1987 upon consultation with the grievants, by establishing auxiliary routes and/or router positions, etc., so that they no longer exceeded the standard eight hours. In essence, the Employer would consider the grievances rendered moot or satisfied by virtue of the adjustments made to the routes more than four months after the special inspections were requested. I disagree.

Additionally, as stated above, the Employer's advocate at the Arbitration hearing argued that since the grievants received overtime pay at their overtime rates as provided in Article 8, Section 4 of the National Agreement, they suffered no monetary losses. This point is addressed below.

Conclusions

I disagree with the Employer's position that for the reasons it has advanced, the grievances should be denied. I do so upon the submission of ample authority by the Union and general recognition that except in deminimus violations, the existence of a right without a remedy for its violation serves to diminish that right, and in some situations, the right would be made totally meaningless. Therefore, even though the grievants were paid for their overtime work at their overtime rates, they were regularly deprived of their own free hours which, as Arbitrator Pribble put it in Case

Nos. C4N-4J-C6365, 4720 and 6273, cited above, "No possible future remedy can return this time to them." As in those cases, the grievants here "have been harmed by clear and repeated breaches of the Agreement, (and) some monetary award is needed for the Grievants." (Pribble at page 12)

Violations of the M-39 Handbook concerning special mail counts and inspections requested by these grievants clearly and unquestionably occurred when four weeks after their requests were submitted, nothing had been done on their requests. That would have established October 28, 1986 as the date that the Employer's violations of M-39 Handbook began. Those violations continued until the grievants' routes were adjusted in February of 1987 not to exceed eight hours per day. If those adjustments were in fact put in place, whether by establishing and filling router positions or auxiliary routes, or changing street and/or office times, or any combination thereof, and the results were to effectively reduce the grievant's regularly assigned routes to "as nearly 8 hours daily work as possible" (M-39, 242.122), the purpose of the grievants' requests for special inspections will have been met, and the effect of the violations of M-39 will then have come to an end. If those were not the results achieved, then the grievants were again in a position to submit new requests under § 271(g) of M-39, and if nothing was again done after four weeks, new

grievances could have been filed. My reason for these conclusions lie in Article 3 of the National Agreement, paragraphs B and D of MANAGEMENT RIGHTS, the rights to assign employees and to determine methods, means and personnel by which operations are to be conducted. Nothing has been brought to my attention that route adjustments can only be made following a requested or periodic count and inspection under Chapter 2 of M-39. The critical element is that needed route adjustments are to be timely made to keep overtime to a minimum. For these reasons the Union's request that this Arbitrator order an immediate inspection of the grievants' routes is not an appropriate remedy at this time.

More perplexing to this Arbitrator are the questions raised in the Union's second and third requested remedies. Should a monetary award be ordered for the Employer's violations in these cases? If so what shall it be?

It is my considered judgment that the first of these questions should be answered in the affirmative. On the record before me, there was just no good reason for Management to take no action on the grievants' requests during all of the four months after receipt of their requests, even if inaction during December can be excused because of the heavy Christmas mailing. I can only conclude that apart from December, Management was indifferent to the

grievants' regularly working overtime in excess of the half hour on two of five days a week considered not unreasonable or excessive in § 271(g). For showing such indifference, I am of the opinion that assessment of a penalty is appropriate to set an example for the future.

As to the second question, I have very seriously entertained the Union's second and/or third requested monetary remedies, particularly in the light of those prior awards on which it relied, both by consent or upon arbitration. The first question that I address is whether I may or should apply the penalty overtime pay provisions contained in Article 8, HOURS OF WORK, Section 4C and D, and Section 5F of the National Agreement in these cases. It is my considered opinion that I may not and should not. The reason for my opinion is that Section 4D explicitly limits the "double time" penalty rate to "any overtime work in contravention of the restrictions in Section 5F. No proof was offered to show that these grievants were required to work overtime "in contravention" of that Section or if they were, they were not paid for such contravening overtime at the prescribed penalty rate. Moreover, if they were not, in fact, so paid, recourse to the grievance-arbitration procedures of Article 15 was available to them independently of the instant grievance

After careful consideration, I have come to the conclusion that a lump sum payment to each of the grievants is the most equitable resolution, following the precedents of the consent award in Case No. N4N-1K-C 32218 at the Sanford, Maine, Post Office before me, and the consent awards before Arbitrator Liebowitz, Case No. N4N-1K-C 33514-33522 inclusive, Biddeford, Maine, Post Office, and before Arbitrator Stutz, Case No. N4N-1J-C 36001, New Haven, Connecticut.

The cash payments in those three cases, agreed to by the parties, were $250.00, $500.00, and $150.00, respectively. In my considered judgment, a cash payment of $500.00 to each of the seven grievants in the instant arbitration constitutes fair and adequate compensation for the Employer's failure to conduct a timely special mail count and inspection and timely route adjustments, both in violation of the National Agreement.

Finally, this Arbitrator does not deem it in the interest of sound management-labor relations to issue a "strong reprimand" to the Employer, as sought by the Union's last request. Instead, an appropriate instruction in the nature of a cease and desist order should suffice.

USPS and NALC
Case Nos. 30826, 30828,
30829, 30830, 30831,
30832, 30833
Grievants: Karoghlanian et als.

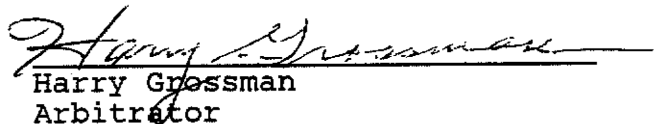
AWARD

1. The grievances are sustained with respect to the stipulation between the parties that the National Agreement was violated when the grievants' requests for special mail counts and inspections were not accorded to them and required route adjustments were not timely made.

2. The seven grievants shall be compensated for such violations by cash payments of five hundred ($500.00) dollars to each.

3. The Employer is ordered to cease and desist from such violations in the future.

Dated: OCT 27 1987



Harry Grossman
Arbitrator

Grievants

R. Karoghlanian	30826
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P. Melo	30829
J. Yadisernia	30830
C. Tracy	30831
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