

C#15022

REGULAR ARBITRATION PANEL

X

In the Matter of the Arbitration

GRIEVANT:
Gary H. Gibson

between

POST OFFICE:
Mystic, CT

UNITED STATES POSTAL SERVICE

CASE NO:
B90N-4B-C 95045915/
20295

and

NATIONAL ASSOCIATION OF LETTER CARRIERS

X

GTS 18390

BEFORE: ROSE F. JACOBS, Arbitrator

APPEARANCES:

For the U.S. Postal Service:

Vernon Tyler,
Labor Relations Spec.
Lucinda Foular,
Supvsr. Customer Serv.
Vincent Consiglio,
Postmaster

For the Union:

John Kaminski, RAA
Norman St. Arnauld, Pres. U
Glen Aeschliman, Mgmt.
Gary H. Gibson, Grievant

Place of Hearing:

24 Research Parkway,
Wallingford, CT

Date of Hearing:

November 17, 1995

A W A R D

The grievance is sustained. For the violation of M-39, Section 271g acknowledged by the Employer, Gary H. Gibson is awarded two (2) hours pay at the overtime rate for each day worked from April 14, 1995 through October 6, 1995. The request for an additional penalty sum of \$2,000 is hereby denied.

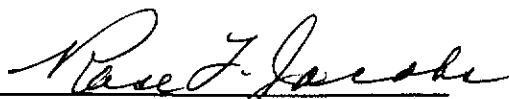
Date of Award:

December 17, 1995

Arbitrator:

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DEC 28 1995



ROSE F. JACOBS

N.A.L.G. New England Region

Pursuant to the arbitration procedures set forth under the National Agreement between the UNITED STATES POSTAL SERVICE and the NATIONAL ASSOCIATION OF LETTER CARRIERS, (hereinafter referred to as the "Postal Service" and the "Union", respectively), the Undersigned was appointed Arbitrator to hear and decide the grievance herein and to render a final and binding Award. This proceeding involves the grievance of GARY H. GIBSON with regard to his request for a route inspection. The dispute being unresolved was submitted by the Union to arbitration for final determination.

A hearing was held before the undersigned Arbitrator at the offices of the Postal Service at 24 Research Parkway, Wallingford, CT on November 17, 1995. The evidence adduced and the positions and arguments set forth at the hearing have been fully considered in preparation and issuance of this Opinion and its accompanying Award. The hearing was not transcribed and the Record consists of the Arbitrator's notes, 9 Management Exhibits, 8 Union Exhibits, and a total of 24 Awards submitted by the Parties to substantiate their positions. The evidence so submitted and the positions and arguments set forth at the hearing have been fully considered in preparation and issuance of this Opinion and its accompanying Award.

The Parties were not able to frame the issue before the Arbitrator and they jointly stipulated in writing that after hearing all the evidence the Arbitrator is empowered to make that determination. The Parties were afforded ample opportunity to present evidence and testimony germane to their positions. After

hearing the evidence, the Arbitrator determines that the following issue is presently before her:

THE ISSUE

Should a monetary sum be awarded to the Grievant for the Employer's admitted violation of Section 271g of the M-39 Handbook with regard to special route inspection?

If so, what shall be the appropriate remedy?

BACKGROUND

This case pertains to an allegation by the Union that the Postal Service violated the Agreement when it failed to conduct a special route inspection as requested by the Grievant. Management contends that the grievance was resolved in part and denied in part during the grievance procedure -- the matter was resolved to the extent that if local Management authorizes overtime or auxiliary assistance on the route being served by sub-Carriers, then that route may qualify for a special inspection provided no action was taken on the sub-Carriers which would indicate unsatisfactory performance. The case was denied to the extent that the request for the remedy of the payment of 2 hours per day of overtime pay until route inspection is completed is inappropriate and amounts to punitive damages which is not allowed under the Agreement. The Union argues that as a result of Management's admitted breach Mr. Gibson is entitled to a financial remedy. The Parties holding diverse opinions with regard to the application of the Agreement to the statement of facts brought the matter to this arbitration. The matter is now before the Arbitrator for final resolution.

POSITIONS OF THE PARTIES

The Union:

The Union contends that route 5502's Regular Carrier, Gary Gibson, requested a special inspection on March 17, 1995; that Mr. Gibson has met the criteria set down in Handbook M-39, Section 271g for special inspection; and that his argument pertains to the 6 consecutive weeks where the route shows over 30 minutes of overtime or auxiliary assistance on each of 3 days or more during each week of the period in question.

The Union has shown that Management violated Article 19 of the National Agreement and its related M-39 Handbook, Section 271g when it failed to provide Letter Carrier Gary Gibson a special route inspection. He notified Postmaster Vincent Consiglio in writing that his route 5502 met the criteria. "...it flies in the face of equitable considerations as well as good faith enforcement of contractual requirements to deny a remedy where a violation has occurred. As common law maxim has long had it, there is not right without a remedy."¹ The Union contends that a cease and desist order would be inappropriate as the route inspection has been completed and the adjustments implemented. Thus, what remains is the basic principle to render an Award that will both fairly compensate the Employee in question and serve as a detriment to future violations. Management admits in its Step 3 decision that it violated the mutually negotiated 30 day time limit for giving special route inspections.

¹ Case No. W8N-5K-C 13928, 2/10/83, (W. Eaton, Arb.)

The grievance now comes down to the issue of whether punitive damages are appropriate and what they should be. Management has expressed a willful and deliberate disregard and defiance of the Contract. At first the only argument raised was that the Grievant did not meet the required criteria, but, during all the Steps of the grievance procedure, Management did acknowledge that the Grievant was entitled to a special inspection to be completed within 30 days of his request. However, Management defied the Agreement for six months and then provided inspections and adjustments only when arbitration became inevitable.

The evidence demonstrates a clear avoidance of the obligations of Management under the M-39 Handbook. The Union endorses the authority of the Arbitrator to fashion an appropriate remedy. Arbitrators have long recognized that penalty payments are sometimes necessary to make a Grievant whole or to stop flagrant violations of the Contract. The underlying rationale for awarding interest or punitive damages is that the Employer has acted wrongly and not in good faith and with the intention of harm. Management has demonstrated a strong contempt for both the grievance arbitration procedure and the Arbitrator's authority to provide a remedy. Keeping in mind the history of willful and deliberate violations of the Agreement with regard to special inspections, it is apparent that a substantial financial penalty is required in this instance to protect the integrity of the Contract.

There is an obligation on the part of the Postal Service to adjust the route to eight (8) hours. By refusing to grant the

Grievant the route inspection he was entitled to, the Postal Service blatantly denied the Grievant that route adjustment. The Union believes that justice must be prompt and effective and should provide consistency in the application of penalties and remedies. The Union argues that Management does not have the right to ignore clear and unambiguous language in the contract, and then use the grievance/arbitration procedure as a back door method for extending for seven (7) months the negotiated thirty (30) days to complete a special inspection. Without a remedy there is no relief, and a failure to provide financial penalties would in effect render this section of the National Agreement null and void. The Union requests that the Grievant, Gary Gibson, be awarded two (2) hours pay at the overtime rate for each day worked from April 14, 1995, the day the special mail count and inspection should have been completed, until the day the special route inspection was completed on October 6, 1995. In addition, the Postal Service must be estopped from continuing to pursue senseless litigation and the Union thereby requests an additional penalty of \$2,000 for its flagrant abuse of the grievance/arbitration procedure as a clear warning to Management that it is bound by the rules of arbitral law.

The Postal Service:

Management denied the grievance based on Section 271g of the M-39 Handbook. It is the contention of the Postal Service that the Regular Carrier assigned to the job must meet the criteria set

forth. During the 6 weeks that Union Steward Gary Gibson felt that he met the criteria, he did not work a complete service week either because he was on annual or sick leave. The Regular Carrier must show that he is working 30 minutes of overtime or auxiliary assistance during the 6 consecutive weeks being monitored. He has not done that.

The grievance was filed by the Union when Gary Gibson was initially denied a special route inspection. Ultimately the request was granted. Mystic Postmaster Consiglio has explained his legitimate business concerns as to why the route was not inspected and that he made his decision after consulting people in Operations Support. The decision was neither arbitrary nor capricious with no show of bad faith on his part. However, as soon as he was made aware of the Step 3 decision which granted the inspection, he complied with that decision.

The sole issue before the Arbitrator is one of remedy. The Union has requested two hours overtime per day from April 14, 1995, the day the inspection should have been completed, until the day the inspection was completed on October 6, 1995. The remedy requested by the Union is nothing short of punitive and totally unwarranted, inappropriate, and represents unjust enrichment beyond the scope of the National Agreement, especially in light of the fact that Postmaster Consiglio responded totally above board and in good faith when he denied the inspection. Furthermore, the Grievant was consistently given the opportunity to receive help on his route or work overtime. Although the Postal Service admits the

delay, the Grievant was ultimately granted the special route inspection.

The Arbitrator could award an inspection and make the Grievant whole if it did not occur. In this case the Grievant's route was inspected, thereby making him whole. The request by the Union to receive punitive damages where no one was harmed is out of order. According to Elkouri and Elkouri on page 401 of "How Arbitration Works" monetary damages should normally correspond to specific monetary losses suffered. In this case the Grievant suffered no loss. Arbitrator Mittenthal found in case No. H1C-NA-C 97 that it is generally accepted that a damage award under the Collective Bargaining Agreement should be limited to the amount necessary to make the injured employee whole. The remedy requested by the Union in this case amounts to over 335 hours which the Postal Service considers inappropriate and beyond the scope of the National Agreement. Therefore, the Union's grievance should be denied.

**PERTINENT PROVISIONS OF THE AGREEMENT AND
RELEVANT HANDBOOKS AND MANUALS**

ARTICLE 19 - 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 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.

. . .

MANAGEMENT OF DELIVERY SERVICES M-39, TL-8

270 SPECIAL ROUTE INSPECTIONS

271 WHEN REQUIRED

Special route inspections may be required when one or more of the following conditions or circumstances is present:

. . . .
g. 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. The month of December must be excluded from consideration when determining a 6 consecutive week period. However, if a period of overtime and/or auxiliary assistance begins in November and continues into January, then January is considered as a consecutive period even though December is omitted. A new 6 consecutive week period is not begun.

MEMORANDUM OF UNDERSTANDING BETWEEN THE USPS AND THE NALC

Re: Special Count and Inspection - City Delivery Routes

. . . .
Therefore, where the regular carrier has requested a special mail count and inspection, and the criteria set forth in Part 271g of the Methods Handbook, M-39, have been met, such inspection must be completed within four weeks of the request, and shall not be delayed. If the results of the inspection indicate that the route is to be adjusted, such adjustment must be placed in effect within 52 calendar days of the completion of the mail count in accordance with Section 211.3 of the M-39 Methods Handbook. . . .

Date: July 21, 1987.

DISCUSSION AND CONCLUSION

The route inspection issue has been arbitrated many times in the past, and the Parties have jointly submitted twenty-four prior Awards of other Arbitrators on the subject of special route inspections and whether or not a remedy for its violation should be granted. The Union contends that Arbitrators have consistently provided financial penalties on Management in the cases where it was shown that the Postal Service violated the Agreement. Having met the criteria set down in this instance, the Union argues that the Regular Carrier for route 5502, Gary Gibson, requested a special inspection on March 17, 1995. Mr. Gibson's argument pertains to the six (6) consecutive weeks where his route showed over 30 minutes of overtime or auxiliary assistance on each of 3 days or more during each week of the period monitored. At first Management denied the grievance based on Section 271g of the M-39 Handbook contending that the Regular Carrier assigned to the job must meet the criteria set forth in this section -- that during the 6 weeks that Union Steward Gary Gibson felt that he met the criteria he did not work a complete service week either by being on annual or sick leave.

Management claims it has never denied its obligation under the Agreement to provide special inspections. On April 14, 1982 the Postal Service sent a memo to all regions with regard to the need to abide by the time limits for special inspections. The memo was reprinted and sent to all District Managers in the Northeast Region on April 22, 1982 and read in pertinent part:

If a route meets the criteria in Section 271g, M-39, and the regular carrier assigned to the route requests a special mail count and inspection, management must conduct the count and inspection within 4 weeks of the request and in accordance with appropriate procedures outlined in Chapter 2, M-39.

At the outset of the Arbitration the Postal Service stipulated and agreed that Section 271g of the M-39 Handbook was violated to the extent that the route inspection was not granted within the required 4 week period. In fact, in its Step 3 decision, Management sustained that part of Mr. Gibson's grievance and agreed that "this case is resolved in that if local management has authorized overtime or auxiliary assistance on this route when served by the sub carriers, then the route may qualify for a special inspection provided no action has been taken on the sub carriers which would indicate unsatisfactory performance." The Postal Service denied however that the 2 hour overtime payment as a remedy requested by the Union is appropriate and argued that this remedy is punitive and therefore not attainable within the four corners of the National Agreement.

An examination of the Record reveals that in numerous similar cases in the past on the issue of Section 271g violations a financial remedy has been appropriate. As far back as July 7, 1987 Arbitrator Jonathan Liebowitz issued a consent arbitration Award (U.Exh.#21, Case No. N4N-1K-C 33514-33522, inclusive) in which the USPS agreed with the NALC that:

In any future case where 271g of the M-39 Handbook is violated by management, the parties agree that a monetary remedy is necessary to make the grievant(s) whole.

The aforesaid Consent Award was followed by similar stipulated Consent Awards with monetary settlements by Arbitrators Robert L. Stutz (Case No. N4N-IJ-C 36001 [U.Exh.30]), Arbitrator Grossman (Case No. N4N-1E-C 33973 [U.Exh.#22]) and additional Step 3 monetary settlements between the Parties in years 1987 and 1988 (U.Exh.#8[a-j]). These Step 3 settlement agreements and Consent Awards led to a series of similar Awards by Arbitrators (U.B /r.pp. 21-22).

Normally, in order to determine an appropriate remedy, the critical issue to be determined in a Contract dispute is whether there has been a violation of the Agreement. The Record and evidence in this case clearly reveal that the Carrier in this grievance had a legitimate basis on which to request a special route inspection. As the common law maxim has long had it, "[T]here is no right without a remedy" when a violation has been found. In this case, the determination was clearly made by Management itself that there was a breach as the Postal Service admitted the violation in its stipulation before the Arbitrator at the outset of the hearing and at the Step 3 hearing. Therefore, the remedy that the NALC seeks remains an integral part of the dispute since Article 15.9 of the National Agreement specifically grants the Arbitrator the right to a final and binding disposition of the remaining issue before her.

Arbitrators have granted Awards in the Postal Service which are simply punitive and the Parties have settled on such a basis at Step 3 and in Consent Awards in which the Parties specified that

inspections would be completed and a monetary payment would be paid to the grievant as compensation for the delay. Although the Arbitrator is not rigidly bound by precedent, it serves no purpose not to follow what appears to be a concept between the Parties. Since the inspection has already taken place and the Union's claim found to be justifiable, it remains for the Arbitrator to fashion a proper remedy for the violation. Arbitrator Gamser in a National Level Case No. NC-S-5426, April 3, 1979 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 that he found. Although there is no specific provision defining the nature of such remedy in the Agreement, to provide for an appropriate remedy is within the inherent powers of the Arbitrator. It seems that the Employer had continued to disregard its obligation to grant special route inspections on a timely basis to keep the route as close to eight hours as possible, and, in this instance, the Grievant was harmed by its clear breach.

It is recognized that many Arbitrators have awarded punitive damages when the violation of the Agreement has been repeated or malicious. Therefore, based upon careful consideration of the entire matter, I have seriously considered the Union's monetary remedy, particularly in the light of the prior Awards on which it relied both by consent or during the arbitration, and it is concluded that an appropriate cash payment to the Grievant constitutes fair and adequate compensation for the Employer's

failure to conduct a timely special route inspection.

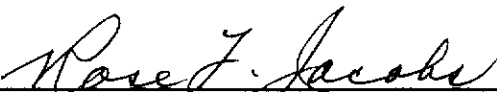
With respect to the legal argument of res judicata advanced by the Union, double jeopardy is a legal concept which prohibits the exaction of a second penalty for an act already punished with the imposition of a previous penalty. Charging a grievant in a removal for an identical incident in a prior grievance already adjudicated involving the same grievant is considered res judicata or double jeopardy. Double jeopardy does not apply where the preliminary action taken may not reasonably be considered final -- Elkouri and Elkouri, How Arbitration Works, 4 Ed. (1973) p. 637 and cases cited therein at note 124. Double jeopardy is a proper defense in disciplinary cases that involve the exact same grievant and the exact same set of facts that have already been adjudicated. It is used in the employer-employee relationship where Management takes disciplinary action against an employee for an act of misconduct and later takes disciplinary action a second time against the same employee for the same misconduct. The Union's res judicata argument in this matter is therefore found to be misplaced and does not apply here.

A W A R D

The grievance is sustained. For the violation of M-39, Section 271g acknowledged by the Employer, Gary H. Gibson is awarded two (2) hours pay at the overtime rate for each day worked from April 14, 1995 through October 6, 1995. The request for an additional penalty sum of \$2,000 is hereby denied.

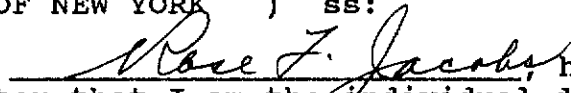
It is so ordered and directed.

Dated: New York, New York
December 17, 1995



ROSE F. JACOBS

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss:

I, , hereby affirm upon my oath as Arbitrator that I am the individual described herein who executed the within instrument which is my Award.