C-25374 A+B

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In the Matter of the National Arbitration Between

UNITED STATES POSTAL SERVICE	)	
	)	B98N-4B-I-01029365
and	)	B98N-4B-I-01029288
	)	Springfield & Greenfield, MA
NATIONAL ASSOCIATION OF LETTER CARRIERS, AFL-CIO	)	Locally Negotiated Wash-up Periods
	)	

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Before: Dennis R. Nolan, Arbitrator, USC Law School, Columbia, SC 29208-0001

Appearances:

For the Employer: John Dockins, Manager, Contract Administration, USPS, 475 L'Enfant Plaza, S.W., Washington, DC 20260-1150

For the NALC: Keith E. Secular, Cohen, Weiss and Simon, LLP, 330 West 42nd Street, New York, NY 10036-6976

Place of Hearing: Washington, D.C.

Date of Hearing: March 5, 2004

Date of Award: July 25, 2004

Relevant Contract Provision(s): Article 8, Section 9; Article 30, Section B.1

Contract Year: 1998

Type of Grievance: Contract Interpretation

Award Summary:

Section 8.9 and 30.B.1 prohibit negotiation of LMOU provisions that provide wash-up time to all employees without consideration of whether they perform dirty work or are exposed to toxic materials. Local parties remain free to define the employees who satisfy those conditions.

Dennis R. Nolan, Arbitrator

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OPINION

I. Statement of the Case

These grievances began as local implementation impasses from Greenfield and Springfield, Massachusetts in 2000. Both involve Local Memorandums of Agreement (LMOUs) providing wash-up time to all employees without considering whether they perform dirty work. The issue is whether such provisions conflict with the National Agreement. The same issue has been arbitrated countless times throughout the country with inconsistent and irreconcilable results. The Union therefore concluded that this was a national interpretive issue and took these grievances to Step 4. When negotiations at that stage failed to settle them, the Union filed for national level arbitration in March of 2002.

For reasons that do not appear in the record, the arbitration hearing did not take place until March 5, 2004. Both parties appeared at the hearing in Washington, DC and had full opportunity to testify, to examine and cross-examine witnesses, and to present all pertinent evidence. Both parties submitted lengthy post-hearing briefs (and many supporting arbitration awards) that arrived on June 24, 2004.

II. Statement of the Facts

A. Introduction

The two grievances involved in this case are really proxies for a much larger dispute. In both Greenfield and Springfield, Massachusetts, the Union had obtained LMOU terms providing wash-up time for all carriers, not merely for those engaged in dirty work. In Greenfield, the LMOU provided reasonable wash-up time "not to exceed eight (8) minutes" at the beginning of street delivery, before lunch, and at the end of the tour. This was in addition to wash-up time "needed after performing unusually dirty work or incident to personal needs." In Springfield, the LMOU provided for daily wash-up time between five and ten minutes. During local implementation negotiations in October 2000, management declared those provisions inconsistent with the National Agreement. That of course led to these grievances.

This arbitration is the culmination of an extraordinarily prolonged contract dispute. For more than thirty years, the National Agreement has directed local managers to provide reasonable wash-up time for employees engaged in dirty work (Section 8.9, first adopted in 1971).[1] For almost as long, Section 30.B.1, first adopted in 1973, has allowed local implementation bargaining over "Additional or longer wash-up periods" (as well as over 21 other enumerated items). The same section, however, cautions that "no local memorandum of understanding may be inconsistent with or vary the terms of the 1998 National Agreement."

The obvious question, asked in innumerable regional and impasse arbitrations, is whether bargaining for fixed amounts of wash-up time for all bargaining unit employees is simply an attempt to gain "Additional or longer wash-up periods" authorized by Section 30.B.1 or would instead "vary" or "be inconsistent with" Section 8.9's grant of "reasonable" wash-up time only to employees who engage in dirty work.

B. Previous Arbitration Awards

The first run of arbitration cases on that question occurred after the 1973 National Agreement. More followed after each successive National Agreement. All the major unions were covered by the same agreement at the time, so many of the cases involved the APWU or the Mail Handlers. Reviewing the scores of cases submitted by the parties in this case would be pointless. Suffice it for the moment to say that most arbitrators found that giving general wash-up time to all employees of a local installation without determining whether they engage in dirty work would conflict with Section 8.9's provision for a specific benefit for certain employees. (For the sake of convenience, I will refer to the types of contract terms at issue here — namely those that provide fixed amount of wash-up time to all employees without considering whether they perform dirty work

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[1] To be precise, Section 8.9 requires reasonable wash-up time both for employees who perform "dirty work" and for those who "work with toxic materials." I use the term "dirty work" in this opinion to include both categories.

— as "general" wash-up time provisions to distinguish them from the specific wash-up time provision found in Section 8.9.)

Those arbitrators therefore denied union attempts to gain general wash-up time and even permitted local management to eliminate such provisions in existing LMOUs. Some of the early awards thoughtfully examined the specific contract language. Some, and particularly those decided after the first and second rounds, simply adopted the conclusions of the earlier awards.

A minority of the arbitrators disagreed. They found that general wash-up time provisions were simply "additional or longer wash-up periods" authorized by Section 30.B.1. The main argument of this camp was that Section 8.9 *mandated* reasonable wash-up time for employees engaged in dirty work, so Section 30.B.1's express permission for local negotiation of "Additional or longer wash-up periods" must have been intended to allow other employees to gain wash-up time. As with the majority opinions, some of the minority awards reflect original analysis while others just followed earlier decisions.

No national arbitration award involving the NALC squarely addresses the issue in this case. Nevertheless, some national awards are at least tangentially relevant. In an APWU case, HOC-3W-C 4833 (Carlton J. Snow, 1997), for example, the arbitrator denied a grievance seeking general wash-up time for Letter Sorting Machine Operators. He held that Section 8.9 "provides the framework within which wash-up time shall be granted." The APWU had argued that all LSM operators met the criterion of being exposed to toxic materials but Arbitrator Snow disagreed. Because the case involved only that section of the National Agreement and not the validity of an LMOU, it does not directly apply to local implementation bargaining under Section 30.B.1. Another national decision cited by the Postal Service, A-NAT-2833 (Sylvester Garrett, 1973), is of even less help. It merely holds that local agreements cannot "vary or subvert" basic terms of the National Agreement.

C. Practices

Despite the parties' clear official interpretations of those provisions, their practices have not been entirely consistent. Apparently not all NALC locals bargained vigorously for general wash-up time provisions. In any event, relatively few pushed such demands to the point of impasse. Moreover, the Union has consistently but unsuccessfully sought to obtain general wash-up time in national bargaining ever since 1971. Finally, the NALC's own guide for 1996 local negotiations informed its local officials that most arbitrators held that wash-up time should be granted according to the specific needs of the individual. The 1996 guide is not a concession but it does reflect a recognition that the matter remained unsettled after a quarter-century of disputes.

Similarly, despite its theoretical opposition to general wash-up time, the Postal Service has not been able to keep some local managers from granting such Union requests. Even at USPS headquarters, some executives signed off on grievance settlements involving general wash-up time. If USPS headquarters itself has consistently accepted these local provisions, the Postal Service can hardly rely on a supposed consensus to the contrary. It is therefore essential to examine the five

settlements cited by the Union as demonstrating the Postal Service's recognition of the validity of locally negotiated general wash-up time provisions. One difficulty in reviewing these documents is that many of them are summary: one cannot determine precisely what the local agreement provided.

- The first settlement (Union Exhibit 5, dated March 24, 1975) resolved a pending arbitration in Des Moines, Iowa. The agreement upheld an LMOU clause on wash-up time. The second paragraph of the settlement stated that "all letter carrier routes . . . which have been adjusted since August 21, 1974, will be readjusted . . . using current data and including the 10 minute wash-up time provided for in the local agreement." Paragraph 4 provided back pay to those whose routes "were not adjusted in conformance with the local wash-up time agreement." While the document is not completely clear, a fair implication would be that the Union negotiated a general wash-up right in Des Moines and that the national Labor Relations Department accepted it.

That is only part of the answer to this issue. The lack of any evidence about the facts of the dispute makes reliable interpretation difficult. If local management had found that all the affected employees engaged in dirty work, the settlement is consistent with the Postal Service's position in this case. If the LMOU granted general wash-up time without regard to the work performed, the settlement would support the Union's position here. Without further information, it is impossible to tell which was the case.

- The next settlement (Union Exhibit 6, dated August 29, 1975) resolved a grievance from Las Cruces, New Mexico. That LMOU provided all carriers two minutes of wash-up time before and five minutes during street time. The Labor Relations Department agreed that the LMOU "is binding on both parties." As with the first settlement, nothing in the document indicates whether local management believed that all carriers performed dirty work or whether it granted wash-up time regardless of their work.

- The third settlement (Union Exhibit 7, dated May 7, 1976) resolved "all outstanding . . . local impasses relative to" Section 30.B.1. Paragraph 1 of the settlement recited the Section 8.9 right to reasonable wash-up time "for a letter carrier who performs dirty work." Paragraph 2 provided that "any letter carrier should be granted such time as is reasonable and necessary for washing up after performing dirty work or incident to personal needs as currently established." The first phrase of the second paragraph merely confirms the Postal Service's position that Section 8.9 means what it says. The second phrase isn't so clear. It could be that "incident to personal needs as currently established" refers to locally negotiated general wash-up time. More likely, however, the parties intended "personal needs" in the sense they use that phrase elsewhere, as a euphemism for bathroom breaks. Washing up is appropriate to such breaks and there is no suggestion that any local management denied wash-up time in that situation.

Union Exhibit 7 does not, either on its face or by reasonable inference, show that management approved any local agreement for general wash-up time without regard to the nature of the employees' work. To the contrary, management's contemporaneous cover letter forwarding

this settlement to local officials (Postal Service Exhibit 6) expressly stated that "the intent of this agreement is not to cover all letter carriers as a group or to automatically grant wash-up time at any particular time of the day" (emphasis in original).

- The fourth settlement (Union Exhibit 8, dated March 27, 1978) resolved a grievance from Rossville, Georgia. It involved some additional issues, but the critical sentence stated that carriers "will be given a five minute wash-up time period on their street time in accordance with" the LMOU. Once again, there is no indication what type of work the employees performed.

- The final settlement (Union Exhibit 9, dated August 26, 1980) is almost as ambiguous as the third. It resolved all pending disputes regarding items that may be included for credit on Line 21. The fifth item was wash-up time

> in excess of personal time provided for on line 20, if such additional or longer wash-up time is provided for during office time in [an LMOU] or, if pursuant to local past practice, additional or longer wash-up time had been granted and included on line 21.

Because the settlement does not state just what "additional or longer wash-up time is provided for" in the LMOUs, it does not show an acceptance of any general wash-up time provision of the sort involved in these grievances. There may have been some such LMOU provisions at the time. If so, they would have been swept up in this blanket approval. Without further evidence as to the information the negotiating parties had, however, this settlement is not sufficiently clear to constitute a concession.

In sum, three settlements, two from 1975 and one from 1978, lend some support to the Union's position. Because they do not indicate whether the affected employees performed dirty work (or whether the parties even considered that question), they are far from conclusive. So far as the record shows, however, management at the same time was opposing general wash-up rights in other arbitration cases, and has maintained that opposition at the national level for the last 26 years.

It is surprising that the parties have allowed this issue to fester so long. It does neither party any good to fight the same battle in many local impasse arbitrations after each new National Agreement. Nor does the resulting inconsistency of results benefit the Postal Service or the Union. Perhaps for those reasons, the issue (or at least the portion of it dealing with retention of existing general wash-up time provisions) has finally reached national arbitration. The parties must therefore expect a decision that will bind their local representatives, at least until the parties themselves change the wording of the relevant provisions of the National Agreement.

III. The Issue

The parties phrased the issue at the arbitration hearing in slightly different terms but they do agree on its essence. A neutral phrasing of that essence is this: Do Local Memorandums of

Understanding (LMOU) that provide wash-up time to all employees without regard to the work they perform conflict with Article 8.9 of the National Agreement?

IV. Pertinent Contractual Provisions

Article 8, Section 9:

> Installation heads shall grant reasonable wash-up time to those employees who perform dirty work or work with toxic materials. The amount of wash-up time granted each employee shall be subject to the grievance procedure.

Article 30, Section B.1.:

> B. There shall be a 30-day period of local implementation to commence **October 2, 2000** on the 22 specific items enumerated below, provided that no local memorandum of understanding may be inconsistent with or vary the terms of the 1998 National Agreement:
>
> 1. Additional or longer wash-up periods. . . .

V. The Union's Position

Underlying the Union's case is the assertion that arbitration of this issue at the national level is *de novo* — that is, a national arbitrator should review the evidence and make an independent decision regardless of what regional arbitrators have done. National arbitrators are not bound by regional awards: just the contrary, in fact. National arbitrators should treat regional awards with respect and may use them to find a "settled interpretation," but on this issue there is no settled interpretation at the regional level.

With that foundation, the Union argues that general wash-up time provisions in LMOUs are consistent with Section 8.9. That section specifically authorizes local negotiation of "additional" wash-up periods, a term that must mean "more than" those already guaranteed by the National Agreement. "More than" must in turn refer to employees who would not be covered by virtue of their dirty work. While Section 8.9 obliges managers to grant wash-up time to employees who do perform dirty work, it says nothing about other employees and certainly does not prohibit general wash-up time agreements. If the Postal Service's interpretation were correct, then Section 30.B.1 becomes mere surplusage.

Section 8.9 was a compromise between a Union proposal for general wash-up time and a management proposal prohibiting wash-up time except for those who perform particularly dirty work. Section 30.B.1 came from a 1973 Union proposal for wash-up time irrespective of the work performed by any employee. That bargaining history undercuts the argument that Section 30.B.1 merely implements Section 8.9.

General wash-up provisions are appropriate and routine without consideration of whether the covered employees' work is "dirty." Some of those provisions may be compromises granted by management in return for other concessions. Others might be granted for administrative convenience — for example, to avoid the hassle of determining each day which employees are entitled to wash-up time under Section 8.9, to eliminate grievances, and in some cases to put a ceiling on the amount of wash-up time.

Turning to evidence of the parties' practices, the Union notes that many of the regional awards submitted by Management involved the APWU and Mail Handlers rather than the NALC. Moreover, many of those awards simply followed what they believed to be the majority provision without making an independent evaluation of the contract arguments. Many also found *all* agreements covering an entire bargaining unit facially invalid, even if local management concluded that all employees performed dirty work. The Postal Service abandoned that position in this case, so those decisions are not helpful. Finally, the Union notes that only two of the regional awards submitted by Management mentioned the national settlements that accepted general wash-up time agreements in Letter Carrier LMOUs. Those settlements demonstrate that the Postal Service itself has accepted the validity of LMOU terms like those at issue here.

The Union offers as an alternative argument the proposition that LMOUs are valid under Arbitrator Mittenthal's 1981 Helena, Montana award. Management had argued in that case that Section 30.B.1 limited local bargaining to the 22 specified items. Arbitrator Mittenthal rejected that argument, holding that the section merely makes the listed items mandatory subjects of bargaining and leaves other topics as permissive bargaining subjects. Thus even if Section 8.9 limits *mandatory* local negotiations on wash-up time to those employees performing dirty work, it does not bar local management from *voluntarily* negotiating broader wash-up time for all employees.

VI. Management's Position

The Postal Service does not claim that providing wash-up time for all employees in a unit would necessarily violate the National Agreement. Such a provision would be valid if the employees met the criteria of Section 8.9 for dirty work or work with toxic materials. Its disagreement with the Union stems from the Union's assertion that local parties need not even consider the Section 8.9 criteria.

The core of the Postal Service's position is that Section 8.9 provides wash-up time to certain employees and thereby excludes all others from that benefit. Section 30.B.1 then allows local bargaining to "implement" the national standard by determining which employees perform dirty work and how much wash-up time they need. An LMOU granting wash-up time to those not engaged in dirty work would therefore alter the National Agreement.

The Postal Service relies heavily on local impasse awards including many by national arbitrators. A notable example is Arbitrator Mittenthal's August 19, 1974 APWU award in Tampa, Florida. The only issue was the Union's claim for general wash-up time. He rejected the claim,

stating that giving all employees several fixed periods of wash-up time "would provide them with a benefit they do not appear to need."

The vast majority of regional arbitration awards, including several of my own, support the Postal Service's position. The principle of consistency requires adherence to that majority approach. To overrule those awards would be inconsistent and counter-productive to the goal of providing labor relations stability.

VII. Discussion

A. Introduction

The issue in this arbitration is purely a matter of contract interpretation. The Union was careful not to raise in this forum the factual question of whether all letter carrier work is by its nature dirty or potentially toxic. Regardless of the decision here, the Union thus remains free to argue for general wash-up time on that basis.

This case offers a rare opportunity to revisit an issue I first dealt with as an impasse arbitrator nineteen years ago. Following negotiation of the 1984 APWU National Agreement, the local impasse arbitration procedure was swamped with cases, many of which involved the very question at issue here. Several impasse arbitrators repeatedly addressed that question in different localities. During the summer of 1985, for example, I dealt with it in five APWU impasse arbitrations. Realizing before I finished the first of my awards that consistency demanded the same result in similar cases, I drafted a holding and rationale that I then used in each case.

Like many other arbitrators before and after those decisions, I found both parties' arguments plausible. I indicated that if the issue were novel, I would be inclined to find that general wash-up time provisions were permissible because they were "additional" in the sense of covering some employees beyond those specifically entitled to wash-up time pursuant to Section 8.9. Given the lack of national guidance at the time and considering the likely harms caused by conflicting decisions and by the wasted transaction costs of multiple arbitrations, I decided to put aside my own inclination and follow the rulings of what, on the basis of the evidence I received in those cases, seemed to be the vast majority of Postal Service arbitrators. I therefore denied the APWU's requests for general wash-up time. That left the APWU free to seek additional or longer wash-up time for those employees who actually engaged in dirty work.

The same issue is now back before me in my capacity as national arbitrator. As the Union's brief emphasizes, regional and impasse arbitration decisions are not binding at this level. The slate is not exactly clean — I cannot ignore the long history of this dispute or the attempts so many others have made to resolve it — but the time is certainly ripe for an independent decision. When making that decision, however, the same concern for uniformity applies. Thus the first question is whether there has been a sufficient consistency in the parties' positions and in previous arbitral rulings to constitute a consensus. Absolute agreement is neither expected nor required. An organization with

as many arbitrations as the Postal Service is bound to encounter some disparate results. If there is at least a solid consensus, a national arbitrator should disturb it only if the majority position is clearly erroneous. If there is no consensus, it will be necessary to evaluate the contractual issue from scratch.

B. Previous Arbitration Decisions

Each party submitted a large number of regional and impasse arbitration awards to support its case. The stack of awards submitted by the Union approached in height the stack submitted by management, but the bulk of the Union's cases were on other issues or were otherwise distinguishable. Most of those that were on point involved the APWU, and many of those were decided after the NALC and APWU had separate contracts; decisions interpreting even identical language from another contract carry less weight than decisions interpreting the same contract, because the meanings of words often change in different contexts or different bargaining relationships. The Union was able to find only a small handful of supportive NALC arbitration decisions dealing directly with the consistency of general LMOU wash-up provisions and Section 8.9. Virtually all of the many cases cited by management, in contrast, were directly on point. Twenty-five such NALC awards supported the Postal Service's position, as did 43 APWU cases, many of them during the period of a common APWU and NALC contract.

The evidence still shows an overwhelming majority of NALC regional arbitrators holding that locally negotiated fixed and general wash-up time proposals are inconsistent with Section 8.9 of this National Agreement. Very few of those awards addressed the Union's contention here that the phrase "more than" in Section 30.B.1 means groups of employees who are not already entitled to wash-up time because they perform dirty work. Their answer seems to be that Section 30.B.1 allows local negotiations over *which* employees perform dirty work. No doubt some of the differences among the regional arbitrators are explainable by the specific evidence presented in each case and by the varying quality of the advocates.

The point is not that national arbitrators are bound by a majority of lower level arbitrations. That would defeat the very purpose of a hierarchical arbitration system. Rather, the point is that the parties' arbitrators during the last 30 years have, with very few exceptions, reached a settled interpretation on the relationship between Sections 8.9 and 30.B.1 Even a national arbitrator should give careful and respectful attention to the long-standing collective wisdom of regional arbitrators.

C. Settlement Agreements

The settlement agreements discussed in Section II.C. above showed only a minor degree of inconsistency at Postal Service headquarters about the legitimacy of locally negotiated general wash-up time agreements. At most, higher management accepted three such provisions twenty-odd years ago. The lack of information about those grievances makes even that conclusion suspect. Given the quality of the Union's representation and research, it is fair to conclude that there have been no others. To put it differently, in the 26 years since 1978 management has avoided accepting such

local agreements. While the three from the 1970s may show some small cracks in management's position, they do not deserve great weight. In an operation the size of the Postal Service, it would be astounding if on any issue there were not some disparities over a 30-year period. Even if there was some waffling at headquarters in the early years of this dispute, the subsequent quarter-century of opposition to general wash-up agreements negates the Union's suggestion that the Postal Service conceded error.

When combined with the near-consensus among the parties' arbitrators, this relatively consistent interpretation of Sections 8.9 and 30.B.1 makes a powerful case that the National Agreement bars local agreements giving all carriers a benefit that the National Agreement guarantees only for some.

D. The Merits of the Case

Neither party specifically addressed the proper burden of proof in impasse arbitration. The general rule, of course, is that the Union bears the burden of proof in contract interpretation cases while management does in discipline cases. Impasse arbitration does not fall neatly into either category because it involves contract formation rather than contract interpretation. Without the benefit of the parties' arguments and evidence on that question, a broad ruling would be unwise. I therefore limit my self to the narrow question of the proper allocation of that burden in the immediate grievances.

The Postal Service seeks to undo existing LMOU terms by arguing that they are inconsistent with the National Agreement. In effect, it asserts an affirmative defense. Accordingly, it bears the burden of proof on that issue. One approach it can take toward that end is to show a settled understanding on the meaning of the National Agreement. The Postal Service demonstrated such a consensus among its regional arbitrators for three decades. At this point the burden shifts to the Union to show that the settled understanding is clearly erroneous. I turn now to the Union's arguments on that point.

The Union's alternative arguments are that (1) Section 30.B.1 specifically authorizes general wash-up agreements in LMOUs as "additional" wash-up time and (2) general wash-up agreements are permitted under Arbitrator Mittenthal's Helena Montana award because Section 30.B.1 does not limit local bargaining to the 22 specified topics.

The problem with the first argument is that it simply challenges the arbitral consensus without showing it to be in error. The many cases on this issue show that the Union asserted its interpretation of the word "additional" in virtually every wash-up time arbitration. Almost all the arbitrators who discussed that interpretation rejected it. As many of them pointed out, the Union's position was certainly plausible, but so was management's. Merely repeating its assertion here does not make it any more persuasive.

The Union's second argument rests on a firm foundation: there is no reason to believe that the parties intended the 22 topics to be exclusive. They made the listed topics mandatory subjects for bargaining without forbidding discussion of other topics. The Union then makes a dangerous leap from that foundation when it argues that general wash-up agreements fall within the realm of permissive subjects. That would be true if the agreements were consistent with Section 8.9. Section B. of Article 30 contains a broad statement that "no" LMOU "may be inconsistent with or vary the terms" of the National Agreement. Although that sentence occurs in a provision authorizing negotiations over the 22 specified items, it must apply as well to LMOU clauses on other matters. If that were not so, the Union could negate the National Agreement through local negotiations.

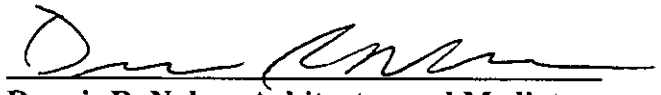
That brings the debate back around to the exclusivity of Section 8.9. If that section bars negotiation of general wash-up agreements pursuant to Section 30.B.1's express authorization for local bargaining over "additional . . . wash-up periods," then surely it must bar similar agreements negotiated outside the 22 listed items. It would have been illogical for the parties to permit such an easy end run around Section 8.9. If, as many arbitrators have held, the parties limited wash-up time to employees who perform dirty work, local parties may not extend wash-up time to others regardless of whether they claim to be "implementing" the National Agreement or "supplementing" it.

E. Conclusion

Sections 8.9 and 30.B.1 prohibit negotiation of LMOU provisions that provide wash-up time to all employees without consideration of whether they perform dirty work or are exposed to toxic materials. Local parties remain free to define the employees who satisfy those conditions.

AWARD

The grievance is denied.



Dennis R. Nolan, Arbitrator and Mediator

July 25, 2004
Date