C#07603

BEFORE THOMAS F. LEVAK, ARBITRATOR

REGULAR WESTERN REGIONAL PANEL

In the Matter of the Grievance Arbitration Between:	W4N-5R-D 44413 W4N-5R-C 45036
U. S. POSTAL SERVICE THE "SERVICE" (Lynnwood, Washington) and NATIONAL ASSOCIATION OF LETTER CARRIERS-AFL-CIO THE "UNION" (D. Mock - Grievant)	DISPUTES AND GRIEVANCES CONCERNING REMOVAL FOR UNSATISFACTORY WORK PERFORMANCE-EXPANSION OF STREET TIME GTS #2312;2313 ARBITRATOR'S OPINION AND AWARD

These matters came for hearing before the Arbitrator at 9:00 a.m., November 10, 1987 at the offices of the Service, Lynnwood, Washington. The Service was represented by Jeffrey Foster, who was assisted by Janice San Jose. The Union was represented by Jim Williams, who was assisted by Jim Edgemon and Joe Quintanilla. The Grievant testified and appeared throughout the proceedings. Testimony and evidence were received, and the hearing was declared closed following oral closing argument. Based upon the evidence and the arguments of the parties, the Arbitrator decides and awards as follows.

OPINION

I. THE CHARGE AND THE ISSUE.

The March 20, 1987 Notice of Proposed Removal issued by Supervisor of Delivery and Collections James Walters to the Grievant provides as follows:

> This is advance written notice that it is proposed to remove you from the Postal Service no sooner than thirty (30) days from the date of your receipt of this letter. This action is based on the following reasons:
>
> Unsatisfactory Work Performance - Expansion of Street Time:
>
> On March 6, 1987 your street time was 5 hours and 47 minutes.
>
> On March 9, 1987 your street time was 6

hours and 3 minutes.

On March 10, 1987 your street time was 5 hours and 38 minutes.

On March 11, 1987 your street time was 6 hours and 3 minutes.

On March 18, 1987 your street time was 6 hours and 4 minutes.

On December 9, 1986 your route was counted by Robert Westfall, Route Examiner. You carried the route in 5 hours and 22 minutes.

On January 30, 1987, your route was counted by Terry Dickenson, Supervisor. You were given one and one-half (1 1/2) hours of auxiliary assistance. You carried the route in 3 hours and 27 minutes with one and one-half (1 1/2) hours assistance for a total street time of 4 hours and 57 minutes.

On February 3, 1987, I inspected your route. You had a coverage and made at least 95% of your possible deliveries. You carried the route in 5 hours and 7 minutes.

A reasonable street time has been established that has been met by you and other employees. You have been informed of what is acceptable job performance and told when you failed to meet that performance. You have continued not to perform at an acceptable level despite repeated corrective action. Your failure to put forth an acceptable effort will not be tolerated.

The Postal Service is a service-oriented organization and as such has commitments to its customers, one of which is to provide reliable and efficient service. Our customers appreciate being able to count on timely delivery of their mail, and as a professional Letter Carrier this is your duty. Customer service becomes increasingly important as the nature of the business becomes more and more competitive.

By your actions you are in violation of the following Postal Rules and Regulations:

NA Article 34.A. The principle of a fair day's work for a fair day's pay is recognized by all parties to this Agreement.

M-41 City Delivery Carrier Manual, Sections:

112.1 "Provide reliable and efficient service"

122.11 "Deliver mail on a prescribed route, on a regular schedule."

ELM 666.1 Discharge of Duties

Employee [sic] are expected to discharge their assigned duties conscientiously and effectively.

ELM 661.21.3. Give a full day's labor for a full day's pay; giving to the performance of duties earnest effort and best thought.

ELM 661.3.C. Impeding Postal Service efficiency or economy.

Your value as an employee is reduced based on previous action which created the necessity of deferring your Step Increase on June 3, 1983, and of issuing a Letter of Warning for Unsatisfactory Work Performance - Expansion of Street Time on February 9, 1987, and a 7-day Suspension for Unsatisfactory Work Performance - Expansion of Street Time on February 13, 1987. (J2)

The April 7, 1987 Letter of Decision issued by Postmaster/OIC Jerry Chastain provides in relevant part:

On March 21, 1987 you were issued a Notice proposing to remove you based on the charge outlined in the Notice. I have given consideration to your personal answer March 30, 1987 and your written answer of the same date and all other evidence of record. I find, however, that the charges, as stated in the Notice which was dated March 20, 1987, are fully supported by the evidence and warrant your removal.

In regard to your answer and other information submitted on your behalf:

Pat Foley, NALC Steward, in his letter dated March 29, 1987 alleges that the times that were cited for each of the three (3) route inspections were cited in error. Mr. Foley states the actual street time on December 9, 1986 was five (5) hours and 52 minutes

according to the clock rings. The time of five (5) hours and 52 minutes includes a 30 minute lunch, the time of five (5) hours and 22 minutes does not include a lunch. As the time of December 9, 1986 route count, which is cited in your Notice of Proposed Removal, does not include a lunch, the time of five (5) hours and 22 minutes is correct.

Mr. Foley claims the actual total street time of the January 30, 1987 route inspection should be five (5) hours and 36 minutes. Again, the time cited by Mr. Foley includes a lunch and the time cited in your Notice of Proposed Removal does not. The time without a lunch, even adding nine (9) more minutes of auxiliary assistance, still comes to five (5) hours and six (6) minutes. This is within one (1) minute of the time Mr. James Walters came up with on February 3, 1987.

Mr. Foley claims the actual total street time of the February 3, 1987 route inspection should be five (5) hours and 27 minutes. The route count of February 3, 1987 was conducted properly and the street time of five (5) hours and seven (7) minutes that was arrived at is correct.

These three (3) route inspections were done correctly, cited correctly and are evidence that you are capable of carrying your route on the street in approximately five (5) hours. In your answer and in the other material submitted on your behalf, little was said of your performance as cited in your Notice of Proposed Removal. Also, little was said concerning the fact that the street time you demonstrated during the three (3) cited route counts was met by the other carriers who carried your route.

In summary, and it remains unrebutted, you have shown the ability to carry your route on the street in approximately five (5) hours (5:22 on December 9, 1986; 4:57 or 5:06 on January 30, 1987; 5:07 on February 3, 1987); the other Carriers who have carried your route have carried the route in the time you demonstrated in the three (3) route counts (or better).

You received disciplinary action on February 9, 1987 and February 13, 1987 for Unsatisfactory Work Performance - Expansion of

Street Time, and yet you continued your unsatisfactory performance (as evidenced by your performance as cited in your Notice of Proposed Removal).

Mr. Foley in his letter of March 29, 1987 claims the proper procedure for determining a route's street time is to be found in Section 242.3 of the Handbook M-39. Mr. Foley goes on to claim that in your case a street time was determined from one route count. The M-39 section cited by the Union is not relevant in your case. You, by your own performance, showed on three (3) separate occasions, with three (3) different Managers, the level of performance you are capable of.

Mr. Foley makes reference to an "incident" between yourself and Mr. James Walters. I fail to see any relationship between an interaction you had with Mr. Walters and any crrection actions that were taken, or with this removal.

Mr. Foley also mentions you have a high regard for safety. A review of your safety record shows poor safety performance and nothing that would indicate a high regard for safety.

Mr. Foley put forth no supportable reason to mitigate your removal from the Postal Service. The reasons that he put forth, such as your concern for safety, are not supported by the record.

In response to your letter of March 30, 1987 I appreciate your former military service and your years of Postal service. The fact remains that by your own lack of maintaining satisfactory work performance, when you have shown the ability to perform satisfactorily, your removal from the Postal Service is warranted. You failed to respond to prior corrective action concerning your performance and so made your removal necessary. Your letter does not address the merits of the charges as set out in your Notice of Proposed Removal. I must then consider those charges unrebutted by you.

The Postal Service is a service-oriented organization and has commitments to its customers. It must be able to supply accurate, timely and reasonably priced delivery services or it will cease to exist.

> You have shown the ability to perform at a certain level and other Carriers doing the same route have been able to perform at that level, but when you perform your route unsupervised you fail to perform at the level you have demonstrated. This unsatisfactory performance cannot be tolerated.
>
> The action will be effective April 24, 1987. (J3)

At the commencement of the arbitration hearing, the parties stipulated that the following issue was to be resolved by the Arbitrator:

> Did just cause exist as is required by Article 16 of the National Agreement for the Notice of Proposed Removal issued the Grievant under date of March 20, 1987 for "unsatisfactory work performance-expansion of street time" as well as a Letter of Decision issued April 7, 1987 on the same charge?
>
> If not, what is the appropriate remedy?

II. FINDINGS OF FACT.

Background.

This case concerns the Lynnwood, Washington office of the Service. At the time of his removal, the Grievant had served as a Letter Carrier for ten years, all of that time at Lynnwood. For the past seven years, his regular bid route was Route 3615. Since November 12, 1986, the Grievant's immediate supervisor was Superintendent of Delivery and Collections James Walters. At all times relevant, the Postmaster/OIC was Jerry Chastain.

Past Elements Cited in the Notice of Removal.

The warning letter and suspension cited as past elements in the Notice of Proposed Removal were overturned in expedited arbitration by arbitrator McCaffrey on October 31, 1987. The step increase deferral referred to in the Notice of Proposed Removal was overturned at Step 3 of the grievance procedure.

Facts Relating to the Grievant's Performance on Route 3615.

Prior to September 22, 1986, the street time for the Grievant's route was six hours fifteen minutes. On September 22, 1986, seventy to eighty stops were cut from the route. Prior to the time the Grievant had the opportunity to deliver the adjusted route, his then-supervisor asked him if he believed the cut was about forty-five minutes in length. The Grievant informed him that forty-five minutes seemed about right, and based on that

estimate, the Grievant's then-supervisor posted the time for the route at between five hours thirty minutes and five hours thirty-five minutes.

From September 22, 1986 until February 1, 1987, the Grievant's route increased by approximately fifty stops. The Grievant timely completed form 1521's noting the additional new stops.

The only evidence is that on most days, the Grievant delivered his route in the allotted time, but that when volume was relatively heavy, or where marriage mailers were added, or where a number of accountables were added, the Grievant, from time-to-time, failed to meet the allotted street time. The Arbitrator now turns to the specific days cited in the Notice of Proposed Removal.

On December 9, 1986, the Grievant's route was counted by Route Examiner Robert Westfall. The evidence at the arbitration hearing established that the Grievant carried his route in five hours fifty-two minutes, not the five hours twenty-two minutes cited in the Notice of Proposed Removal. Westfall did not testify, and it was the Grievant's unrebutted testimony that Westfall cited no deficiencies or time-wasting practices to him. The Grievant noted that Westfall did comment that it was not necessary to lock the vehicle while delivering a certified letter or a parcel, but when the Grievant told Westfall that he had been instructed to do so and that others had been disciplined for not doing so, Westfall advised him to continue to practice. The Grievant further noted that on December 11, 1986, Westfall came to his case and advised him to finger mail with his hand, rather than from the tray. The Grievant testified that from that point forward he followed Westfall's advice. The Service presented no evidence regarding the volume or type of mail on the Grievant's route on December 9, 1986.

On January 30, 1987, the Grievant's route was counted by Supervisor Terry Dickenson. Again, the Service presented no evidence regarding the volume or type of mail on the route on that day. Because the Grievant had worked approved overtime four days in a row, the Service, in order to avoid penalty overtime on a fifth day, gave the Grievant one and one-half hours auxiliary assistance.

The Service utilized the auxiliary assistance time of one and one-half hours to calculate a net street time for the Grievant of four hours fifty-seven minutes. On cross-examination, Walters conceded that it was improper to utilize auxiliary assistance time to calculate a net street time, and that under established handbook and manual provisions, the Service should have utilized the Grievant's last 3919 to calculate the net.

It also was the Grievant's unrebutted testimony that Dickenson cited no time wasting practices or other deficiencies

to him for January 30.

On February 3, 1987, Walters inspected the Grievant's route. Again, the Service offered no evidence regarding the volume of type of mail on that day. However, it was the Grievant's unrebutted testimony that volume was light and that at the commencement of the day, he had given five and one-half hours as his estimated street time. Significantly, it was stipulated at the commencement of the arbitration hearing that the Grievant actually took five hours twenty-seven minutes to complete his route on that day, not the five hours seven minutes cited in the Notice of Proposed Removal. Walters cited no deficiencies or shortcoming to the Grievant on the route as he carried it on that day, and cited no deficiencies or shortcomings to him on that day after he completed the route.

On February 5, 1987, the Grievant was called to a meeting with Walters and Dickenson. Only the Grievant testified regarding the contents of that meeting. According to the Grievant, only the following three things were discussed at that meeting. First, Dickenson advised the Grievant that the way he was reloading trays while delivering was unsafe and told him to follow a different method, a method that is more time consuming. Second, Dickenson advised the Grievant that he was talking too long to get certifieds signed, but she did not explain any specific time-wasting practice; she simply told him to work faster. Third, she told the Grievant that he took twenty-eight minutes on auxiliaries, a too-long period of time. The Grievant simply disputed that he had taken that period of time and asserted that Dickenson had improperly counted the time it took to drive from lunch to his first box.

Regarding March 6, 1987, the Grievant testified that his street time was five hours twenty-six minutes, not five hours forty-seven minutes, as asserted in the Notice of Proposed Removal. The Grievant's testimony is supported by his clock rings. Walters conceded that from the form 4570 it was possible that the Grievant only used five hours twenty-six minutes on that date.

On March 9, 1987, it was the Grievant's unrebutted testimony that volume was heavy, that he had a marriage mailer and a price setter coverage sequenced into his flats, that trade mail volume was high, that he had large parcels, and that accountables were high. His morning estimate for the route was six hours ten minutes, and he actually used six hours three minutes. His estimate was not disputed prior to leaving on the route and he completed a form 3996 that was approved. Again, the Service itself offered no evidence regarding volume or the type of mail on that date.

Walters testified that on March 10, he specifically asked the Grievant to give any explanation he might have regarding the purported expanded time on March 6 and March 9, and that the Grievant simply responded that he was doing the best he could.

The Grievant specifically testified that Walters never asked him to explain those two dates.

On March 10, 1987, the Grievant took five hours thirty-eight minutes to deliver his route. Again, the Service offered no evidence regarding the volume or type of mail involved.

When the Grievant returned from his route on that day, he stopped Chastain on the dock and told him that he was concerned about the warning letter and suspension letter and was fearful of removal, and that he wished to have a meeting with Chastain and his shop steward. According to Chastian, the Grievant never asked for a specific time for a meeting, so Chastain merely waited for a more formal request. On March 15, 1987, the Grievant wrote a certified letter to Chastain claiming that no meeting had been arranged. On March 19, 1987, Chastain wrote a letter back to the Grievant stating that a formal meeting had not been requested and that Chastain did not anticipate that he was supposed to set a meeting. What is noteworthy is that Chastain never thereafter arranged for any meeting with the Grievant.

Regarding March 11, 1987, the Service, again, offered no evidence regarding the volume or type of mail on the Grievant's route on that date. The Grievant actually had a marriage mailer on that date. In the morning, the Grievant estimated his delivery time at six hours and actually took six hours three minutes. His estimate was not disputed when he made it and overtime was authorized.

Regarding March 18, 1987, again the Service offered no evidence regarding volume or type of mail. The Grievant had a marriage mailer and a third bundle. Also, he held a five-minute meeting with Walters that was factored into his street time.

Walters testified that on March 19, 1987, he confronted the Grievant regarding March 11 and March 18, and asked him to explain the purported delays. Again, the Grievant testified that Walters never approached him.

Regarding all of the March 1987 dates, the Grievant was not observed on the route on any of those dates. It was his unrebutted testimony that he did nothing abnormal or of a time-wasting nature that had been idenitified by management on those dates. He testified that he did nothing on those dates that, to his knowledge, would subject him to discipline.

On March 13, 1987, the Grievant made a formal request for an M-39 Section 271.g special route inspection. Chastain testified that he made the decision that the Grievant was not entitled to a special route inspection because he was under corrective disciplinary action at the time and was not performing in a proper manner on the street. Chastain cited that portion of Section 271.g which provides that a route inspection will only be provided where performance is otherwise satisfactory. Chastain did not notify the Grievant that his request was being denied.

The Arbitrator notes that the evidence established that for a six-consecutive-week period the Grievant's route showed over thirty minutes of overtime or auxiliary assistance on each of three days or more in each week during that period.

Finally, it is noted that the Grievant was given no remedial training to correct any purported deficiencies.

Arbitrator's Specific Findings of Fact Related to the Grievant's Testimony.

The Arbitrator found both the Grievant's specific and overall testimony to be particularly candid and forthright. His manner while testifying was particularly convincing. He appeared totally relaxed and credible, and his responses had, as they say, "the ring of truth about them." Also, his overall testimony was in many respects unrebutted, and appeared to be consistent with all documentary evidence. Accordingly, the Arbitrator has credited the Grievant's testimony on all matters in dispute; and the Arbitrator makes a specific finding of fact that the true facts of this case are as recited by the Grievant.

The Arbitrator is aware that a witness's demeanor does not always reflect the truth. Indeed, sometimes the choice is made not to call a bumbling, inarticulate, unintelligent, or easily confused person as a witness not because he is dishonest, but because while he tells the truth it appears to be a lie. However, where a grievant testifies in a manner that so clearly appears truthful, and where management is unable to meet its burden of disproving such testimony by preponderant evidence, the grievant's testimony must be credited. That the Arbitrator has done.

Evidence Regarding Alleged Disparate Treatment and Alleged Due Process Violations.

~~At the arbitration hearing, the Union submitted certain~~ evidence regarding alleged violations of due process and alleged ~~disparate treatment. Because this case can be decided solely on~~ the merits in favor of the Union, and because the Arbitrator believes it is important to focus upon the expansion issue, those other assertions will not be treated in this case, and the parties' contentions set forth hereafter will relate solely to the merits.

III. SERVICE CONTENTIONS.

The Service has established that just cause existed for the Grievant's removal. It should first be noted that the parties have stipulated that the route time was established in 1986 at five hours thirty minutes to five hours thirty-five minutes. Thus, the Service is enforcing an already established standard. The M-39 provisions cited by the Union relate only to the establishment of a time not yet established. Even considering

that forty to fifty deliveries have been added to the Grievant's route, the established time is reasonable.

Second, even though the warning letter and notice of suspension have been overturned in expedited arbitration, and are not binding in this case, it is important to understand that overturned discipline can act as notice to an employee that deficiencies exist. In this case, the Grievant has been repeatedly notified through the warning letter and suspension and through other counselings that deficiencies existed that would result in his removal if not corrected.

Third, the real key to this case is reasonable effort. At some point, an employee must produce within standards established by management. Where the employee does not, it becomes the employee's burden to give satisfactory reasons why those reasonable standards are not met. In the instant case, the Service set reasonable standards and the Grievant never explained his failure to meet those standards in any satisfactory manner. The fact is that the five hour thirty minute standard was reasonable, that the Grievant had demonstrated he was capable of meeting that standard on many days, but that on numerous days he simply did not perform.

The Service's position is supported by substantial arbitral precedent. See Case Nos. NC-S-5193-D, 2990-D and 2991-D, Paul J. Fasser, Jr., approved by Sylvester Garrett, January 31, 1978; NC-W-NO7-D, William Eaton, September 28, 1978; NC-W-11, 323D, December 6, 1978, William E. Rentfro; W1C-5K-D 9232, Francis Richard Walsh, July 5, 1983; and S4N-3D-D 21653, Dennis R. Noland, July 30, 1986.

The Service is also supported by numerous non-Service arbitrations. See, Grand Union Co., 80 LA 588 (1983), and other cases provided the Arbitrator at the time of the arbitration hearing.

IV. UNION CONTENTIONS:

The Service has failed to establish that just cause existed for the Grievant's removal. Indeed, the Service has failed even to establish a prima facia case. This case is simple because no matter what the Service says a reasonable standard is, there is contractual language on how that standard must be established. In this case, the Service has used time alone as a standard and has based that time on one-day inspections only. If the Service were to be allowed to do that, the door would be open for abuse; management could simply set a time and then discipline for failure to meet it.

It is well-established that under the National Agreement, management must tell an employee what he is doing wrong. In this case, there is no evidence of time-wasting practices or any type of wrongdoing on the route by the Grievant. In fact, the

Service's Step 2 answer itself shows that the Service based its case on assumptions that the Grievant must have been acting improperly, rather than any facts.

After the September 22, 1986 evaluation of the route, some forty to fifty stops were added to that route. Further, all the requirements under the M-39 Section 271.g were met. Accordingly, management clearly violated the M-39 and the National Agreement when it failed to honor the Grievant's request for a six-day route inspection. The Service's argument that the Grievant was not entitled to that inspection because his work was not otherwise satisfactory is the classic "chicken-egg" argument. The Service clearly cannot simply discipline an employee and then claim that he is not entitled to a route inspection as a means of circumventing that provision.

Also important is the fact that the Grievant went directly to Chastain and asked for a meeting to obtain a full explanation as to what he was purportedly doing wrong. That meeting was never afforded the Grievant, and is ridiculous that the Service would claim that the Grievant himself had some responsibility to arrange the meeting. It is management's responsibility to investigate fully, not the Grievant's obligation to arrange for a meeting.

All of the prior elements charged against the Grievant have been voided in arbitration. Accordingly, the chain of progressive discipline has been broken and the removal cannot be sustained on that basis.

The Service has violated the mandate set forth in the minutes of the National Joint City Delivery Committee Meeting of November 16, 1983 which provide that volume, standing alone, without additional evidence to substantiate wrongful expansion of street time, cannot sustain a disciplinary action.

~~As Walters conceded on cross-examination, M-39 Section~~ 242.321 establishes only two methods of evaluating and adjusting ~~street times. Neither of those was utilized in the case of the~~ Grievant.

The evidence, as well as the stipulations of the parties, established that several of the times set forth in the Notice of Proposed Removal are inaccurate, and that when the times are corrected, no expansion can be proved.

The Union's position is supported by substantial arbitral precedent. See, Case Nos. W4N-5B-D 3530, Thomas Levak, December 19, 1985; W1N-5B-D 28620, Carlton J. Snow, October 7, 1985; NC-S-14, 859-D, March 19, 1979, Bernard Cushman; Cushman, May 28, 1979; NC-S-16, 329-D and NC-S-16, 328-D, J. Fred Holly, April 10, 1979.

The Union asks for full backpay and benefits, for expungement of the disciplinary actions against the Grievant, and

for interest.

V. ARBITRATOR'S CONCLUSION.

The Arbitrator concludes that the Service has failed to establish by clear and convincing evidence that the removal of the Grievant was for just cause and in accordance with National Agreement Article 16. Accordingly, the grievance is sustained. The following is the reasoning of the Arbitrator.

Basic Principles Applicable to an Expansion of Street Time Case.

The Arbitrator hereby reaffirms the principles he first set forth in Case No. W4N-5B-D 3530, grievant C. Santos, on December 19, 1985, to wit: that under the National Agreement and the M-39, each Letter Carrier must be individually judged by the fair day's work that he accords the Service and that route street standards are to be developed with reference to that specific Carrier. That is, where a Carrier is conscientiously working and is engaging in no deliberate or negligent improper practices, the assigned street time for his route must be adjusted and set according to his individual abilities.

The Arbitrator noted in the Santos case, that earlier decisions of arbitrator Cushman and arbitrator Holly are in support of that basic principle. The Arbitrator also noted that the principle had been confirmed by a pre-arbitration settlement at the National level dated October 22, 1985 and by an April 14, 1982 memorandum from the Office of Delivery and Collection to all Delivery Divisions.

At the instant arbitration hearing, the Union also provided the Arbitrator with a copy of an October 7, 1985 decision by Carlton Snow involving a grievant named Kostch, Case No. W1N-5B-D 28620. While Snow sustained the Kostch removal, the principles he cited are particularly well-stated and are applicable to the instant case.

In the Kostch case, the grievant was initially removed for inadequate performance, but the removal was set aside at Step 3, with the parties agreeing that a six-day special route inspection would be held. The route inspection was subsequently held, and the grievant and two other Carriers were observed on the route. At the time the grievant was observed, specific time-wasting practices were noted, the grievant was counseled regarding those practices, but she continued to engage in them.

Subsequently, management kept track of mail volume on days that Kostch delivered her route, and offered into evidence at her subsequent removal hearing evidence that on light volume days she did not need an adjusted time for the route. The Service also submitted into evidence forty days of randomly selected timecards from the period of time prior to the special

inspection, which demonstrated that the Grievant had previously carried her route within the proper allocated time. Management further submitted specific evidence that the grievant had received remedial training regarding her time-wasting practices, but had failed to correct them. Finally, management submitted specific evidence that the average time for all other Carriers who delivered the route was within the adjusted standards.

Arbitrator Snow noted that the Service had met all of the ordinary steps to be followed in testing the propriety of the termination for inadequate performance: standards were clearly established and were reasonable; management had informed the Carrier of those standards, had warned her and had given her another opportunity to meet the standards; the Carrier had received remedial training; the Carrier had been informed of the consequences of failing to improve; and, the Carrier was given sufficient opportunity to improve, and she failed to do so. Snow thereafter cited numerous commonlaw, non-Service arbitration decisions in support of those basic principles.

The Arbitrator wishes to state that Snow's decision is particularly well-researched and well-reasoned. The Arbitrator is in agreement with all of the principles and guidelines set forth in the Kostch decision, finds that they are consistent with his own as set forth in the Santos case, and adopts them as applicable to the instant dispute.

One other evidentiary matter should be covered. An analysis of all of the cases cited, and particularly that of Arbitrator Snow, has convinced the Arbitrator that where proper foundation is shown - e.g., evidence of a properly established street time, evidence that there has been no substantial change of conditions on the route, evidence of volume on the specific days at issue, as well as the days the other Carriers carried the route, and evidence that a grievant has previously normally carried his route within properly established times - that the average performance of non-exceptional Carriers may be offered into evidence as a means of establishing that it is reasonable to conclude that the Grievant should be able to carry his route within the appropriate time frame. However, such evidence should not be received before a proper foundation is laid, since to do so could be highly prejudicial. Further, absent evidence of time-wasting practices, an intentional slowdown, or other improper practices, such evidence would have to be given very limited or no weight.

Application of the Basic Principles to the Facts of This Case.

First, unlike the facts of the Kostch case, the September 22, 1986 standard for the Grievant's route was not established by any specific M-39 provision, but rather by an arbitrary managerial decision, made after consultation with the Grievant, but before he had ever delivered the adjusted route. Also, while there is no evidence that the Grievant failed to meet the

old base standard for his route, he - unlike Carrier Kostch - almost immediately was unable to continuously meet the new standard for the route.

Second, and also unlike the facts in the Kostch case, the Grievant was not counseled regarding numerous time-wasting practices. Further, unlike Kostch, the Grievant did not continue the one time-wasting practice pointed out to him, but rather changed his practice.

Third, unlike the Kostch case, management in the instant case did not determine and consider mail volume on any of the days in question. Significantly, it was the Grievant's unrebutted testimony that factors such as mail volume, the existence of marriage mail or the existence of certifieds, that contributed to greater time on the route.

Fourth, unlike Kostch, the Grievant was given no remedial training.

Fifth, unlike Kostch, there is no evidence that the Grievant improperly delivered the mail during any route inspection.

Sixth, unlike the Kostch case, the Service did not accede to the Grievant's request for a Section 271.g route inspection. That fact alone is fatally defective to the Service's case. The Grievant had satisfied all the conditions for a special mail count and inspection and was improperly denied one.

The Arbitrator agrees totally with the Union's argument that the Service has attempted to defend its action on a "chicken/egg" argument. For the Service's contention to be accepted, all it would have to do is institute disciplinary action - either before or after a special inspection request - to avoid the mandate of Section 271.g. In any event, it should be noted that at the time of the denial, the Service had no actual evidence that the Grievant's performance was unsatisfactory; and only knew that on some days he failed to complete his route within the allotted street time.

Seventh, no foundation was laid by the Service for evidence that other nonexceptional Carriers were able to carry the Grievant's route in the asserted proper time.

The decisions of Service arbitrators relied upon by the Service do not support its position. The Fasser/Garrett award involved a special six-day inspection, as well as several subsequent spontaneous inspections, all of which revealed intentional delaying tactics by the Carrier in an attempt to keep the same street time. The Eaton decision involved specific time-wasting practices and a conclusion by the arbitrator that the Carrier intentionally "did move at an unnaturally, and unnecessarily slow pace***." The Rentfro decision involved a Carrier who was dissatisfied with the results of some seven route inspections by different inspectors and intentionally engaged in

delaying tactics with the aim of prolonging his street time. None of those situations - all crucial to those arbitrators' rulings - are present in this case.

In sum, the grievance must be sustained on the merits for the reason the Service did not follow the principles applicable to an expansion case.

For all the above reasons, the grievance is sustained.

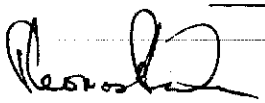
AWARD

Just cause did not exist for the Notice of Proposed Removal or for the Letter of Decision. The grievance is sustained.

The Grievant immediately shall be reinstated to his former position and route at the Lynnwood, Washington office of the Service with full backpay and benefits and without loss of seniority. Further, the Notice of Removal and Letter of Decision, and all prior disciplinary actions taken against the Grievant, shall be expunged from the files of the Grievant and from the files of the Service, and shall not be used against the Grievant in any subsequent disciplinary action or in any other proceeding. No interest is awarded.

The Arbitrator retains jurisdiction of this case solely to resolve any disagreement between the parties regarding the actual amount of backpay due the Grievant.

DATED this 30th day of November, 1987.



Thomas F. Levak, Arbitrator.