BEFORE THOMAS F. LEVAK, ARBITRATOR

C#05952

In the Matter of the Regular Western Region Arbitration Between:

W4N-5B-D-3530

U. S. POSTAL SERVICE
THE "SERVICE"

and

NATIONAL ASSOCIATION OF LETTER CARRIERS
THE "UNION"

(C. SANTOS, THE "GRIEVANT")

DISPUTE AND GRIEVANCE CONCERNING REMOVAL FOR EXPANSION OF STREET TIME/SAFETY RULES DEVIATION

ARBITRATOR'S OPINION AND AWARD

This matter came for hearing before the Arbitrator at 9:00 a.m., November 7, 1985 at the offices of the Service, Santa Monica, California. The Union was represented by Dale Hart. The Service was represented by Lynn Hill. The Grievant, Charles Santos, appeared and gave testimony on his own behalf. Testimony and evidence were received. The Service's post-hearing brief was received by the Arbitrator on November 18, 1985, and the Union's brief was received on November 22, 1985. Based upon the evidence and the arguments of the parties, the Arbitrator decides and awards as follows.

OPINION

I. THE CHARGES AND THE ISSUE.

The Notice of Proposed Removal dated March 25, 1985 provides in relevant part:

> This is advance written notice that it is proposed to remove you from the Postal Service no sooner than 30 days from the date of your receipt of this letter.
>
> Charge #1: Expansion of Street Time/Unauthorized Use of Overtime.
>
> On 3/1/85, you requested 1 hour of overtime or auxiliary assistance to investigate and meet with me on union business. I approved and issued you Form 3996, Carrier-Auxiliary Control, for one (1) hour of street assistance. In addition to granting 1 hour of street assistance, I gave you 55 minutes of office assistance (routing flats) to ensure that you would be able to complete your duties in 8 hours. A review of Form 1813, Late Leaving and Returning Report, shows that you

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clocked out to the street at approximately 1010 hours, 1 hour and 5 minutes after your scheduled leaving time. You did not return to the office until approximately 1514 hours, approximately 1 hour after your scheduled return time, despite the fact that I had given you 1 hour of street assistance. In addition to expanding your street time, you used 58 minutes of overtime that was unauthorized and clearly unwarranted (PS Form 1017-B).

On 3/5/85, you submitted Form 3996 requesting 1 hour of overtime or auxiliary assistance to complete your duties. The reason for your request was that you were "late leaving"--you had approximately 15 1/4 feet of mail, 5 feet was cased the previous day and your reference volume is 14.25 feet. I disapproved your request. I also observed that you had completed casing your route at approximately 0825, 40 minutes prior to your scheduled leaving time giving you sufficient time to complete the remainder of your office duties. Your leaving 1 hour late was clearly unwarranted and your only explanation to me for leaving late was that you "had a lot of mail." A review of Form 1813 shows that you left the office at 1005 hours, 1 hour after your scheduled leaving time and returned to the office at approximately 1556, 1 hour and 42 minutes after your scheduled return time. You expanded your street time by approximately 42 minutes. When I questioned you concerning the additional time spend (sic) on the street, you stated that you were "only 22 minutes over my street time." In addition to your expansion of street time, you used approximately 1 hour and 33 minutes of unauthorized overtime.

On 3/6/85, I authorized RLC S. Tillis-Fraser to case (4 feet) and route your flats (total 9 feet). In addition, you submitted Form 3996 requesting 1 1/2 hours of overtime or auxiliary assistance to complete the remainder of your duties. After visually and quantitatively reviewing your work load, I approved 1/1/2 hours of street assistance in order for you to work 8 hours. While approving your street assistance, I told you that the street assistance granted should get you back to the office well before your scheduled end of tour. When I reviewed Form 1813, you left the office at approximately 0943 hours, 38 minutes after your scheduled

leaving time. You did not return to the office until approximately 1446 hours, 31 minutes after your scheduled return time. The scheduled street time for your route (209) is 5 hours, 11 minutes (lunch included). Despite the fact that you were given 1/1/2 hours of street assistance you used 5 hours, 2 minutes (lunch included) to complete the remainder of your route. You clearly expanded the time needed to deliver your route on the street by approximately 1 hour and 23 minutes and used 16 minutes of overtime that was unauthorized. The total time used on your route was 12 hours and 17 minutes.

On 3/14/85, you submitted Form 3996 requesting 1.75 hours of overtime or auxiliary assistance. Supervisor Jeff Musial approved 1 hour of overtime. You left the office approximately 55 minutes late. You did not return to the office until approximately 1615 hours, 2 hours after your scheduled return time. A review of Form 1813 verifies the fact that you expanded your street time by approximately 1 hour, 4 minutes. You also used approximately 53 minutes of overtime that was unauthorized.

Charge #2: Failure to Follow Safety Rules and Regulations.

On 3/15/85, you were assigned 1/2 ton vehicle #1214110. At approximately 1345 hours, while on street supervision, I observed your vehicle parked on Carlyle at 25th Street without the emergency (hand) brake set. I then proceeded to locate you on your route. When I questioned you concerning this safety violation, you stated, "Sorry, I set it all the time. This time I forgot." I then instructed you to set your hand brake at all times.

You have been cited on previous occasions for failure to follow safety rules and regulations and have been present at numerous safety talks where motor vehicle safety was stressed. In addition, the Santa Monica Post Office, as well as the Inglewood MSC as a whole, is presently involved in an aggressive vehicle accident reduction program aimed at raising the awareness of safe driving practices in order to reduce vehicle accidents.

Charge #3: Unauthorized Deviation from Route

209.

On 3/15/85, you left for your route at approximately 1022 hours. You were observed arriving at your first delivery (park) point at approximately 1121 hours by Supervisor Jeff Musial. When I questioned you concerning your late arrival, you stated that you had taken lunch prior to starting your route and that you had placed your lunch place and time on Form 3996, Carrier-Auxiliary Control, prior to leaving the office. You further stated that Supervisor Musial had "authorized" your lunch time by authorizing you 45 minutes of overtime to complete delivery of your route. A review of your 1564-A, Carrier's Route Book - Route Instructions, shows that your normal lunch time is from 1230 - 1300 hours, after relay #4. In addition, Supervisor Musual (sic), on 3/14/85, annotated your 3996 to take lunch according to your 1564-A. Your actions to take lunch prior to beginning your route without the expressed authorization from a supervisor resulted in the delayed delivery of the business portion of your route.

This action is based on your continued disregard for satisfactory perimeters of work performance and continued failure to follow established safety rules and regulations. You have demonstrated, when accompanied by a supervisor, that you are capable of carrying your route in a satisfactory manner within acceptable time frames. Currently, the 90402 carrier unit is using an office assistance program in an effort to reduce high carrier overtime. Your deliberate actions to expand your work day and use unwarranted/unauthorized overtime is counter-productive to an efficient carrier operation and an unnecessary expense to the Postal Service that cannot be tolerated. Your continued failure to carry your route in the manner in which it is set up denies our customers, especially business customers who rely on early mail delivery, the service that they deserve and expect from our organization.

Your failure to follow safety rules and regulations demonstrates a total lack of concern for safety and increases the possibility of injuring yourself and others.

In addition, the following elements of your past record will be considered in arriving at

a decision if the charges are sustained:

> You were given a 7 calendar day suspension effective 1/29/85 for: #1 - Failure to Follow Safety Rules & Regulations, #2 - Unauthorized Deviation from Route 209, #3 - Unsatisfactory Work Performance, #4 - Expansion of Street Time/Unauthorized Use of Overtime.
>
> You were given a letter of warning on 12/21/84 for Expansion of Street Time/Unauthorized Use of Overtime.
>
> You were given a letter of warning on 12/24/84 for Failure to Follow Safety Regulations - Failure to Curb Wheels of Vehicle.

The stipulated issue is whether the removal of the Grievant was for just cause; and if not, what is the appropriate remedy?

II. FINDINGS OF FACT.

Background.

The Grievant has been employed by the Service since August 1975 and has worked as a Letter Carrier since May 1982. From May 1982 until February 1984, the Grievant worked as a T-6, when he bid into Route 209, the route he held until the date of his removal.

Route 209 is located in an affluent area of Santa Monica, and includes residences, a shopping plaza and professional offices. Parts of the route are hilly. The route is a park-and-carry route, and fourteen individual swings are required.

The Form 1813 assigned street time for Route 209 was five hours and sixteen minutes. (Arbitrator's note: at various times during the hearing, the parties and witnesses described the assigned street time as 5:06, 5:16, and 5:11. The variances are irrelevant to the Arbitrator's determination.) Service witnesses were unaware of the establishment date for that street time. The Grievant's unrebutted testimony was that the street time was the result of a 1980 route inspection. The Grievant's unrebutted testimony is accepted by the Arbitrator as fact.

The Elements of Past Record.

The letter of warning and suspension referred to in the Notice of Proposed Removal were jointly adjudicated in an expedited arbitration proceeding before arbitrator James T. Barker. On September 23, 1985, arbitrator Barker denied both grievances. See Case Nos. W1N-5B-D-31704 and W4N-5B-D-398.

Charge #1: Expansion of Street Time/Unauthorized Use of

Overtime.

The general facts set forth in Charge #1 are not disputed by the Union. That is, the Union does not dispute the fact that on the four days in question in March 1985, the Grievant utilized the overtime hours set forth in the charge, neither does it contend that the various leaving and returning times are inaccurate. Rather, it is the Union's contention that the demands of the route on those days required the Grievant to spend the stated office and street time, and that the Grievant did not deliberately and improperly expand his assigned time.

Regarding each of the days at issue, there was no direct evidence presented by the Service to establish that the Grievant engaged in any deliberate or negligent unproductive, time-consuming or inefficient practices unacceptable from an experienced carrier. On none of the four days in question was the Grievant actually observed by any supervisor, either in the office or on the street. As an example, there was no testimony by any supervisor that on March 1, 1985, the Grievant was observed wasting time in the office for any portion of the one hour and five minutes that he spent in the office after his scheduled leaving time.

The Grievant's unrebutted testimony was that at all times on the four days in question he was productively working and that he was not engaging in any unauthorized or time-wasting practices. Thus the only direct evidence is that on the days in question, the Grievant was making every effort to service his route efficiently and expeditiously.

Since the Grievant began to carry Route 209, he has met the five hour, 6 minute standard on only one occasion, on July 20, 1984 when he was accompanied on the street by a Supervisor Wilson. On two other occasions when he was accompanied by his supervisor, the Grievant exceeded that standard, including a January 4, 1985 observation by a Supervisor Hurtado. (Note: Both the July 20, 1984 and January 4, 1985 observations were considered by arbitrator Barker in his opinion and award.) The Grievant has also regularly and continually exceeded his established office time.

From February 1985 until his removal, the Grievant was assigned a router carrier on a regular basis.

The evidence established that throughout the time the Grievant worked Route 209, he regularly required from thirty minutes to more than an hour of overtime or auxiliary assistance on virtually a continual basis. During October 1984, the Grievant made a request for a special route inspection pursuant to M-39 Section 271 on the ground that over the preceding six consecutive week period, his route had shown over thirty minutes of overtime or auxiliary assistance on each of three days or more in each week during that period. The Grievant's request was denied and the Union filed a grievance on behalf of the Grievant

(Branch Grievance No. 8531-SM). The grievance was ultimately settled at Step 3 of the grievance procedure when the Service agreed that the Grievant and other employees who had also filed similar grievances would be given special route inspections beginning on or before October 5, 1985. Unfortunately, the Step 3 settlement was reached on June 20, 1985, two months after the removal of the Grievant on April 22, 1985.

As noted, the Grievant contends that his expansion of office time and street time was caused by generally heavy mail volume. The Service stipulated at the hearing that mail volume fluctuations can cause a Carrier to be fifteen to twenty minutes late, that the Service intended that such fluctuation will not cause a Carrier to be one hour late. The parties further stipulated that Santa Monica Letter Carriers Isenhard and Nordstrom, if called by the Union, would have testified that fluctuations of mail volume can extend street time by an hour or more.

The Service did not call any Carriers to rebut Isenhard and Nordstrom's stipulated testimony, nor did the Service make any attempt to impeach it. Further, the supervisors called by the Service have never worked as carriers. After weighing the evidence, the Arbitrator makes a special finding of fact that fluctuatuions of mail volume on a route at the Santa Monica office can and does extend street time by an hour or more.

Carrier Richard Yoshida was called as a witness by the Union. Yoshida bid into Route 209 in the fall of 1983 and carried it for two months, when he bid off the route. Yoshida testified that he was always over the reference volume while on the route, so he was always late leaving the office and regularly failed to deliver the route within the five hour, six minute time limitation. Yoshida testified that the "nature of" Route 209 was that the reference volume was greater than it should have been. He testified that the volume of mail on that route had a particular effect on the street time because the Carrier had to carry mail on his back all day. He testified that because of the heavier loads, the "fatigue factor" would cause the Carrier to slow down and delay deliveries.

The Grievant testified that Carrier Mark Bicaro was the Carrier on Route 209 prior to the time the Grievant bid on the job. The Grievant testified that Bicaro told him that he bid off the route because of the very heavy mail volume and the fact that he could not get the route completed in the time demanded by management.

The Service called as a witness Letter Carrier Hallie Edwards, who has carried Route 209 on a number of times as a Relief Carrier. Edwards testified that she had no difficulty carrying the route within the allotted time. Documentary evidence submitted by the Union established that Edwards' performance levels on all routes she carries is extremely high, that is that she is able to carry any route at the Station within

the assigned time with very little experience on the route. The Arbitrator is satisfied from the evidence that Edwards' ability as a Carrier far exceeds that of the average Carrier.

Based on all the evidence, the Arbitrator finds as fact that an average Letter Carrier working Route 209 would normally exceed the assigned time by one-half hour to one hour, and that in periods of heavy mail volume, street time could reasonably be expected to be in excess of one hour over the assigned time.

No mail counts were performed by supervision on the days in question.

Based on the fact (1) that there is no direct evidence that the Grievant engaged in time-wasting practices on the days in question, (2) that the Grievant's route (including office time) normally takes one half hour to one hour longer than the assigned time to complete, and (3) that the only evidence is that heavy mail volume existed on the days in question, the Arbitrator finds as fact that on the four dates specified in Charge #1, that neither deliberate nor negligent actions caused the Grievant to exceed his assigned time.

The Grievant's unrebutted testimony establishes as fact that except for the July 20, 1984 count, every day that he was checked, his mail was not counted.

Charge #2: Failure to Follow Safety Rules and Regulations.

The Grievant does not dispute that he did not set his hand brake on the date in question. The Grievant testified, however, that he did not consider that he had committed a safety violation because Carlyle Street between 25th and 26th Streets is flat, and at the time his gearshift was set in the park-position and his wheels were cornered. The Arbitrator drove to the location in question and found Carlyle Street to be relatively flat.

Charge #2 does not allege the violation of any specific safety rule or violation contained in any handbook or manual. Neither did the Service offer into evidence at the arbitration hearing any applicable handbook or manual provision.

Charge #3: Unauthorized Deviation From Route 209.

The Grievant does not dispute that on March 15, 1985 he took an early lunch. However, he contends that the early lunch was authorized by Supervisor Jeff Musial. The Grievant testified that on the previous day, March 14, 1985, he completed a Form 3996 requesting an early lunch and submitted the form to Supervisor Musial. He testified that on that date Supervisor Musial disapproved the early lunch in writing on the Form 3996.

The Grievant testified that on March 15, 1985 he also requested an early lunch in writing on the Form 3996, and that he also complained to Musial that he was improperly being required

to work six hours without a lunch break. The Grievant testified that on March 15, 1985 Musial made no objection to his request for an early lunch.

Musial testified that he disapproved the Grievant's March 14 request for an early lunch in writing and disapproved his March 15 request verbally. Musial had no explanation for his failure to disapprove the Grievant's request in writing on the second day.

The Form 3996's utilized by the Grievant were received into evidence. Those forms demonstrate that on March 14, 1985 the Grievant made a specific request to take a 10:30 a.m. lunch at Sweet 16 Restaurant, and that the request was expressly denied in writing on the 3996 as follows: "Lunch according to 1564-A." The Form 3996's also show that on March 15, 1985 the Grievant requested a 10:45 a.m. lunch at Sweet 16 but that no denial of the request was made in writing.

Faced with conflicting testimony, the Arbitrator determines that the Form 3996's constitute the "best evidence" of the true facts. Simply stated, on both days the Grievant followed the correct procedure in requesting overtime and modified lunch periods on the appropriate form, and on both dates Musial ostensibly followed the appropriate procedure by approving overtime in writing on the 3996, and by denying the Grievant the March 14, 1985 early lunch in writing on the 3996. However, on March 15, 1985, Musial did not deny the written request in writing on the 3996. The Arbitrator therefore determines that Musial gave at least his tacit permission for the Grievant to take an early lunch on March 15.

It should also be noted for the record that the Grievant's regularly established lunch period did in fact exceed the six hour standard published by E&LRM Section 432.34 to effect that no employee shall be required to work more than six continuous hours without a meal or rest period of at least one-half hour. The Arbitrator deems it probable that when the Grievant raised that provision on March 15, that Musial felt it was advisable to grant the Grievant's request.

III. SERVICE CONTENTIONS.

This case involves a recalcitrant employee who has wilfully violated three basic conditions of employment.

Charge #1 is supported by the relationship demonstrated by the Grievant during previous performance levels and those cited in the Notice of Removal. In particular, arbitrator Barker weighed precisely the same arguments resurrected by the Union concerning management's right to expect a five hour, sixteen minute street time. Barker weighed all relevant factors extensively. In particular, Barker considered the route inspection of July 20, 1984 an acceptable basis for comparison.

The Grievant's expansion of office time and expansion of street time has not been supported by any acceptable reason. He received substantial office assistance and on two occasions was granted substantial amounts of overtime.

The Union's contentions regarding special route inspections must be rejected. First of all, under Article 15, arbitrator Barker's ruling is final and binding, and established that the street time guidelines are proper. Second, the Step 3 decision was not directly applicable to the Grievant's route and did not imply that his route should be checked nor even that he was eligible.

Even assuming that the Grievant was eligible for a route inspection, it would have no bearing on this removal case. He would have received no more under M-39 Section 243.21 than that which had already been accorded him, namely: relief on heavy days. In any event, the Grievant is not immune from consistent street time or performance level by the mere fact that a special route inspection grievance was filed or even that he qualified for one.

Turning to Charge #2, Article 16 clearly allows for removal for failure to observe safety rules and regulations.

The incident in Charge #2 would seem punitive if it was an isolated incident, but it was not isolated. Nine separate safety violations are contained in the Grievant's official personnel folder. (The Service detailed each of those nine alleged violations in its post-hearing brief. It is noted by the Arbitrator that those alleged violations were not offered into evidence at the arbitration hearing.) In the face of such a serious history of safety irregularities, Charge #2 in the Notice of Removal becomes the final and safe act. To tolerate such flagrant disgregard of basic safety rules and regulations would violate the National Agreement.

Regarding Charge #3, that charge on its own merit is cause for removal. It is clear that the Grievant chose to disobey the directives of his supervisor regarding lunch places and times, thereby sacrificing the mail service to the business customers on his route.

The Grievant was well-aware of the policy requiring him to adhere to his 1564-A, and he attempted to take advantage of Supervisor Musial, who also verbally denied the Grievant's request on March 15, 1985.

IV. UNION CONTENTIONS.

With regard to Charge #1, it should first be noted that the Grievant's supervisor never conducted an investigation to thoroughly assure himself that the street time he assumed was a proper and real assessment of Route 209 was correct.

Second, the Grievant followed the proper procedure in that he requested a special route inspection pursuant to the criteria set forth in M-39 Section 271.g. The only legitimate work measurement system for evaluating a route is contained in M-39, Chapter 2. By refusing to grant the Grievant's request for a special route inspection, management prevented a proper appraisal of the route and the street time to be conducted, thus preventing the attainment of an accurate base street time. This action deprived the Grievant ultimately of his right to due process under the National Agreement.

Third, testimony of the Grievant and Yoshida indicated that the route had to be carried in a greater street time than was assigned. Management's only counter was the testimony of Carrier Edwards, who is an exceptionally fast Carrier and not a fair comparison to be used against anyone.

Fourth, management's contention that the Grievant carried the route under the allotted street time three times while being followed by a supervisor is incorrect. On two of those occasions, he had a longer street time than the assigned street time. Further, Supervisor Wilson's observation was unfair because it was conducted during the summertime in violation of M-39 Section 211.1. Section 221.134 prohibits curtailment of mail on the last day of count, which would encompass every day the Grievant was checked. The Grievant's unrebutted testimony also was that except for the July 20, 1984 count, every day that he was checked, his mail was not counted, which violates Section 221.131. Further, Section 272 states that when special inspections are made, they must be conducted in the same manner as annual counts and inspections.

Further, the M-39 provides only two methods for attaining an analyzed base street time for a route. Those methods were not followed. See Section 242.221.

Arbitrator Barker's case should not be treated as precedent of any kind. As it was an expedited hearing, Barker did not look at all the complicated aspects concerning rules and regulations. While the relevancy of the M-39 Handbook and Article 34 were brought before him during the case, he did not address it in his decision.

Next, there is no keying incident which led to the Grievant's removal. Rather, this case looks like a blatant attempt to lump some arbitrary dates together to uphold the charges.

The Service's contention that a fluctuation in mail volume does not affect street time on the route is not credible. Testimony at the arbitration hearing was to the contrary. Further, the M-39 substantiates the fact that mail volume definitely has an effect on street time. Numerous sections speak to that fact in a general manner, and Section 242.221

specifically states that in making a fair appraisal of street time, the manager shall consider his knowledge of the normal mail volume.

Next, there was no evidence that the Grievant engaged in any time-wasting practices. Further, following the Grievant's last discipline, management did not follow the Grievant on the street once, and there is no evidence of any remedial training being granted the Grievant, a direct violation of corrective discipline principles.

Relative to Charge #2, the Union does not dispute the fact that the Grievant failed to put on the hand brake of his vehicle. However, that act was neither a serious one nor did it place anybody or anything in jeopardy. The Grievant's wheels were curved and his transmission was in "Park." Any error was unintentional and de minimis.

Regarding Charge #3, the evidence establishes that the Grievant's request on March 15 was approved by Supervisor Musial. Musial's testimony to the contrary is false.

Finally, even assuming that the Grievant is guilty of all the charges, removal is too severe a penalty considering the Grievant's nine and one-half year history of employment.

V. ARBITRATOR'S CONCLUSION AND AWARD.

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. Accordingly, the grievance is sustained. The following is the reasoning of the Arbitrator.

With regard to Charge #1, the starting point is National Agreement Article 34.A-C. The basic principle established by those provisions is that each employee is to be individually judged by the fair day's work that he accords the Service and that any work standards must be fair, reasonable and equitable. As noted in the Findings of Fact, it was stipulated by the parties that there are no specific street time standards. Accordingly, it is clear that street time standards must be established in accordance with M-39.

An overall reading of M-39, Chapter 2, leads the Arbitrator to the inescapable conclusion that route street standards can only be developed with reference to a specific individual Carrier. That is, an evaluation must be based upon the performance of an individual Carrier while giving a "fair day's work." That is, if a Carrier is conscientiously working and is engaging in no deliberate or negligent improper practices, the assigned street time for the route must be adjusted and set according to his individual abilities.

The fact that a previous Carrier on the route may have

possessed greater ability to carry the route in a lesser amount of time, or the fact that the individual Carrier himself , as a younger or lighter person, may have carried the route faster, is irrelevant. At any time that the six consecutive week period requirement of M-39 Section 271.G is met, a requested special route inspection must be conducted, and the route is subject to readjustment to meet the then-existing abilities of the individual Carrier. It should be noted that the reference in Section 271.G to otherwise satisfactory work performance necessarily relates to "improper practices" as that term is used in M-39, Chapter 2, and not to comparisons between the Carrier and other Carriers or between the Carrier and himself at an earlier stage in his life.

That a Carrier must be judged upon his own personal abilities and work performance has been established in numerous other Regular Regional arbitration cases. For example, see Case No. NC-S-16 271-D, Grievant Clarence E. Hamm, Arbitrator Bernard Cushman, May 28, 1979; NC-S-14 859-D, Grievant Jerry DiBello, Arbitrator Bernard Cushman, March 19, 1979; NC-S-16 327-D and NC-S-16 328-D, Grievant B. L. Wier, Arbitrator J. Fred Holly, April 10, 1979.

In the DiBello case, arbitrator Cushman overturned disciplinary action in part on the ground that the Service had cited no specific instance of improper performance by DiBello. He noted that the only evidence in the hearing was the testimony given by DiBello to the effect that he had made every effort to service his delivery route efficiently and expeditiously. Cushman rejected the inferential conclusion drawn by DiBello's supervisor that the mere use of excessive time demonstrates poor performance, and held that due regard must be given to variable factors.

In the Hamm case, arbitrator Cushman noted that the gravaman of the Service's case was that during the period in question, Hamm had used more street time to deliver his route than did other carriers who serviced his route when he was not on duty, and that on times when he was accompanied by management, he used a lesser amount of time. Cushman found that those facts were insufficient to establish that the Grievant's efforts to deliver the mail on his route were not diligent or conscientious as charged. Cushman noted that the Grievant had never been caught doing anything wrong on his route. He further held:

> That in evaluating a route for the purpose of setting time schedules, only the time used by the carrier is considered, and not that of other carriers who occasionally carry the route.

Cushman overturned the imposed discipline ruling, holding that it was improper for management to discipline a Carrier solely for the reason that the Carrier exceeded either the posted office time or the posted street time or both.

In the Wier case, arbitrator Holly found disciplinary action to be arbitrary and capricious where it was based solely upon a repetitive heavy usage of overtime on the part of Wier. Holly made specific reference to M-41 Sections 112.24, .25 and .28 which require a conscientious effort, prompt performance of duties and no loitering. Holly noted that there was no direct evidence that any supervisor had observed a lack of such behavior by Wier.

The next point is that it is clear from M-39, Chapter 2 and the aforestated Regional arbitration decisions that where an employee meets the standard of M-39, Section 271.g, and requests a route inspection, discipline is inappropriate unless and until such an inspection is conducted. Absent such an inspection, it is simply impossible to determine whether the office time and street time standards remain appropriate at the time in question. In the Wier case, Holly stated:

> The fact is that if Management believed that the Grievant was performing unsatisfactorily, his heavy usage of overtime provided an opportunity, in fact an obligation, to make a special route inspection as per Section 271 of the M-39.

In the Hamm case, arbitrator Cushman found the discipline to be inappropriate, partly for the reason,

> that the grievant's frequent use of overtime and late return from street duty required such an inspection and evaluation according to Section 271 of M-39.

The appropriate rule is also confirmed by a pre-arbitration settlement at the National level dated October 22, 1985:

> Mr. Francis J. Conners
> Vice President
> National Association of Letter Carriers,
> AFL-CIO
> 100 Indiana Avenue, N.W.
> Washington, D.C. 20001-2197
>
> Dear Mr. Conners:
>
> Recently we met in prearbitration discussion of the following cases:
>
> H1N-1N-D 31781, Madison, NJ
> H1N-1N-D 30460, Madison, NJ
> H1N-1Q-D 37134, Albany, NY
> H1N-1N-D 36767, Avenel, NJ
> H1N-1N-D 36766, Avenel, NJ
> H1N-1N-D 36684, Avenel, NJ

H1N-1N-D 36683, Avenel, NJ
H1N-1N-D 34559, Avenel, NJ
H1N-1N-D 28979, New Haven, CT
H1N-1J-D 28974, New Haven, CT
H1N-1J-D 28973, New Haven, CT
H1N-1J-D 36895, Avenel, NJ

Each of these cases involve a disciplinary action as a result of route management. In keeping with the principle of a fair day's work for a fair day's pay, it is understood that there is no set pace at which a carrier must walk and no street standard for walking. Therefore, these cases are being remanded to the regional level of arbitration with the clear agreement between the parties that these cases are to be arbitrated at the regional level.

Please sign and return the enclosed copy of this letter acknowledging your agreement to remand these cases, withdrawing them from the pending national arbitration list.

Sincerely,

Frank M. Dyer
Labor Relations Specialist
Arbitration Division
Labor Relations Department

Francis J. Conners
Vice President
National Association of
Letter Carriers, AFL-CIO

10/23/85 (U5)

Also relevant is an April 14, 1982 memorandum from Office of Delivery and Collection to all Delivery Divisions:

Date: Apr. 14 1982
Ref: DS210:SCchlepitz:jh:7221
Object: Special Route Inspection

General Manager
Delivery Division
ALL REGIONS

In the Memorandum of Understanding of July 21, 1981, between the USPS and NALC, we agreed that our joint objective is to reduce the number of carrier routes that will be scheduled for annual mail counts and route inspections. The Memorandum does not limit

or preclude inspections required under the provisions of Section 271g, Handbook M-39.

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.

Unsatisfactory conditions such as "poor case labels," "poor work methods," or "no route examiners available," should not be used as an excuse not to conduct the inspection within the 4-week time frame.

Please communicate the above information to delivery managers in your Region.

Eugene Fleming, Jr.
Acting Director
Office of Delivery and Collection
Delivery Services Department (U6)

The Service's failure to judge the grievant according to his own abilities and its failure to provide him with a special route inspection when he met the requirements of the M-39 are fatally defective to its case. The Service presented absolutely no direct evidence that during the days in question the Grievant was guilty of any improper work habits or of any time wasting habits. Absent such evidence, Charge #1 cannot stand.

It should further be emphasized that the Service has accused the Grievant of deliberate time-wasting practices, not merely negligent ones. Therefore, it was particularly incumbent upon the Service to demonstrate through direct and immediate evidence that such deliberate practices had occurred.

Turning to Charge #2, that charge must be rejected for a reason fundamental to the arbitration process. Where the Service alleges that an employee has failed to follow safety rules and regulations, it must specifically allege the rules and regulations allegedly violated. In the case at hand, the Grievant has denied that he violated any safety rules or regulations, and neither the charge itself nor any evidence presented by the Service at the hearing sets forth any safety rules and regulations found in any handbook or manual incorporated into the National Agreement.

The Arbitrator cannot simply assume that some unstated handbook or manual provision requires that a Carrier set the hand brake of his vehicle at all times, (even where a street is flat and even where he has placed the transmission and drive and has set the wheels to the curb). The violation of some specific rule

or regulation must be alleged and proved.

For the record, the Arbitrator feels compelled to state that he was very disturbed by the attempt of the Service to introduce into evidence through the post-hearing brief evidence not offered or received at the arbitration hearing. The Service's belated attempt to introduce detailed evidence from the Grievant's personnel file can only be deemed to be improper and prejudicial to the Grievant's right to a fair hearing before this Arbitrator.

Turning to Charge #3, based on the Arbitrator's above Findings of Fact, the charge cannot stand. The Arbitrator wishes to emphasize that he is well-satisfied from the evidence that the Grievant had regularly and continually been complaining about having to work over six hours without a lunch period or break. The Arbitrator is also well-satisfied that the Grievant on each occasion meticulously preserved a record of his requests and any denials. There simply is no question but that the Grievant was consumed with the need to memorialize every facet of his working day. His daily diary clearly demonstrated that fact.

Further, there is no doubt but that the Grievant followed the proper procedure in requesting an earlier lunch time on a Form 3996. Musial simply did not deny the Grievant's request on March 15, and the Grievant had the absolute right to take a lunch at the earlier time.

Finally, the Arbitrator deems it proper to comment upon the status of arbitrator Barker's September 23, 1985 expedited award. As an expedited award, arbitrator Barker's decision does finally resolve the encompassed grievances. To that extent, the Union is prevented from relitigating the encompassed grievances at a later Regular Regional arbitration.

However,while it is clear from Article 15.4.C.4 that the decision of an expedited arbitrator is final and binding, it is equally clear from that provision that expedited decisions do not establish precedential rules, requirements or standards. Such rules, requirements or standards can only be established in regular arbitration proceedings.

Further, the Arbitrator is unable to determine from the face of arbitrator Barker's decision what particular standard he applied in reaching his conclusion that five hours, eleven minutes represented a reasonable street time for the Grievant's route. This should not be construed as a criticism of arbitrator Barker. His opinion and award is much more detailed, well-reasoned and lengthier than the average expedited award. In any event, the Arbitrator concludes that arbitrator Barker's conclusions concerning standands and requirements are not binding on the Arbitrator.

Thus, while the Arbitrator has no authority to set aside the award of arbitrator Barker denying the two earlier grievances, on the other side of the coin, the Arbitrator is not bound by

arbitrator Barker's reasoning in reaching the proper decision in this case. The Arbitrator deems the reasoning he has applied in determining the applicable standards and rules to be those appropriate to a resolution of this case.

In summary, all three charges against the Grievant are found to be without merit. Accordingly, the grievance must be sustained in its entirety.

AWARD

The Notice of Proposed Removal was not issued for just cause under the National Agreement. The grievance is sustained.

The Grievant shall be immediately reinstated to his former position of Letter Carrier, with full back pay and without loss of benefits. The Grievant shall have no preferential right to Route 209 and may be assigned to any regular full-time route within the Santa Monica, California office.

The Arbitrator retains jurisdiction of this case solely to resolve any disagreement between the parties concerning the actual amount of back pay or benefits due the Grievant.

DATED this 19th day of December, 1985.

Thomas F. Levak, Arbitrator.