

C# 10763

REGULAR ARBITRATION PANEL

In the Matter of the Arbitration)
)
 between)
)
 UNITED STATES POSTAL SERVICE)
)
 and)
)
 NATIONAL ASSOCIATION OF)
 LETTER CARRIERS)

GRIEVANT: Donna Super
POST OFFICE: Morristown, NJ
CASE NO: N7N-1N-D 31281
GTS #7445

BEFORE: Herbert L. Marx, Jr. ARBITRATOR

APPEARANCES:

For the U. S. Postal Service:
Lynn Goldstein

For the Union:
Jules J. Cohen, Regional Administrative Assistant

Place of Hearing: Whippany, NJ

Date of the Hearing: January 25 and March 11, 1991

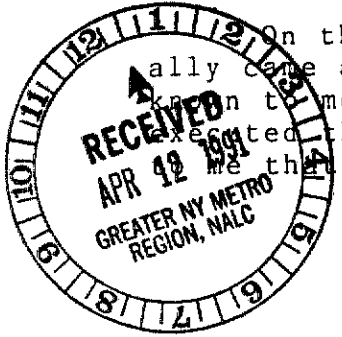
AWARD: See attached Award.

Date of Award: April 11, 1991 *Herbert L. Marx, Jr.*

HERBERT L. MARX, JR., Arbitrator

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

On this 11th day of April, 1991, before me personally came and appeared HERBERT L. MARX, JR., to me known and known to me to be the individual described in and who executed the foregoing instrument, and he acknowledged that he executed the same.



Eleanor C. Puleo
ELEANOR C. PULEO
NOTARY PUBLIC, State of New York
No. 31-4730237
Qualified in New York County
Commission Expires May 31, 1992

O P I N I O N

The United States Postal Service and the National Association of Letter Carriers agreed that the issue to be resolved by the Arbitrator is as follows:

Was the discharge of Letter Carrier Donna Super for just cause? If not, what shall be the remedy?

By letter dated April 27, 1990, Letter Carrier Donna Super, the grievant, received a Notice of Removal to be effective June 1, 1989, under the following charges:

CHARGE #1: FAILURE TO PROPERLY PERFORM YOUR DUTIES/
EXTENSION OF STREET TIME

Specifically, your street time, as established through a six day special inspection is five hours and eighty units (5.80). This time was mutually agreed to. However, on the following days, the volume of mail and your office leaving time dictated that you should have completed your street time within the prescribed 5.80 hours. Rather, you extended your street time without any supporting evidence that can be dictated by other conditions other than the mail.

03/23/90	.86 units	04/05/89	.73 units
03/28/90	.58 units	04/12/90	.75 units
03/31/90	.61 units	04/13/90	1.07 units
04/02/90	.44 units	04/14/90	.74 units
04/03/90	.35 units	04/17/90	.68 units
04/04/90	.67 units	04/18/90	.96 units
		04/20/90	.26 units

CHARGE #2: FAILURE TO FOLLOW INSTRUCTIONS

A. Specifically, on March 31, 1990 at approximately 1:22 PM, while on street supervision, I approached you on Woodcrest Road and asked you why

it took you one hour and ten minutes to reach the third stop on your route from the time you clocked out on road time. You informed me that you took lunch and delivered hold mail on Morris Avenue to Mrs. Renna. You were instructed to take lunch either at Washington Place, 12:00 - 12:30 or Twin Oaks, 1:00 - 1:30.

You failed to comply. In addition, Morris Avenue is the opposite direction from your authorized line of travel.

B. Specifically, on April 2, 1990 at approximately 12:30 PM you were observed by Postmaster Allocco and Mr. Grayson, SPO on Ridgedale Avenue traveling in the opposite direction from your line of travel. At approximately 1:00 PM I ascertained that you had not yet started your deliveries, and you could not be located until 1:20 PM. At that time, you had just arrived to begin the delivery of your route assignment. When asked why it took you one hour forty-seven minutes to begin deliveries, instead of one hour and fifteen minutes as previously established on your 3999 for special instruction, you stated "I took my lunch and made some personal phone calls and delivered some hold mail on the other side of my route." You took your lunch on Ridgedale Avenue at 12:00-12:30, which is an unauthorized place and time. Your lunch is authorized to be taken on Washington Place from 1:00-1:30 PM.

CHARGE #3: VIOLATIONS OF USPS STANDARDS OF CONDUCT

Your actions cited in Charge #1 and #2 are clearly in violation of Section 666.51 of the Employee & Labor Relations Manual which states:

"Employees must obey the instructions of their supervisors. If an employee has reason to question the propriety of a supervisor's order, the individual will nevertheless carry out the order and immediately file a protest in writing to the official in charge of the installation, or appeal through official channels."

Super has been a Letter Carrier for four years. On previous routes up to August 1990, she testified without contradiction that she had experienced no problems in her duties

and had not been subject to any discipline. In August 1990, she was assigned to Route 6 in Morristown. On this route beginning in October, she was frequently late in completing her street duties. This led to some heated exchanges between her and her Supervisor.

Upon intervention by the Union, a meeting was held with the Postmaster, the Supervisor, the Superintendent of Postal Operations, the Union President and the grievant. At this meeting, it was agreed that the route would be subject to a Special Route Inspection. According to the Postal Service, this was on the condition that the grievant would accept the results of the inspection as providing the appropriate street time. The grievant and the Union deny that any such advance commitment was made.

The Special Route Inspection was conducted on February 3-9, 1991. In a meeting held subsequent to the inspection, the Postal Service announced that the result was to increase allowable street time from 5.25 hours to 5.80 hours. The Union disputed the disallowance of ten minutes for what the Postal Service called an "extra comfort stop". At the meeting, Super was reported to have stated she would "do my best", but that she felt she "cannot make 5.80". There was clearly no concurrence on the result of the inspection.

It is the Postal Service's position that the inspection was properly conducted and that Super and others carrying the route had frequently experienced no difficulty in meeting

even the previously established 5.25 hours' street time.

Following the inspection, there were occasions when Super failed to complete her route within the allotted street time. On February 28, 1990, she received a LISTEN Letter of Warning for "extension of street time" on four occasions in February for periods of 10 to 50 minutes.

On March 14 Super was assessed a LISTEN seven-day suspension for "failure to follow instructions", when she was instructed to return to the office at 2:50 p.m. and refused to do so. On March 27 she was assessed a LISTEN 14-day suspension, again for extension of street time on five occasions between March 14 and March 20, ranging from 22 minutes to 44 minutes. The Notice of Removal followed on April 27.

Charge No. 1

The discussion which follows will first be concerned with the first charge under the Notice of Removal. The Union argues that the charge is improper on two principal bases: first, that the Special Route Inspection did not follow the specified Postal Service procedures and thus was invalid; and second, that the Postal Service failed to demonstrate any improper performance by Super in her delivery routine on the days when street time exceeded 5.80 hours, and there were no deficiencies pointed out to her in reference to the allegedly excessive street times cited in the earlier disciplinary actions.

The Union made extensive reference to the Management of Delivery Services, Handbook M-39. Chapter 2 concerns Mail Counts and Route Inspections. Pertinent excerpts are as follows:

134 STREET MANAGEMENT

134.1 Objectives

.11 Street management is a natural extension of office management. All carriers are to be notified to expect daily supervision on the street just as they receive daily supervision in the office. For a delivery manager to fully understand and control the organization, the manager must be aware of any conditions that affect delivery anywhere within the service territory.

.12 Accompanying carriers on the street is considered an essential responsibility of management and one of the manager's most important duties. Managers should act promptly to correct improper conditions. A positive attitude must be maintained by the manager at all times. . . .

134.3 Criteria for Need

Certain criteria may call attention for individual street supervision. When overtime or auxiliary assistance is used frequently on a route (foot, motorized, parcel post, collection, relay), when a manager receives substantial evidence of loitering or other actions or lack of action by one or more employees, or when it is considered to be in the interest of the service, the manager may accompany the carrier on the street to determine the cause, or meet the carrier on the route and continue until such a time as the manager is satisfied. No advance notice to the carrier is required.

217 DRY-RUN COUNT

217.1 A review of the count procedures will be made within 21 days prior to the start of the count and route inspection to teach the carrier how to accurately complete count forms (1838-C and 1838-A) during the period of count and inspection. An actual count of mail or recording

of time used will not be kept on the day the dry-run is made.

232 CONDUCT OF ROUTE EXAMINER

232.1 The route examiner must:

a. Not set the pace for the carrier, but should maintain a position to observe all delivery points and conditions.

b. Not suggest or forbid any rest or comfort stops but should make proper notations of them. . . .

241.4 Providing Carrier with Summary

A completed copy of the front of Form 1840 -- reflecting totals and averages from Forms 1838, day of inspection data, route examiner's comments, and analysis of office work functions and actual time recordings -- will be furnished the carrier at least 1 day in advance of consultation. Completed copies of Form 1838 will be given to the carrier at least 5 calendar days prior to consultation.

242 EVALUATION AND ANALYSIS

. . . .

242.3 Evaluating the Route

. . . .

.34 Street Time Allied Work Rules

.341 . . . Reasonable comfort stops will not be deducted from the carrier's actual time.

270 SPECIAL ROUTE INSPECTIONS

271 WHEN REQUIRED

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

a. Consistent use of overtime or auxiliary assistance.

b. Excessive undertime.

c. New construction or demolition which has resulted in an appreciable change in the route.

d. A simple adjustment to a route cannot be made.

e. A carrier requests a special inspection and it is warranted.

f. Carrier consistently leaves and/or returns late.

g. If over any 6 consecutive week period (where work performance is otherwise satisfactory) a route shows over 30 minutes of overtime or auxiliary assistance on each of 3 days or more in each week during this period, the regular carrier assigned to such route shall, upon request, receive a special mail count and inspection to be completed within 4 weeks of the request. The month of December must be excluded from consideration when determining a 6 consecutive week period. However, if a period of overtime and/or auxiliary assistance begins in November and continues into January, then January is considered as a consecutive period even though December is omitted. A new 6 consecutive week period is not begun.

h. Mail shall not be curtailed for the sole purpose of avoiding the need for special mail counts and inspections.

272 MANNER IN WHICH CONDUCTED

When special inspections are made because of conditions mentioned in 271, they must be conducted in the same manner as the formal count and inspection.

The Union argues that the Postal Service failed to provide the Special Route Inspection in the manner required by the M-39. Initially, the Union points to Section 271 which outlines the conditions under which a Special Route Inspection

is required. The conditions prevalent on the grievant's route were sufficient, in the Union's view, to warrant such an inspection. The Union argues that there was no valid basis for the Postal Service to offer an inspection on the condition that the Carrier agree in advance to be bound by the result. As noted above, the Union denies that such agreement was made.

The Union also faults the Postal Service in failing to provide for the "dry run" specified in Section 217.1. As to the disallowance of the ten-minute comfort stop, the Union points to Section 242.341 which specifically permits "reasonable" stops without deduction.

Most significantly, however, the Union argues that the Postal Service failed to provide the grievant with the paperwork necessary to an effective consultation following the inspection, particularly the Form 1840, Summary of Count and Inspection. This was clearly not supplied in advance, as required by Section 241.4. The Union also argues that it was not provided at the consultation itself, although the Postal Service contends that "all the needed paperwork" was available.

To all of this, the Postal Service points out that, although Super did not accept the new allotted street time as appropriate, no alternate suggestion was made by her or the Union. Further, the Postal Service points out that no grievance was initiated as a result of the inspection.

The Union replies that there was good reason for the absence of a grievance. Testimony by the Union President was that, at the consultation, an oral commitment had been made to make a "territorial change" in the route by the removal of stops at the Woodcrest condominium. This, apparently, would have been a satisfactory resolution to the grievant. At a later date, however, the Union was advised that such change was not going to be made and that "auxiliary assistance" would be provided on a day-to-day basis.

As an entirely separate matter, the Union contests the charge of "extension of street time" by pointing out that at no time (the incidents in Charge No. 2 being exceptions) did the Postal Service offer any showing that Super was not performing her delivery duties in an appropriate manner. The Union notes that the Supervisor never took the opportunity to accompany Super on her route, as had been requested and as referenced in Section 134.3, to determine if problems might exist as to the grievant's performance.

Charge No. 1 accuses the grievant of extending her street time "without any supporting evidence" on 13 occasions between March 23 and April 20, 1990 for periods ranging from a quarter of an hour to just in excess of one hour. By way of explanation, Super stated that on many of these days, heavy volume of mail required extra time for delivery. A previous Letter of Warning and a disciplinary suspension, which led to the removal action, were under similar circumstances, according to Super.

The Arbitrator finds that disciplinary action under Charge No. 1 is not for just cause. "Extension of street time" may be the result of some deliberate action by a Letter Carrier, such as extended break time or failure to work at a normal pace. There is no showing that this is the case here. The Postal Service rests its judgment on the fact that the street time exceeded the standard of 5.80 hours, without more. This, in turn, means that the street time was "extended" by the Carrier only if it can be shown that the standard on which the Letter Carrier is measured has been properly formulated.

Because of earlier difficulties, the grievant had requested and received a Special Route Inspection. The Arbitrator does not conclude that the results of the inspection were fully accepted by the grievant and/or the Union. The Union pointed out, largely without contradiction, that the consultation following the inspection did not follow the prescribed procedure. There is ample reason to believe that a territorial change was offered by the Postal Service, apparently in recognition of the circumstances resulting from the inspection. For whatever reason, this offer or promise was withdrawn, and temporary help as needed or possibly as available was substituted.

As a result, it is simply not proven that the extra time taken and/or required on the specified dates was in fact a "failure to properly perform . . . duties".

The Postal Service's responsibility in such circumstances was fully reviewed in three Awards by Arbitrator

Bernard Cushman, cited by the Union. In Case No. RA-8147D-75 (Hamm, May 26, 1979), Arbitrator Cushman stated:

The efficiency of the Postal Service is, of course, a legitimate objective of the Postal Service. The Postal Service is not required to suffer incompetence on the part of letter carriers. Nor is the Service required to permit "unsatisfactory effort." When, however, the Postal Service claims either incompetence or unsatisfactory effort, it must prove those claims. Unsatisfactory effort means that the carrier did not try or did not try hard enough. For the reasons set forth above, such proof does not lie solely in a comparison of posted route times and the actual time used by a carrier. Nor does such proof lie in a comparison with other routes manned by other carriers. In such limited comparisons, without more, it may fairly be said that the thinkers don't count and the counters don't think. Mere statistics so limited are not meaningful. If the Postal Service wishes to show that a carrier does not try it must show specifically that he loiters or he does not seek to get receipts for certified mail or he spends one half hour playing ball with the children on his route and the like. Incompetence may be shown by continuing deliveries to the wrong addresses, by failures to deliver mail he has cased and has in his bag, by not receiving receipts for registered mail or in numerous other ways. If his route has had a six day evaluation while he worked the route, of course, that is one relevant consideration if his time seriously exceeds the posted time, if his volume and kinds of mail have in fact been counted by supervisors, if all the variables such as weather, traffic and the like are also objectively considered, if his work has been observed by supervisors and if all of these and other objective facts are proved to be incompatible with reasonable expectations in the light of the provisions of the applicable Handbooks and accepted practices, and in their totality may fairly be said to show lack of effort or where the facts so demonstrate, incompetence, then the carrier is clearly subject to discipline.

By contrast, the Postal Service submitted as examples three Awards which sustained removals for extension of street time. These, however, can be readily distinguished from the

situation here under review. In one instance, the Carrier was shown to use overtime consistently, after route studies for three separate time periods. In another, the Carrier was found to have failed to make reasonable estimates as to required assistance, thus leading to unwarranted overtime. A third instance concerned an employee "whose performance is at 50% efficiency over a period of eight weeks after an increase in his allotted street time".

Charge No. 2

Charge No. 2 accuses the grievant of taking lunch at an unauthorized location and time, deviating from her route, and not keeping to her established delivery schedule. Super's Form 1564-A, Delivery Instructions, specifies two authorized lunch locations and times. While the grievant had explanation for her activity on the specified dates, the observations in the charge are apparently accurate.

Given the difficulties in meeting street time, of which the grievant was fully aware, it was clearly her responsibility to adhere to her route pattern and lunch schedule with special care.

Underlying all the circumstances here is an obvious hostility between the grievant and her Supervisor. While the testimony shows that the Supervisor was harsh and less than fully professional in his direction, it also may well be that Super was not fully cooperative in her responses.

During the arbitration hearing, the Union raised, apparently for the first time, the question of whether previous disciplinary actions, used as support for the removal, were undertaken in the proper manner under the LISTEN disciplinary program. In view of the Arbitrator's findings as to Charge No. 1, it is not necessary for the Arbitrator to review these contentions. Further, such contentions would have been more properly raised at the time the earlier disciplinary actions were imposed.

Charge No. 1 concerning extension of street time is obviously the most significant of the charges against the grievant. As discussed above, the Arbitrator finds this charge to be without adequate support. Charge No. 2 and in part Charge No. 3 are sufficiently proven to warrant appropriate discipline. The Award will reflect this conclusion.

A W A R D

The removal of Letter Carrier Donna Super was not for just cause. Based on Charge No. 2, a disciplinary suspension of 30 calendar days is warranted. The grievant shall promptly be offered reinstatement to her former position with reimbursement for lost straight time pay commencing 30 calendar days after her removal to the date of offer of reinstatement, less any compensation received during this period. In addition and if requested by the grievant, the Postal Service shall undertake a new Special Route Inspection in full conformity with the requirements of the M-39 Handbook.

HERBERT L. MARX, JR., Arbitrator

DATED: April 11, 1991