Exhibit 1

Letter or document notifying employees that their start times will be changed on a specific date.

121.32 Park and Loop and Drive-Out Routes

Flats and letters are pulled down and strapped out using the same procedures as foot routes. As the mail for each loop is pulled down and strapped out, it is placed into trays or other containers. If using a single satchel, carriers load the mail for the first loop into the satchel before leaving the office. If using the Double Satchel in a configuration with the waist belt, carriers load mail into the satchel at the first delivery point. The carrier is expected to load the satchel with up to 35 pounds of mail.

121.33 Curbline Routes

Curbline carriers pull down using the same work methods outlined for foot routes; but they must place letter and flat mail in delivery sequence in trays without strapping out. Carriers on curbline routes will normally handle presequenced letter and flat mailings as separate bundles, unless the delivery unit manager authorized the casing and/or collating of the mailings.

122 Scheduling Carriers

122.1 Establishing Schedules

122.11 Consider the following factors in establishing schedules:

a. Schedule carriers to report before 6 a.m. only when absolutely necessary.

b. Fix schedules to coincide with receipt and dispatch of mail. At least 80 percent of the carriers' daily mail to be cased should be on or at their cases when they report for work.

c. Schedule carriers by groups. Form groups of carriers who make the same number of delivery trips and whose office time is approximately the same.

d. Generally, schedule carriers of the same group to begin, leave, return, and end at the same time.

e. Schedule so that delivery to customers should be approximately the same time each day.

f. Make a permanent schedule change when it is apparent that one or more days' mail volume varies to where it is causing late leaving.

g. Schedule carriers' nonwork days in accordance with the *National Agreement.*

122.12 Post all schedules and keep them up to date.

122.2 Carriers' Leaving Schedules

122.21 Establishing Leaving Schedule

The leaving time for the carrier is determined by the following:

a. *Workload.* The normal workload for the route;

b. *Availability of Mail.* The time all the mail for the same day's delivery is available;

Exhibit 3

ARTICLE 5 PROHIBITION OF UNILATERAL ACTION

The Employer will not take any actions affecting wages, hours and other terms and conditions of employment as defined in Section 8(d) of the National Labor Relations Act which violate the terms of this Agreement or are otherwise inconsistent with its obligations under law.

(The preceding Article, Article 5, shall apply to City Carrier Assistant Employees.)

Prohibition on Unilateral Changes. Article 5 prohibits management from taking any unilateral action inconsistent with the terms of the existing agreement or with its obligations under law. Section 8(d) of the National Labor Relations Act prohibits an employer from making unilateral changes in wages, hours, or working conditions during the term of a collective bargaining agreement.

In H1N-5G-C 14964, March 11, 1987 (C-06858) National Arbitrator Bernstein wrote concerning Article 5:

> The only purpose the Article can serve is to incorporate all the Service's "obligations under law" into the Agreement, so as to give the Service's legal obligations the additional status of contractual obligations as well. This incorporation has significance primarily in terms of enforcement mechanism—it enables the signatory unions to utilize the contractual vehicle of arbitration to enforce all of the Service's legal obligations. Moreover, the specific reference to the National Labor Relations Act is persuasive evidence that the parties were especially interested in utilizing the grievance and arbitration procedure spelled out in Article 15 to enforce the Service's NLRB commitments.

Not all unilateral actions are prohibited by the language in Article 5—only those affecting wages, hours, or working conditions as defined in Section 8(d) of the National Labor Relations Act. Additionally, certain management decisions concerning the operation of the business are specifically reserved in Article 3 unless otherwise restricted by a specific contractual provision.

Past Practice

The following explanation represents the national parties' general agreement on the subject of past practice. The explanation is not exhaustive, and is intended to provide the local parties general guidance on the subject. The local parties must ensure that the facts surrounding a dispute in which past practice plays a part are surfaced and thoroughly developed so an informed decision can be made.

Article 5 may also limit the employer's ability to take a unilateral action where a valid past practice exists. While most labor disputes can be resolved by application of the written language of the Agreement, it has long been recognized that the resolution of some disputes require the examination of the past practice of the parties.

Defining Past Practice

In a paper given to the National Academy of Arbitrators, Arbitrator Mittenthal described the elements required to establish a valid past practice:

- First, there should be clarity and consistency. A course of conduct which is vague and ambiguous or which has been contradicted as often as it has been followed can hardly qualify as a practice. But where those in the plant invariably respond the same way to a particular set of conditions, their conduct may very well ripen into a practice.
- Second, there should be longevity and repetition. A period of time has to elapse during which a consistent pattern of behavior emerges. Hence, one or two isolated instances of certain conduct do not ordinarily establish a practice. Just how frequently and over how long a period something must be done before it can be characterized as a practice is a matter of good judgment for which no formula can be devised.
- Third, there should be acceptability. The employees and supervisors alike must have knowledge of the particular conduct and must regard it as the correct and customary means of handling a situation. Such acceptability may frequently be implied from long acquiescence in a known course of conduct. Where this acquiescence does not exist, that is, where employees constantly protest a particular course of action through complaints and grievances, it is doubtful that any practice will be created.
- One must consider, too, the underlying circumstance which give a practice its true dimensions. A practice is no broader than the circumstances out of which it has arisen, although its scope can always be enlarged in the day-to-day administration of the agreement. No meaningful description of a practice can be made without mention of these circumstances. For instance, a work assignment practice which develops on the afternoon and midnight shifts and which is responsive to the peculiar needs for night work cannot be automatically extended to the day shift. The point is that every practice must be carefully related to its origin and purpose.
- Finally, the significance to be attributed to a practice may possibly be affected by whether or not it is supported by mutuality. Some practices are the product, either in their inception or in their application, of a joint understanding; others develop from choices made by the employer in the exercise of its managerial discretion without any intention of a future commitment.

Functions of Past Practice

In the same paper, Arbitrator Mittenthal notes that there are three distinct functions of past practice:

To Implement Contract Language. Contract language may not be sufficiently specific to resolve all issues that arise. In such cases, the past practice of the parties provides evidence of how the provision at issue should be applied. For example, Article 15, Section 2, Step 3 of the 1978 National Agreement (and successor agreements through the 2000 National Agreement) required the parties to hold Step 3 meetings. The contract language, however, did not specify where the meetings were to be held. Arbitrator Mittenthal held that in the absence of any specific controlling contract language, the Postal Service did not violate the National Agreement by insisting that Step 3 meetings be held at locations consistent with past practice (N8-NAT-0006, July 10, 1979, C-03241).

To Clarify Ambiguous Language. Past practice is used to assess the intent of the parties when the contract language is ambiguous, that is, when a contract provision could plausibly be interpreted in one of several different ways. A practice is used in such circumstances because it is an indicator of how the parties have mutually interpreted and applied the ambiguous language. For example, in a dispute concerning the meaning of an LMOU provision, evidence showing how the provision has been applied in the past provides insight into how the parties interpreted the language. If a clear past practice has developed, it is generally found that the past practice has established the meaning of the disputed provision.

To Implement Separate Conditions of Employment. Past practice can establish a separate enforceable condition of employment concerning issues where the contract is silent. This is referred to by a variety of terms, but the one most frequently used is the silent contract. For example, a past practice of providing the local union with a file cabinet may become a binding past practice, even though there are no contract or LMOU provisions concerning the issue.

Changing Past Practices

The manner by which a past practice can be changed depends on its purpose and how it arose. Past practices that implement or clarify existing contract language are treated differently than those concerning the silent contract.

Changing Past Practices that Implement or Clarify Contract Language. If a binding past practice clarifies or implements a contract provision, it becomes, in effect, an unwritten part of that provision. Generally, it can only be changed by changing the underlying contract language, or through bargaining.

Changing Past Practices that Implement Separate Conditions of Employment. If the Postal Service seeks to change or terminate a bind-

ing past practice implementing conditions of employment concerning areas where the contract is silent, Article 5 prohibits it from doing so unilaterally without providing the union appropriate notice. Prior to making such a change unilaterally, the Postal Service must provide notice to the union and engage in good faith bargaining over the impact on the bargaining unit. If the parties are unable to agree, the union may grieve the change.

Management changes in such silent contracts are generally not considered violations if 1) the company changes owners or bargaining unit, 2) the nature of the business changes, or 3) the practice is no longer efficient or economical. The first of these has rarely arisen in Postal Service cases involving its numerous bargaining units.

A change in local union leadership or the arrival of a new postmaster or supervisor is not, in itself, sufficient justification to change or terminate a binding past practice, as noted in the previous paragraph.

Exhibit 4

Letter from Branch President stating that the Postal Service has not negotiated over the start time changes with the NALC local union.

Exhibit 5

Letters from carriers (and clerks?) stating that more than 80% of caseable mail is available at carrier cases upon clocking in to work at original start time. (Letters written in the employee's words are best)

Exhibit 6

29717

REGULAR ARBITRATION

In the Matter of the Arbitration	)	
between	)	Grievant: Class Action
UNITED STATES POSTAL SERVICE	)	Post Office: Fort Collins, CO
and	)	USPS No. E06N-4E-C 11198887
NATIONAL ASSOCIATION OF LETTER CARRIERS, AFL-CIO	)	NALC ORT No. 04-199496

BEFORE: Kathy L. Eisenmenger, J.D., Labor Arbitrator

APPEARANCES:

For the U. S. Postal Service: Shirley T. Pointer

For the Union: Michael T. Doherty

Place of Hearing: Fort Collins, CO

Date of Hearing: September 1, 2011[1]

AWARD:

Date of Award: November 15, 2011

PANEL: Colorado/Wyoming or Arizona

Award Summary

The grievance is sustained. The Postal Service violate Article 19 of the National Agreement and specifically Section 122 of the M-39 Handbook when Management at the Fort Collins installation change the letter carriers' start time from 8:30 a.m. to 9:00 a.m. effective April 16, 2011. The start time of 8:30 a.m. is to be reinstated.

Kathy L. Eisenmenger, J.D.

[1] The parties submitted timely post-hearing briefs. I closed the record upon receiving the Union's brief on September 30, 2011, and the Postal Service's brief on October 3, 2011.

Issues

Did the Postal Service violate the National Agreement by changing the reporting time for City Carriers from 8:30AM to 9:00 AM at both Fort Collins facilities? If so, what is the appropriate remedy?

Pertinent Contractual Provisions

Article 3
Management Rights

The Employer shall have the exclusive right, subject to the provisions of this Agreement and consistent with applicable laws and regulations:

A. To direct employees of the employer in the performance of official duties;

* * * *

C. To maintain the efficiency of the operations entrusted to it;

D. To determine the methods, means, and personnel by which such operations are to be conducted; . . .

* * * *

Article 5
Prohibition of Unilateral Action

The Employer will not take any actions affecting wages, hours and other terms and conditions of employment as defined in Section 8(d) of the National Labor Relations Act which violated the terms of this Agreement or are otherwise inconsistent with its obligations under law.

Article 19
Handbooks and Manuals

Those parts of all handbooks, manuals and published regulations of the Postal Service, that directly relate to wages, hours or working conditions, as they apply to employees covered by this Agreement, shall contain nothing that conflicts with this Agreement, and shall be continued in effect except that the Employer shall have the right to make changes that are not inconsistent with this Agreement and that are fair, reasonable, and equitable. This includes, but is not limited to, the Postal Service Manual and the F-21, Timekeeper's Instructions.

Postal Regulatory Provisions

M-39 Handbook, Management of Delivery Services

122 **Scheduling Carriers**

122.1 **Establishing Schedules**

122.11 Consider the following factors in establishing schedules:

a. Schedule carriers to report before 6 a.m. only when absolutely necessary.

b. Fix schedules to coincide with receipt and dispatch of mail. At least 80 percent of the carriers' daily mail to be cased should be on or at their cases when they report for work.

c. Schedule carriers by groups. Form groups of carriers who make the same number of delivery trips and whose office time is approximately the same.

d. Generally, schedule carriers of the same group to begin, leave, return, and end at the same time.

e. Schedule so that delivery to customers should be approximately the same time each day.

f. Make a permanent schedule change when it is apparent that one or more days' mail volume varies to where it is causing late leaving.

g. Schedule carriers' nonwork days in accordance with the *National Agreement.*

Statement of Facts

The Step B Team (Dispute Resolution Team or "DRT") entered into the following stipulated facts:

- Management changed the start time at both stations in Fort Collins on 4/16/2011 from 8:30am to 9:00 am.
- The dispatch log attachment 4, included in the grievance is the current truck log for Fort Collins P.O./s. (Entered into the arbitration record at Joint Exhibit [JX] 3, pages 13 through 16).

- The same truck brings the mail to the Main first and then brings Old Town Station their mail.
- The truck schedule has not changed.
- ODL [Overtime Desired List] carriers that are double casing are allowed to start at 8:30 am as needed.
- The grievance is timely.

Immediately prior to the change in start time, Postmaster Adam Sena sent a letter to Danielle Fake, the local Branch 849 NALC ("the Union") President dated April 11, 2011, to advise the Union that the Fort Collins installation would change the reporting time from 8:30 a.m. to 9:00 a.m. The start time change applied to the City Letter Carriers at both the Main Post Office (MPO) and the Old Town Station (OTS). On April 12, 2011, Management conducted standup meetings to advise the carriers at both stations of the change.

The Union filed an Informal Step A on April 29, 2011, to contest the change in the carriers' start time.

Postmaster Sena testified that prior to October 2009 the Fort Collins installation processed its own mail. He added; however, that due to deteriorating economic reasons, the Postal Service centralized mail processing in October 2009 by having the General Mail Facility/Processing & Distribution Center (GMF/PDC) in Denver, Colorado, process Fort Collins' mail. The Postal Service contracted with private trucking companies to transport the mail from Denver to Fort Collins for the latter installation's personnel to complete the casing of mail.

Postmaster Sena stated that once the Fort Collins installation lost their [mail processing] machines it left the installation dependent on the trucks coming from Denver. When asked why the trucks' schedules were not changed instead of changing the start time for the carriers Postmaster Sena testified that he is held at the mercy of the Denver GMF. He stated that initially the trucks were to leave Denver at 6:30 a.m. but they were unable to do so because the Denver GMF was not yet finished with the mail at that time. He further added that the trucks' arrival time has been renegotiated between the Postal Service and the trucking company from a 7:40 a.m. arrival time to a 8:10 a.m. arrival and the trucks are given a ten (10) minutes window without incurring a monetary penalty.

The record contains a matrix created by Supervisor Nick Goodwin showing the truck arrivals times to the Fort Collins installation at the MPO and the OTS separately. A review of the summary of the information reveals that the last truck is scheduled to arrive at 7:40 a.m. but during the period of eleven (11) days from March 19, 2011 to March 31, 2011, the average arrival time was 8:34 a.m. and the truck was late an average of 54 minutes. For the OTS, the last truck is scheduled to arrive at 8:10 a.m. However, the average arrival time at the OTS for the ten (10) day period of March 28, 2011, through April 9, 2011, was 9:17 a.m. and the truck was late an average of 67 minutes. The document also shows that there was an average of 69% of caseable mail at 8:30 a.m. at the MPO during the survey period and an average of 65% of caseable mail at 8:30 a.m. at the OTS. The document, compiled from information gathered by Supervisor Goodwin during the survey period, shows there were no times where the carriers at either location had at least 80% of caseable mail at 8:30 a.m. JX 3, page 9-b.

Prior to changing the start time for the Fort Collins letter carriers on April 16, 2011, Management had changed the start time for the carrier complement at both stations on a few occasions. Originally before July 16, 2008, the carriers' start time at both the MPO and the OTS was 7:30 a.m. On July 16, 2008, Management changed the start time for the carriers at both facilities to 7:45 a.m. Sometime in March 2009, Management changed the carriers' start time at both facilities to 8:00 a.m. Then sometime in November 2009 Management changed the start time at both facilities for the carriers to 8:15 a.m. Within a few months later in February 2010, Management changed the start time for the carriers at both the MPO and the OTS to 8:30 a.m. On June 5, 2010, Management changed the start time for the carriers working from the MPO to 9:00 a.m. but retained the 8:30 a.m. start time for the carriers at the OTS.

On September 4, 2010, the Union initiated a Step A grievance complaining about the change in start time. The grievance was denied and the Union pursued the grievance to the Step B.[2] On September 24, 2010, the Step B Team resolved the aggrieved issue that "the Postal Service violated Article 19 of the National Agreement when they changed the starting time from 8:30 AM to 9:00 AM for City Carriers." The Step B Team (DRT) ordered that upon receipt of its decision to the Management of Fort Collins, Management would notify the carriers that the original start time of 8:30 a.m. would be reinstated. The Step B Decision also states that, "The

[2] Case No. E06N-4E-C10331997/Branch No. 9AMSTART.

8:00[3] AM start time is to be implemented no later than 10/02/10." The Step B Decision further mandated the following instructions:

> Additionally, the DRT finds it appropriate to issue local management an instructional "cease and desist" in lieu of the compensatory monetary remedy requested by the union. This [*sic*], to insure that if in the future it is determined that changes to scheduled reporting times are necessary, they will be based upon legitimate operational needs and exercised in accordance with the provisions of the National Agreement and all applicable Handbooks and Manuals.

Documentation submitted with the merits of the instant grievance includes computerized print-outs of truck schedules from two (2) different trucking companies contracted by the Postal Service to move mail. Joint Exhibit (JX) 2, pages 13-27. Generally, the documents show the trucks' departure time from the Denver Priority Facility, Denver, Colorado, and then the Denver Processing and Distribution Center (PDC). The documents bear two (2) different effective dates; i.e., July 12, 2010 and July 24, 2010 (the documents for the latter date contain no information pertaining to delivering trucked mail to the Fort Collins' stations). The contract term for one of the trucking companies is for the term of July 1, 2009 to June 30, 2013. Not all of the documents contain information that show delivery times of trucked mail to the Fort Collins installation. None of the documents bear the exact date of the trucks' activities, or at least that can be deciphered by this Arbitrator. Not all of the truck schedules provided here show arrival times for the two (2) stops for the Fort Collins installation. The schedule information shows that the trucks do not make direct stops from the Denver Priority Facility and Denver P&DC to the Fort Collins installation. The trucks generally stop at other cities, such as Longmont, Loveland and/or Berthoud, Colorado, before arriving at Fort Collins. A couple of the schedule printouts showed that the trucks arrived at the Fort Collins' two locations in the afternoon or evening. Other schedule print-outs showed that the trucks arrived at the MPO and the OTS at 6:25 a.m. and 6:55 a.m.; 4:30 a.m. and 5:00 a.m.; 5:00 a.m. and 5:30 a.m.; 7:40 a.m. and 8:15 a.m.; 4:10 a.m. and 4:40 a.m.; and, 3:20 a.m. and 3:50 a.m. respectively.

Branch President Fake testified that one of the clerk craft employees who works at the Fort Collins installation is also the local President for the American Postal Workers Union (APWU), Mark Tindall. She indicated that Mr. Tindall usually works from 4:00 or 5:00 a.m. to

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[3] This appears to be a typographical error.

11:00 a.m. and is in the MPO when the mail is received. Branch President Fake recalled her telephone conversation she had with Mr. Tindall and the interview notes she made of that conversation on April 25, 2011. In her notes, Branch President Fake wrote that Mr. Tindall said to her, "The flats to be distributed to the cases arrive early at around 5am." According to Branch President Fake, Mr. Tindall identified the problem as the office had no mail handlers to do the work anymore and that the office did not have a clerk doing that job either so the mail would sit for a while. Branch President Fake added that Mr. Tindall said the mail was distributed on average prior to 8:00 a.m. JX 3, page 29. At the arbitration hearing, attempts were made by the Union call Mr. Tindall as a witness via telephone. No one answered the telephone number called by the Union Advocate. The timing of the call occurred when Mr. Tindall was off work.

The record contains Mr. Tindall's memorandum signed on APWU Local #539 letterhead, dated August 31, 2010, that stated the following:

> According to our Dock Clerk, Debbie Dixon, the final truck that arrives in Fort Collins each day with mail for distribution is scheduled to arrive at 7:40 a.m. That truck is the DPS truck, which contains all of the Delivery Point Sequenced mail, and very little manual mail. So, in reality, the vast majority of mail to be distributed to the carriers is available before 7 a.m., with the final bit scheduled to be available at 7:40 a.m.
> JX 3, page 30.

One of the spreadsheets compiled by Supervisor Goodwin shows that the DPS truck arrived at 8:05 a.m., and being twenty-five (25) minutes. Supervisor Goodwin counted the mail he considered to be available at 8:30 a.m., consisting of Bundles (bundled flats or DUMBOS), Automated Flats, Manual Flats and letters and then totaled the number of those pieces. He in turn counted the mail he considered to be available after 9:00 a.m. to be S-999, Automated Letters, Other Automated Letters, Manual Flats and Manual Letters and noted the total of those pieces. Based on his observations and the method by which he categorized the mail types, Supervisor Goodwin determined on one occasion that there was 79% of caseable mail at 8:30 a.m. JX 3, page 124.

Union witnesses disagreed with the method Supervisor Goodwin used in compiling his data and used the March 21, 2011, spreadsheet as an example (JX 3, page 124). The Union witnesses testified that S-999 mail is equivalent for counting purposes to DPS mail and therefore should not be counted among the pieces that were made available after 9:00 a.m. Additionally, the Union witnesses stated that Automated Letters and Other Auto Letters should not be counted

in as caseable mail. The Union witnesses calculated that given this method, when S-999, Automated Letters and Other Auto Letters are subtracted, the carriers had about 87% of their caseable mail by 8:30 a.m. on March 21, 2011.

Gerry Hoffman is a City Carrier in Fort Collins and also a Union Steward. He testified that he could not recall ever having to clock in and then wait for mail to be counted. He added that the mail was always counted and available when the carriers arrived. Mr. Hoffman testified that the change in start time has decreased morale because employees are ending work later and has caused one carrier to have childcare difficulties. He added that customers are complaining about their mail arriving later. He denied that the carriers ever sat around doing nothing and stated that most of the time the mail was counted, at least as much as three (3) or four (4) letter cases and two (2) quantities of flats. Mr. Hoffman testified that when he reported for work at 8:30 a.m. he would leave the office for making deliveries at 11:00 a.m. or 11:30 a.m. He added that he never had to wait around for his mail.

Mr. Hoffman testified that the S-999 mail that Supervisor Goodwin counted as some of the mail available after 9:00 a.m. is considered as mail counted because the JWRAP verifies the counts. He added that he was told by a named supervisor that DPS mail is never counted or considered as caseable mail, except when an audit is being conducted. He added that S-999 mail always has been counted as DPS mail is counted.

Union Branch President Fake testified that she filed a previous grievance when in June 2010 Management changed the start time at the Fort Collins Main Post Office. She added that in June 2010 the carriers' start time remained at 8:30 a.m. for the Old Town Station. President Fake further testified that Management should look into why the trucking companies do not get the mail to Fort Collins on time and if they cannot do so the Postal Service should contract with a company that can make deliveries on time. She stated that she reviewed the documents Supervisor Goodwin compiled when she met with him at the Formal A grievance step. President Fake worked as the carrier for Route 13 (annotated on the Route/Carrier Daily Performance/Analysis Report as Route 21013). She reviewed the Mail Volume Recording in Inches worksheet completed for March 28, 2011, during her testimony. JX 3, page 280. The worksheet shows that Route 13 received 38 in Letter Volume at 7:00 a.m. and 19 in Letter Volume at 10:00 a.m. for a total of 57 letter pieces. President Fake testified that the numbers on the worksheet did not appear to be correct. The copy of the Route/Carrier Daily

Performance/Analysis Report for March 28, 2011, shows that President Fake cased 157 letter pieces, although the form does not show the time in which that mail was received. The Route/Carrier Daily Performance/Analysis Report also shows that President Fake cased 414 pieces of Flat Mail (JX 3, page 279) whereas the volume work sheet shows that her route received 277 pieces of Flat mail (the time of the third delivery is illegible) on JX 3, page 280. In addition to the above, she testified that Supervisor Goodwin stated to her that sometimes when the trucks arrive the mail would sit without action because there is no employee around to do the mail.

President Fake testified that the Union compiled a listing to show the summary of all the grievances filed over the issue of Management mandating overtime to be worked by carriers who are not on the Overtime Desired List (ODL) from January 12, 2011, to April 25, 2011. JX 3, page 38. The summary shows that there were eighteen (18) grievances filed at each the Fort Collins offices where the mandated overtime incidents occurred prior to the change in start time on April 16, 2011. The summary shows there were three (3) grievances filed after the start time had changed. President Fake stated there were numerous additional grievances that have been filed since April 25, 2011, because of mandated overtime.

Postmaster Sena testified that the first time he decided to change the carriers' start time from 8:30 a.m. to 9:00 a.m. was grieved by the Union. He could not recall the reason why the start time for the carriers at the OTS was not changed in June 2010. He added that the June 2010 start time change was overturned because Management did not have evidence to support the basis for the change and the start time resumed to 8:30 a.m. Postmaster Sena added that the Fort Collins installation continued to receive late arrivals of the trucks from Denver with the mail. He stated that the trucks were initially scheduled to arrive at the Main Post Office first at 7:40 a.m., but the trucks came at 8:30 a.m. and sometimes as late as 9:00 a.m. Initially, Postmaster Sena testified at the hearing that currently the trucks are to leave earlier, presumably before 7:40 a.m. Later, on cross-examination, he testified that the Postal Service renegotiated with the truck company whereby the trucks are now to arrive at the MPO at 8:10 a.m. He stated that he preferred to have the trucks from Denver arrive by 7:00 a.m. so that the mail could be delivered earlier but under the circumstances the installation offices were experiencing a lot of stand-by time, which was non-productive. He stated that if the trucks could arrive earlier on a consistent basis he would change the carriers' start time to an earlier time.

Postmaster Sena stated that the clerks' morning schedule is based on the arrival times of the trucks delivering mail from Denver. He added that the installation has approved pre-tour overtime. He also testified that mandating overtime increased during the peak period when employees took vacation time. He added that since March there have been seven (7) carriers on long-term absences due to surgeries and that they returned in mid-August. He acknowledged that the installation mandated overtime three (3) to four (4) times a week but that the mandates are now done infrequently.

Supervisor Nick Goodwin testified that after the 2010 grievance was sustained, the Postmaster asked him to determine how much mail was available and when. He explained that he noted the Letter Volume and the Flat Volume on the worksheets entitled Mail Volume Recording in Inches for each of the days in the survey and listed the respective volumes (estimated piece count of mail) of the time of day when mail was available to the carriers. The notations were then transferred to a worksheet to show the mail available at 8:30 a.m. versus the mail available after 9:00 a.m. and the percentage of available mail at 8:30 a.m. For each day of the survey, Supervisor Goodwin relied upon reporting documentation the Postal Service uses in the normal course of operation in arriving at his mail percentage chart; i.e., End-of-Run Carrier Piece Counts for ZIP Codes 80525 and 80526, DOIS Web Reporting Volume Reports, Route/Carrier Daily Performance/Analysis Reports, an untitled worksheet annotated to show the DPS truck's arrival times and the times S-999 was given to the carriers, and the TAC report showing the amount of waiting time under Operation Code 354. JX 3, pages 109 through 396, covering the period of March 19, 2011, through April 9, 2011.[4] For example, the TAC Report for the date of March 21, 2011, shows ten (10) carriers had a total of five (5) hours and twenty-nine (29) minutes of Code 354 time. JX 3, page 138. The TAC Report for March 22, 2011, shows two (2) hours and three (3) minutes of Code 354 for five (5) carriers that day. A review of the TAC Reports submitted in the record show that almost without exception some carriers had Code 354 time, except on two (2) days where there was no Code 354. The amounts of Code 354 time are generally in the plus-one to plus-two hours. However, one day the installation incurred over thirty-five (35) hours of Code 354 time. The Code 354 TAC reports also showed erratic usages with seven (7) minutes one day, sixteen (16) minutes on another day but on following days there was six-plus hours and then seven-plus hours of Code 354 time on two (2) different

[4] This time frame is hereinafter referred to as the survey period.

days. Supervisor Goodwin stated that after the start time change the installation captured 25% of unproductive time for the MPO and 91% for the OTS.

Supervisor Goodwin testified that he used estimations to determine the mail volume and did not do an actual piece count. He acknowledged the numbers could have errors, but he added that the conversion method using inches has been a recognized valid method for estimating mail volume and is used by the carriers when they seek to have route adjustments. He stated that the DPS mail was not counted in his survey because DPS mail is already sorted in order and does not need to be cased by the carrier. He differentiated DPS mail from Auto Mail stating that the latter is not delivery point sequence. He further stated that S-999 mail involves different types of mail, such as vacation holds, out of sequence mail, changes of address, mail that is missing a suite number or other types of mail. He added that the S-999 mail must be handled by the carrier at the case. Supervisor Goodwin also identified the types of mail he used in his survey chart, whether it was caseable mail and where it comes from. He explained that Bundle mail, known also as DUMBOS, is mail the clerks take and throw. The Auto Flats are run by the Denver GMF. The Manual Flats are sorted by the clerks. The Letters, or raw mail, is sorted and cased by the carriers.

Supervisor Goodwin testified that he did not provide notice to the Union before or during his survey of mail and its availability time frames. He conceded that the Union was not given the opportunity to check his figures while he conducted the survey.

The record contains personal statements from seven (7) letter carriers submitted to the Union pertaining their dissatisfaction with the 9:00 a.m. start time. JX 3, pages 31-37.

In the Step B Team's narrative statements of the parties' respective contentions, Management asserted that it was unreasonable for the Union to insist on an actual count of every single piece of mail to verify the quantity in its worksheets made prior to making the start time change. Management further asserted that based on a study made at both offices in Fort Collins it was shown that only 69% of the caseable mail was available to the carriers at the Fort Collins MPO and 65% was available at the OTS. JX 3, page 8-b.

Positions of the Parties

For the Union

The Union acknowledged that Management has certain rights under Article 3 of the Negotiated Agreement; however, many of those rights enumerated are limited by negotiated contract provisions. Reference Joint Contract Administration Manual (JCAM), page 3-1. The Union argued that when trucks scheduled to dispatch the mail to the Postal Service offices are late by an average of 54 to 67 minutes Management has failed to "maintain the efficiency of the operation entrusted to it," per Article 3.

The Union contended that part of efficiency includes financial responsibility. The Union noted that Postmaster Sena testified that he made the start time change as a sound business decision. The Union cited the documentary evidence in the file at Joint Exhibit (JX) 3, pages 39-87, and Ms. Fake's testimony to show that the Union filed numerous grievances concerning Management's actions to mandate employees for overtime when the employees were not on the ODL. The Union contended that the resolution of those grievances filed prior to the start time change totaled over $10,000.00, and since the start time change the Union has filed additional grievances over improper mandating actions to force overtime on the non-ODL carriers. The Union asserted that the decision to change carrier start time and the growing number of grievances gives credence to the fact that Postmaster Sena is not maintaining the efficiency of the operation entrusted to him.

The Union claimed that Management should have scheduled distribution clerks so that there would be an even flow of mail to be provided to the carriers each day and that service standards are met.

The Union alleged that Management violated Article 5 of the National Agreement by failing to notify the Union of Management's intention and to negotiate a proposed change to hours of work for the carriers.

The Union also alleged that Management violated Article 19 by failing to act according to Section 122 of the M-39 Handbook. The Union relied upon the regional arbitration award rendered by Arbitrator Carlton Snow.[5] Arbitrator Snow stated in his Award that "Managerial control of work schedules, however, is not totally unfettered or without limitations," and that the

[5] Case No. F98N-4F-C 02062648 (2003).

"M-39 handbook specifies that schedules must be fixed to coincide with the receipt and dispatch of mail." After quoting the contents of Section 112.11(b) of the M-39 Handbook (reproduced at page 3 above), Arbitrator Snow held the following:

> The instruction is not a suggestion but is stated as an imperative. The Handbook, which is pursuant to Article 19 of the labor contract has been incorporated into the parties' collective bargaining agreement, eliminates a manager's unfettered control over Start Times. Start Times remain within management's control but must be exercised after giving due deference to the M-39 Handbook.

The Union contended that Management's pile of numbers and data is flawed and inaccurate and skews the truth pertaining to the arrival of mail received at the Fort Collins installation. The Union asserted that the spreadsheet compiled by Supervisor Goodwin shows only "mail available @ 8:30" and "mail available after 9:00" but does not show the various mail categories involved in that simple division. The Union noted Supervisor Goodwin's testimony that he did not allow the Union to observe the arrivals of the mail to verify his accounts. In contrast, the Union relied upon the interview notes taken by Branch President Fake of her telephone interview with President Mark Tindall and his written statement. JX 2, pages 29 and 30. The Union's brief provided a point-by-point review of the documents Management relied upon in making the start time change. The Union observed that March 21, 2011, was Monday and asserted that because Sunday is a non-delivery day the plant would have had processed mail for Monday. The Union pointed to the "0" quantity of mail Supervisor Goodwin placed in the column for "Letters" for Zone 80526 for March 21, 2011. The Union alleged that it would be nearly impossible to have "0" letters available at 8:30 a.m. for an entire zip code on a Monday. JX 3, page 124. The Union reviewed the other documents and found that the total counts on three documents had three different sets of counts, except for DPS mail, which the parties agree is not cased by the carriers. The Union asserted that Management should have done an actual piece count to verify the accurate amount of mail available to the carriers by 8:30 a.m.

The Union pointed to other documents alleged to contain inconsistencies. For example, Management alleged that on March 26, 2011, there was 67% of the mail at issue at 8:30 a.m. (JX3, page 198); however, the mail was not actually counted until 8:45 a.m. (JX 3, page 199).[6]

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[6] The PAC report for March 26, 2011 shows five (5) carriers incurred Code 354 in respective amounts of seventeen (17) minutes, fifteen (15) minutes, forty-seven (47) minutes, twenty-four (24) minutes and one (1) hour.

The Union questioned Management's claim and asserted its doubts that the carriers waited for the mail for fifteen (15) minutes. The Union cited Union Steward Hoffman's testimony wherein he stated he could not recall ever having to clock in and then wait for mail to be counted, that the mail was always counted and available when the carriers arrived. The Union submitted that when Supervisor Goodwin was asked if there were any errors in his documents, which he denied, he admitted that if there were errors it could throw off the data.

The Union claimed that Management failed to follow the previous Step B Decisions. The Union stated that when Management had attempted to change start times in 2010 the DRT resolved the grievance and issued a "cease and desist" order. The Union noted that the DRT also held that "if in the future it is determined that changes to scheduled reporting are necessary, they will be based upon legitimate operational needs and exercised in accordance with the provisions of the National Agreement and all applicable Handbooks and Manuals." The Union proffered that based on the foregoing assertions the current start time change was not made in accordance with the provisions of the National Agreement and all applicable Handbooks and Manuals.

The Union contended that there was no operational need to change the carriers' start time. The Union asserted that the problems persist for which Management could make corrections and return the carriers' start time to an earlier time. The Union claimed that Management in Fort Collins has failed to enforce the truck schedules to be on time. The Union further claimed that Management has failed to properly staff the clerk function to receive the mail in the stations. The Union requested as remedial relief that the start time be reinstated to 8:30 a.m., that a compensatory settlement of administrative leave be granted or any other monetary award the Arbitrator deems appropriate.

For the Postal Service

The Postal Service denied that Management's change to the letter carriers' start time violated the National Agreement. The Postal Service maintained that Management made the change under the provisions of Article 3 and all of the Articles of the National Agreement.

The Postal Service asserted that extensive evidence shows there was less than 80% of the caseable mail available to the carriers at 8:30 a.m. and referred to documentation contained in the arbitration record at JX 2, pages 109-397. The Postal Service contended that after the start time change as of April 16, 2011, the letter carriers experienced a significant decrease in their time

spent waiting for caseable mail. The Postal Service claimed the Union was aware of the concerns pertaining to the excessive waiting time for the carriers to receive sufficient mail to case and the loss of productivity due to the delay in the arrival of the trucks from Denver to Fort Collins carrying their mail. The Postal Service claimed that the trucks were constantly later than their appointed arrival time.

The Postal Service contended that the letter carriers' start time change to 9:00 a.m. adjusted their schedules to be realistic with the circumstances described above. The Postal Service asserted that Management had articulated a legitimate business interest for making the change to the letter carriers' start time. The Postal Service opined that the changes in business mail volumes and revenue dictate such changes may be necessary. The Postal Service asserted that when mail is not available it serves no purpose to have earlier start times and that it increases costs unnecessarily. The Postal Service claimed that the Union's argument based upon the Management's singular input error made by a supervisor into the DIOS database could not be shown to change the amount of mail available to be cased. The Postal Service further contended that the Union's challenges to Management's analysis of the mail volume for the first time at arbitration is inappropriate because the Union had a prior opportunity to do so during the grievance procedure but failed to do so.

The Postal Service asserted that the time change in this grievance is distinguishable from the time change done in the past for which the prior grievance was resolved by the Step B Team. The Postal Service claimed that the Step B Team overturned the prior time change because Management had failed to conduct a documented analysis about the lack of available mail to be on hand earlier in the morning. The Postal Service argued that in the instant case Fort Collins Management conducted an analysis of the lack of mail volume, thus supporting with evidence the need to make the change to letter carriers' start time. The Postal Service summarized that the effectuation of DPS mail and changes pertaining to moving the processing operations and the lateness of mail to Fort Collins dictated the time change.

The Postal Service submitted six (6) arbitration awards is support of its positions.[7]

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[7] Case No. B06N-4B-C 09199341 (Barrett, 2009) (finding that local management had changed start time for work tours numerous times there existed no settled past practice, thus, "to overturn a management decision that is made within the confines of Article 3 that does not violate any other article, handbook, manual, agreement or law is not within the purview of an arbitrator."); Case No. B06N-4B-C 08223150 (Ross, 2009) ("[The start time changes] were taken as cost

Analysis and Discussion

The Union objects to the change in start time effective April 16, 2011, claiming that there was no operational purpose for the change. The Postal Service defends its action on the basis that less than 80% of the carriers' caseable mail was not available at the start time of 8:30 a.m., thus contending that Management properly moved the start time to 9:00 a.m. Management also relied on the allegedly late but consistent arrival of the mail delivery trucks from Denver P&DC/GMF to the Fort Collins installation as the reason for the unavailability of mail for the carriers at 8:30 a.m. and that the delay resulted in unproductive time spent by the carriers until the mail arrived after 8:30 a.m. The Postal Service relied upon Section 122.11b of the M-39 Handbook wherein the regulation instructs Management to fix schedules to coincide with the receipt and dispatch of mail. The regulation requires, among other factors, that the carriers' schedule be set so that "[a]t least 80 percent of the carriers' daily mail to be cased be on or at their cases when they report for work."

In the previous grievance filed over the identical issue (sans the Old Town Station), the DRT set forth a mutually-agreed upon proviso should Management determine (subsequent to October 2, 2010) that changes to the scheduled reporting times are necessary, stating such

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measures and improvement in efficiency. The authority to change the starting time to maintain the efficiency of the operations rests with Management."); Case No. K01N-4K-C 07162991 (Trosch, 2008) (Parties' LMOU required a postal notice if changes were made to start times up to two hours. Grievance denied upon finding the Postal Service relied on the 80% criterion in Section 122.11 of the M-39 and had the necessary basic information upon which to make the change); Case No. B01N-4B-C 05082195 (Deinhardt, 2005) (Parties' LMOU provided the letter carrier may ask that his/her route or assignment be posted for bid if his/her route or bid assignment schedule is changed by more than one(1) hour. Grievance denied by finding that Article 41 and the Local Agreement contemplates changes to carriers' start times); Case No. B94N-4B-C-99206131 (Sharkey, 2000) (grievance denied based on conclusion that the change of one hour poses no violation of the National Agreement); C94N-4C-C 99235545 (Roberts, 2002) (Based upon the direction at Section 112.11 of the M-39 Handbook that at least 80% of the carriers' daily mail to be cased should be on or at their cases when they report for work, that Management retained the right to determine the personnel by which operations are conducted and that Article 41.1.4 allows for change in start time of one hour or less the adjustment of the grievants' start time of one-half earlier [to 7:30 a.m.] the change was in accord with the National Agreement).

changes "will be based upon legitimate operational needs and exercised in accordance with the provisions of the National Agreement and applicable Handbooks and Manuals."

Generally, the Union bears the burden of proof to show by credible and reliable evidence that the National Agreement has been violated. However, in this instant case the aggrieved action rests entirely upon evidence compiled by the Postal Service where much of that information cannot be verified as to the relevant and material circumstances. Another factor that sets this grievance apart from the traditional union contract grievance is that the parties' mutually designated Step B Team issued Fort Collins Management a cease and desist order and instructed Management that any future start time changes should be determined on the basis of "legitimate operational" needs in accordance with the provisions of the National Agreement and applicable Handbooks and Manuals. In this regard, the Step B Team placed the onus primarily on Management to show proof of the "legitimate operational needs" for changing the carriers' start time if done so in the future. The Step B Team issued its Decision on September 24, 2010. The Fort Collins installation did not begin its mail volume survey until March 19, 2011. Thus, when Management conducted its survey beginning March 19, 2011, Management was on specific notice of the June 2010 grievance pertaining to the change in start time for the carriers and the terms of the DRT's resolution. Management conducted the mail volume survey unilaterally without notice to the Union and without input or participation with the Union. Normally, a joint labor-management effort is not required when Management expends efforts to gather facts before exercising its decision-making authority. However, given the fact that the previous grievance over the exact issue had been sustained by a joint representation from the Postal Service and the Union, a joint survey could have avoided some issues that surfaced in the second attempt to the change the carriers' work schedule more than six (6) months later.

I find that Supervisor Goodwin conducted a thoughtful survey of the situation as directed by Postmaster Sena and that Supervisor Goodwin attempted in good faith to perform a thorough compilation of data. Unfortunately, the compilation of evidence simply fails to sufficiently meet verifiable support, and thus justifiable, to change all of the carriers' start time from 8:30 a.m. to 9:00 a.m. Those deficiencies are discussed below.

Inasmuch as the Postal Service relied upon the assertion that less than 80% of the caseable mail was available to the carriers at their 8:30 a.m. start time and attributed that lateness to the arrival of the trucks traveling from Denver, the Postal Service had the obligation to show

how much actual caseable mail was available to the carriers as of at least 8:30 a.m., the actual and separate arrival times of the trucks from Denver to the Fort Collins MPO and the OTS, and the actual quantity of caseable mail delivered at those times. Supervisor Goodwin's mail volume worksheets show handwritten notations purportedly meant to record the delivery of mail from the trucks from Denver. The difficulty with this information is that there exists recordable information maintained in a database for the truck's departures and arrivals at all of its stops on its route for each day. That information is lacking in the record. Moreover, the truck delivery reports in the record show evening or very early morning arrival times at Fort Collins, suggesting that at least on some occasions Fort Collins received mail that would have been available first thing in the morning when the carriers reported for work. It is also incongruent that the trucks from Denver arrive first at the MPO and then make the next stop (usually) at the OTS. This would lead to the conclusion that the majority of waiting time would occur at the Old Town Station, but a review of the documents in the file do not reflect that presumption. The Denver trucks' routing raises the issue for placing the most northern arrival point of Fort Collins as the last on the route as opposed to reversing the routing to have the truck drop off mail first at Fort Collins, and then back-track to the other cities on the way to their home base in Denver. The latter routing could enable the trucks to deliver mail to Fort Collins at least an hour earlier.

The Postal Service relied on their proffer that the carriers spent 527 minutes in waiting time (Code 354) (during the period of March 19, 2011 through April 9, 2011) because of the insufficient availability of mail (less than 80%) at or on their cases when the carriers arrived at work. Indeed, the TAC reports in the record establish there was waiting time incurred during the survey period. However, it appears that the circumstances pertaining to the waiting time was not analyzed. The TAC reports do not indicate what time of day the waiting time occurred. The reports do, however, reflect the names of the individual carriers who experienced Code 354 time and the day/date of the week on which the waiting time happened. One extreme example happened on Saturday, April 9, 2011, when twenty-eight (28) carriers experienced waiting time for a total of 35-plus hours, where the carriers incurred a range of waiting time with one carrier having the least amount of waiting time of .80 hours whereas another carrier having the maximum amount of waiting time at 2.29 hours. However, one of the MPO carriers is shown to have waiting time on numerous previous occasions, six (6) total, and for large (over one hour) amounts of time. Only a few of the carriers at the OTS had experienced waiting time during the

survey period prior to April 9, 2011. This particular day clearly appears to be an anomaly and would certainly negatively skew the "averages" calculated by the Postal Service to support its position that the carriers' start time was changed in part to offset or reduce the time of carriers waited for their morning mail. The total number of minutes under Code 354 for April 9, 2011, was shown as 2,139. Reference JX 2, page 9-b. If one disregards that particular day, especially inasmuch as the chart compiled by Management does not show the delivery truck from Denver to have arrived late, the average waiting time in minutes would equate to 180.55 minutes, not 376 minutes as reported by the Postal Service. More importantly, the documents also do not reflect the circumstances that may have caused the anomaly on April 9, 2011. The "Mail Volume Recording in Inches" report for April 9, 2011, initially shows delivery times for mail but the columns are marked out as if to show errors in the information. JX 3, page 386.

A review of the TAC reports also show that other than the April 9, 2011, work day, the waiting time is limited to individuals and is not incurred by the entire or large majority of the carrier complement at the Fort Collins installation. It appears that there were twenty-two (22) carriers at the MPO and nineteen (19) carriers at the OTS. Reference Postmaster Sena's testimony and JX 3, page 110. Of the seven (7) carriers who wrote personal statements for the grievance, only two (2) incurred waiting time per the TAC reports, and one of those carriers experienced waiting time on only one occasion. Of the forty-three (43) carriers shown on the TAC reports to have experienced waiting time, nine (9) had waiting time only once, twelve (12) had waiting time on two (2) occasions, nine (9) had waiting timeon three (3) occasions, three (3) carriers had waiting time on four (4) occasions, four (4) carriers had waiting time on five (5) occasions, five (5) carriers had waiting time on six (6) different dates and one (1) individual carrier had waiting time on eight (8) occasions during the survey period of March 19, 2011 through April 9, 2011. There was no information presented by the Postal Service to show the reasons or circumstances under which most carriers incurred very small amounts of waiting time but their counterparts would have waiting time, sometimes in significant amounts, five (5), six (6) and eight (8) times each. The Postal Service's analysis of the data captured for the Fort Collins installation does not address other possible systemic problems but appears to have relied solely on the trucks' arrival time as the culprit. Moreover, while the TAC reports show that waiting time actually happened, they fail to show the time of day so spent and the reason why some employees experienced waiting time whereas their coworkers did not and why no one on

any one particular day had the same or similar amount of waiting time. Overall, there appears to be no analysis to address the great fluctuations in the totals listed for the waiting time. On two (2) days during the survey period, there were no minutes recorded under Code 354, thus no time spent waiting for anything by any carrier. On another day, there was only seven (7) minutes under Code 354, and on a different day only sixteen (16) minutes shown under Code 354. There is also no explanation for the large number of waiting time minutes for March 21, 2011 (329) and April 6, 2011 (438) but where the percentage of caseable mail available at 8:30 a.m. was at 79% and 77% respectively, thus almost meeting the 80% threshold. If the Union's method for counting what constitutes caseable mail, those days would have realized more than the regulatory 80% standard. Additionally, there is no documentation in the record to substantiate the Postal Service's assertion that after the start time change as of April 16, 2011, the letter carriers experienced a significant decrease in their time spent waiting for caseable mail.

The Union's *prima facie* case involved presenting anecdotal accounts from the Union witnesses and written statements from seven (7) carriers and one clerk/APWU President to show that caseable mail was available to the carriers at 8:30 a.m. Generally, such anecdotal evidence, some of which consists clearly as hearsay, lacks probative value to offset contrary evidence, particularly documentary evidence created in the normal course of the employer's business. The overall emphasis of the statements; however, gives probative value to the information imparted. For example, neither President Fake nor Steward Hoffman's names are on any TAC report showing either person had time recorded under Code 354. Therefore, the TAC reports corroborate their testimony that they did not experience waiting time for lack of caseable mail. Additionally, only two of the seven (7) carriers who submitted statements incurred Code 354 time and one individual experienced waiting time only once during the survey period. Therefore, the anecdotal evidence tends to support the Union's claim that the reason given for changing the start time was not shown to be for a legitimate and justifiable operational reason.

For the foregoing reasons, I find that the Fort Collins Management failed to support its assertion that all of the carriers at the installation's locations lacked at least 80% of their caseable mail at least by 8:30 a.m. Therefore, the start time of 9:00 a.m. must be rescinded and the start time of 8:30 a.m. must be reinstated. The reinstatement of the 8:30 a.m. start time does not mandate that the time be set in perpetuity. As Arbitrator Snow indicated in his award on the

same type of issue, Management may make necessary adjustments upon proof in compliance with the factors in Section 122.11 of the M-39 Handbook. (See footnote 3, page 13).

Award

The grievance is sustained.

The Postal Service violated Article 19 of the National Agreement and specifically Section 122 of the M-39 Handbook when Management at the Fort Collins installation change the letter carriers' start time from 8:30 a.m. to 9:00 a.m. effective April 16, 2011. The start time of 8:30 a.m. is to be reinstated at the beginning of the next full pay period after receipt of this Award, unless the parties mutually agree to a later date. No other remedy is granted.

Date: November 15, 2011

Kathy L. Eisenmenger, J.D.
Labor Arbitrator

Exhibit 7

C-22889

REGULAR ARBITRATION PANEL

In the Matter of Arbitration between **UNITED STATES POSTAL SERVICE** and **NATIONAL ASSOCIATION OF LETTER CARRIERS, AFL-CIO**	**Grievant:** Class Action **Post Office:** Henderson, NV **USPS Case No:** E94N-4E-C99210007 **NALC Case No:** 10099C

BEFORE: Charles M. Rehmus, Arbitrator

APPEARANCES:

For the U.S. Postal Service: Joseph H. Huotari, Labor Relations Specialist
Doug Adelman, Manager, Labor Relations, Las Vegas District

For the Union: Joan Hurst, Regional Administrative Assistant

Place of Hearing: Henderson, NV

Date of Hearing: October 30 and November 15, 2001

Date of Award: December 17, 2001

Relevant Contract Provision: Articles 15, 19, 31, 41; LMOU

Contract Year: 1998-2001

Type of Grievance: Contract

AWARD: On remand of the grievance to Step 2, Management's refusal jointly to provide data to show that the change in starting time was in conformity with the M-39 was a violation of Article 15 and thereby Article 19 of the National Agreement. The remedy requested, payment of out-of-schedule premium pay for the half-hour involved to the affected Letter Carriers from the date of the change until it was rescinded, shall therefore be paid. The Postal Service shall also cease and desist from such violations of Articles 15 and 19.

Charles M. Rehmus

BACKGROUND

City Letter Carriers were informed by letter that on May 8, 1999, all routes would have their starting time changed from 0700 to 0730 (JX2, 23). The Union grieved this change, alleging it to be arbitrary and capricious and in violation of Articles 3, 8, 14, 19, and 41 of the National Agreement (JX2, 16-18). To the grievance it attached the result of a 3-day count the Union had recently conducted showing that there was considerably more than one hour of mail to be sorted each day at 7:00 a.m. at nearly every case (JX2, 21-22). Apparently the Union also attached a letter the Henderson Shop Steward had received from the Manager of Post Office Operations in Las Vegas. This letter listed approximate Letter Carrier productivity standards in Minutes Per Foot (MPF) of mail, and stated that residual case volume is worth 15-18 MPF (JX2, 19-20). As a remedy for the alleged violation the Union asked for a Cease and Desist Order and that Letter Carriers receive out-of-schedule pay for the time they were being asked to work out-of-schedule each day until the grievance was resolved (JX2, 16). The grievance was denied at Step 1 on the basis that Management has the right to set starting times (JX2, 17).

This grievance was advanced to Step 2 where the Union alleged the change in start times was simply a temporary, not permanent, change designed to be an attempt to "capture hours." In effect, this was alleged to be a kind of indirect work speed-up, relating to the greater number of street hours now necessarily having to be worked during the hottest part of the summer day.

The initial Step 2 Answer contended at some length that because the local MOU (JX4) allows an "advance in start times" greater than the one hour permitted in Article 41.1.A.5 of the National Agreement, the change Management had introduced was permitted by the LMOU. In addition,

Management contended that change in starting times had been necessitated by late trucks and other delays in receipt of mail from the Processing Center. Finally, the Step 2 Answer dismissed the letter the Union had received from the Las Vegas District officer, stating its author was not a part of the Henderson Post Office management (JX2, 12-13). The Union's Additions and Corrections to this Step 2 Answer was equally lengthy (JX2, 10-11). Essentially it responded that Henderson Management had not provided it with information it had requested, such as times of arrival of trucks from the Processing Center, or examples of any Carriers coming on duty without mail to case.

Thereafter the grievance was appealed to Step 3 (JX2, 9). At Step 3 the parties' representatives agreed to remand the grievance to the local parties to document mail arrival times for 30 days. The remand also attached Section 122.11 of the M-39 setting forth the factors to be used in establishing work schedules (JX2, 6-7).

This remand was received by Union and Management officials at the Henderson Post Office on or about October 4, 1999 (JX2, 5). The Union forwarded copies of it to Henderson managers together with a draft sheet on which it proposed to collect the 30 days of data it felt the remand required (JX2, 8). No data collection appears to have taken place, however, the reasons behind this failure to be described in greater detail below.

A month later, the Union initiated a re- appeal to Step 3, as was permitted in the remand if the dispute remained unsettled (JX2, 3-4). The grievance was then denied at Step 3 on the basis of the late delivery trucks set forth in the original Step 2 Answer, as well as the fact stated at Step 2 that the unilateral change in start times was permitted by the LMOU (JX2, 2). The grievance was then appealed by the Union to arbitration (JX2, 1).

The Union's witnesses were sworn, testified, and were cross-examined on the first day of

hearing. The unavailability of the former Henderson OIC that day necessitated a second day of hearing.

At this second hearing this Management witness was also sworn, testified, and was cross-examined. The parties then asked to file post-hearing briefs. The second of these briefs was received on December 5, 2001. Each party also attached prior awards to its brief, precedents it asked the arbitrator to consider. These briefs were exchanged on December 6, 2001, and thereafter the record was closed.

ISSUES

The parties agree upon one of the issues presented by this grievance, as follows:

> Did the Service violate the National Agreement when it changed regular starting times effective May 8, 1999, through December 4, 2000, from 7:00 a.m. to 7:30 a.m.? If so what is the appropriate remedy?

The reason for the December 4, 2000, closing date set forth above is that on that later date starting times for regular carriers at the Henderson Post Office were returned to 7:00 a.m., as they had been prior to the initiation of this grievance.

The parties are unable to agree that a second issue--one proposed by the Union to be involved here--is properly before the arbitrator. This second proposed issue, the consideration of which will be discussed in detail below, is as follows:

> Did the Service violate Article 15 of the National Agreement when it did not abide by the Step 3 remand instructions dated September 15, 1999? If so, what is the appropriate remedy?

POSITIONS OF THE PARTIES

Issue #1

With regard to the first issue, that of the changed starting time, the Union agrees such action is a Management right. Such action must not be taken, however, for arbitrary or capricious reasons. This is in accordance with Section 122.11.b of the M-39, which the Union notes was attached to and cited specifically in the Step 3 remand. On this subjecct the M-39 Handbook states:

> b. Fix schedules to coincide with receipt and dispatch of mail. At least 80 percent of the carrier's daily mail to be cased should be on or at their cases when they report for work.

The Union notes it challenged the change in starting times at the Henderson Post Office because it believed the change was an attempt to "speed up" the Carriers by moving more of their street time into the forthcoming high afternoon summer heat. This represented a safety and health hazard in violation of Article 14 of the National Agreement. The Union reinforces its "speed-up" argument by noting that Management never changed the standing 5:00 p.m.time for Carriers to return.

The Union notes further that Carriers bid duty assignments based partly on their start times. Under Article 41.1.C.4, "The successful bidder shall work the duty assignment as posted." In short, the Union argues Management cannot change duty assignments, as posted, absent unanticipated changed circumstances. Without a showing of operational need for change, the change here was a unilateral change in "wages, hours, or working conditions" that violates Article 5.

The Union argues further that it made a prima facie case that there was work available for all Carriers at 7:00 a.m. Hence it became Management's obligation to provide data to show such things as truck run profiles, late truck reports, or late leaving reports in order to show an operational basis for the change. Since Management failed to do so, and did not permit the Union to do it either

despite the instructions received in the remand, the remedy of out-of-schedule premium pay set forth in ELM 15.1, Section 434.511 (JX3), as requested in the original grievance, should be paid each Carrier ordered to work outside of his or her bid schedule.

Management's response to this argument is that Article 3 of the National Agreement sets forth its unfettered right to manage its operations and this includes making changes in the time employees start work. Hence in a grievance such as this the Union has the burden of showing that Management's action was arbitrary and capricious. Union representatives here failed to request that Management provide them with information that would prove or disprove their argument. Management was not obliged to produce information to support its actions, but rather the Union's responsibility to request it. The Union did not do so and hence the Union failed to shoulder its burden of proof of a contract violation.

Further, Management notes that when the grievance was filed the Henderson OIC wrote the Union in the Step 2 Answer that "... the change in starting time was made after several months of receiving either late trucks or extra trips of transportation with mail for delivery that day." This assertion further reinforces Management's contention that it then became the Union's obligation to request and obtain such documentation to refute the OIC's statement. Again, the Union not having met its burden of proof, this grievance should be denied.

Issue #2

The Union asserts that at the initial Step 3 meeting the parties' representatives agreed that the M-39 Handbook was controlling here. Further, they agreed that the record was insufficient to make an informed decision about whether the M-39 provisions had been met. The local Union had

presented its record of a 3-day observation while local Management had simply asserted that the change was prompted by operational concerns. Hence the Step 3 representatives remanded the grievance back to Step 2 for "further development of all facts and further consideration" at that level, as provided for in Article 15.2, Step 3:(b) of the National Agreement. The local parties were to do this jointly, the Union argues, to avoid further disputes about the validity of the data. But on remand the Union representatives were told that the OIC was not going to pay Union stewards to collect data that would comply with the remand. Both the OIC and the stewards agreed in their testimony about his statement to this effect.

The Union now argues this refusal was a conscious effort on local Management's part to ignore the instructions it received in the remand. Thereby it was able to continue to order Carriers to work out of their bid schedules. Ignoring the remand by the OIC was a violation of Article 15 of the National Agreement for which the appropriate remedy here is, once again, the out-of-schedule premium pay the Union originally had requested.

Management's position is that this issue is not properly before the arbitrator. It was not filed at Step 1 of the grievance procedure. Management asserts the Union cannot add issues to a grievance as it ascends through the grievance procedure. Hence Management contends this issue is inarbitrable.

Further, Management contends that the grievance is without merit. Management always documents "mail arrival times" that the remand called for. The Union insisted on jointly gathering such information which would have required the two Union stewards be paid for unproductive work beginning as early as 2:30 a.m. When asked, the Step 3 Management representative told the OIC that the remand was "not to result in additional costs." Finally, local Union representatives refused the OIC's suggestion that they "get together" to go over his data, and the Union never filed a grievance

over any failure to provide it with documentation regarding the schedule change. Hence this whole issue is both inarbitrable and unmeritorious.

DISCUSSION

Issue #1

The initial grievance raised here over whether the change in starting times from 7:00 a.m. to 7:30 a.m. violated the National Agreement essentially questions whether the change was introduced because of a change in times of receipt of mail and lack of mail at the cases at 7:00 a.m. If so, it would have been in accordance with Section 122.11b. of the M-39. If it was not for these reasons, however, then it may well have been introduced to "speed-up" street time, as the Union alleged. The Henderson OIC testified that the change reduced overtime by 5%, giving some credence to the speed-up charge. But less overtime could also have resulted from more efficiency in mail receipt and casing. Hence this reduction in overtime could have resulted from a contractually permitted action, from a non-contractual motive, or be unrelated to the change in start times.

At both the Step 2 Answer and the second Step 3 Denial Management defended its right to change the start time as one permitted under the Henderson LMOU. I do not find this persuasive. In a permissible amendment to Article 41.1.A.5 of the National Agreement, the Henderson LMOU states as follows (JX3):

> 1) One (1) advance in starting time of one and one-half (1-1 1/2) hours is permitted without posting per year.

The word "advance" can mean many things but most commonly it means "move forward." This is true with reference to time as well. When a superior states "I wish to advance the time of our noon

meeting one hour" most people would understand this statement to mean she intends to move the noon meeting to 11:00 a.m. Given this common if not universal understanding, I cannot conclude, absent any testimony or proof of its bargaining history, that the use of the word "advance" in the LMOU gave Management the unilateral right it argued for during the grievance procedure--to "delay" starting time from 7:00 a.m.to 7:30 a.m.

The Union accompanied its Step 2 appeal with the record of its 3-day count of mail it found available for sorting at each case at 7:00 a.m., together with a letter it had received from a Las Vegas District manager stating the amount of work time on average this mail amount represented (JX2, 19-22). This represents at least a prima facie showing that the change in start time was not operationally motivated. But to this Management simply responded that it decision was based on several months of late trucks or extra late trips (JX2, 13). Management made no offer to show its records, if any, proving this. In short, Management's Step 2 response to the Union's prima facie case remained unproven. The Union then appealed the grievance to Step 3.

This same lack of proof for Management's decision apparently led to the decision reached at Step 3 to remand the grievance to the parties to prove their cases. The Step 3 agreement on this point was, in crucial part, as follows (JX2, 6):

> The local parties are to document the mail arrival time for a 30-day period in accordance with the M-39 Section 122.11B (attached) and attempt to set the start times based on the documentation results and attempt resolution of this grievance. If this grievance is not resolved, re-appeal with the documentation obtained during the 30-day period.
>
> The Union has the right to re-appeal to Step 3 utilizing the same grievance number.

But upon receipt of this remand the local parties were unable to agree on doing anything jointly, even to exchanging any more documentation each may have had. According to the testimony

of the two Union stewards, they asked to be assigned to come in at 7:00 a.m. to do a footage mail count. To this request they were told by their supervisors that the OIC said "We're not doing it." On this point, the OIC testified he made that decision because Management's Step 3 representative told him, when he called his Step 3 representative later on the telephone, that the remand "didn't recommend any increase in costs." This statement is of course hearsay, as it is a third party's statement given to prove the truth of the matter asserted. Hearsay evidence is always subject to question because of its possible imprecision and lack of completeness. Here its accuracy is challenged by the Union's Step 3 representative.

The OIC also testified he wouldn't pay two stewards to come in at 2:30 a.m. to double-count truck arrivals. Contrasted with this testimony, both stewards and the local president testified they asked only to come in at 7:00 a.m., one-half hour early, to count station mail footages. It was also offered that only one of the two would have needed to have been on overtime.

The OIC testified he asked the local president to "come in to talk." He did not come in, but Management never showed or sent the president the mail arrival time records it is asserted Management had kept and had available all along.

In briefest summary, nothing was done to carry out the remand. The Union, having made a 3-day count of 7:00 a.m. mail in Carrier's cases, was allowed no further opportunity to obtain a 30-day count to prove whether the requirements of the M-39 were met. Management relied on its opinion or records but never showed or sent any of the latter to the Union. Despite the agreement to obtain documentation stated in the remand, the Union was never allowed to collect more documentation and Management never showed it had any at all. The Union then re-appealed the grievance to Step 3. There it was again denied on the same basis it had originally been denied at Step 2.

Issue #2

When the grievance was re-appealed the Union added non-compliance with Article 15 to its alleged violations (JX2, 3-4). Management now asserts this new alleged violation should have been the basis for a new Step 1 grievance and thus is not properly before me. I cannot agree.

The original grievance began at Step 1 and was properly processed through Steps 2 and 3. The remand to Step 2 was perfectly appropriate under Article 15.2, Step 3: (b). Thus the remand represented an agreement regarding the means of resolving the dispute, one that should have been carried out, just as any other proper superior order. Management neither allowed the Union to collect documentation nor gave it any Management may have had. When it was not provided, the Union had the right to re-appeal the grievance. The issue the Union now raised was an integral part of the original, even though it raised Article 15 for the first time. Any contrary ruling would leave the Union with two grievances instead of one, perhaps with no remedy for either. Moreover, whenever these or any parties happened to disagree over minor points during the grievance procedure, requiring a new Step 1 grievance would lead to a never-ending proliferation of grievances. The Union has the right here to say that the third-step agreement over its a grievance was not carried out without having to raise a new grievance. This is particularly evident here where the remand included the right to re-appeal under the original grievance number.

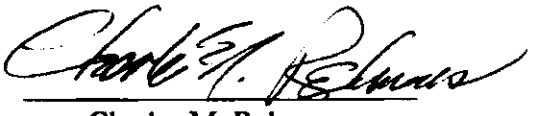
I have earlier in Case No. F90N-4F-D95046313 expressed my opinion that abiding by grievance settlements and agreements is an essential cornerstone of good labor-management relations. Most advocates and arbitrators agree. The Step 3 remand here represented an agreement on means whereby the grievance could or might be settled. Local Management was primarily if not exclusively responsible for repudiating these settlement instructions. The local parties were told "jointly" to

collect data. Management refused to allow the Union to do so and, although it now asserts it collected and possessed relevant data, it never shared this with the Union. Now it argues "the Union never asked for it." But I think the remand makes it clear that, if available, such documentation should have been presented voluntarily after the remand. Management's failure to do so casts reasonable doubt on whether there was data and what the data might have shown. Further, the failure to provide it suggests the speed-up motive the Union alleges may have validity.

The precedents cited by the parties confirm my conclusion. In those cases where Management's right to change starting times was upheld in the face of a grievance, such arbitral decision came after data collection by both parties (B94N-4B-C00013553); proven schedule changes in mail delivery (F94N-4F-C99110628); a total operations review (F94N-4F-C99044815); a demonstrated change in time of demand for mail-delivery (B90N-4B-C93031971); or Union participation in the decision (B94N-4B-C99219474). None of these factors was shown here. Contrary cases, where the decision to change starting times was found to be a violation, it was because it was a unilateral change in violation of the MOU (B94N-4B-C99219470); done without any reason given (F90N-4F-C94063623); or done unilaterally in violation of a prior agreement (G90N-4G-C94018397).

Un the case at hand Management made a unilateral change in starting time. When the Union grieved, Management asserted "operational necessity" but simply asserted it rather than providing documents or evidence to prove it. When the case was remanded fro Step 3 and the parties were instructed to prove their cases, Management refused to allow the Union to do so and still failed to provide the Union with any data to prove its contention. Its refusal to cooperate or provide records certainly violated Article 15, and its failure to do as instructed suggests it may have violated the M-39 and thereby Article 19.

There remains only the question of the remedy. The grievance requests that Regular Letter Carriers receive out-of-schedule pay, as provided for in Section 434.6 of ELM 15.1, for the half-hour of out-of-schedule work ordered, beginning with their temporary change in starting times on May 8, 1999, until they were returned to 7:00 a.m.on December 4, 2000. The Union continues to request that same remedy and asserts it is that required by Article 15.4.A.6. of the National Agreement. This remedy is no doubt considerably larger than the relatively picayune amount that would have been involved in bringing one or even two stewards in a half-hour early for 30 days, but it is the remedy called-for in the National Agreement when employees work outside of their regularly scheduled workday on a temporary basis. The Union presents a credible argument that the change here was a temporary one, designed to secure a non-contractual temporary benefit. When it was agreed at Step 3 that the parties should jointly collect and/or provide documentation to suport the operational need for the change, Management failed to cooperate or to provide any documentation it may have had. Hence the remedy the Union requests will be granted.



Charles M. Rehmus

Exhibit 8

28845

REGULAR ARBITRATION PANEL

In the Matter of Arbitration	)
	) Grievant: Class
between	)
	) Post Office: Los Altos, California
UNITED STATES POSTAL SERVICE	)
	) USPS No. F06N-4F-C 09403058
and	)
	) NALC DRT No. 01-148387
NATIONAL ASSOCIATION OF LETTER CARRIERS, AFL-CIO	)
	) Local Grievance H02-320-09C

Before: M. Zane Lumbley, Arbitrator

Appearances: For USPS: Andrew T. Smith

For NALC: Bryant Almario

Place of Hearing: San Francisco, CA

Date of Hearing: February 19, 2010

AWARD: I. It is the Award of the Arbitrator that Management violated the National Agreement when it changed carriers' regular starting times from 7:30 a.m. to 8:00 a.m. effective July 11, 2009.

II. It is therefore Ordered that the Employer pay affected regular letter carriers one-half hour out-of-schedule pay for each workday he/she was required to report at 8:00 a.m. rather than 7:30 a.m. between July 11, 2009, and November 14, 2009.

III. The Arbitrator hereby reserves jurisdiction for sixty (60) calendar days from the date of this Award for the limited purpose of assisting the parties as may be necessary in connection with the implementation of the remedy ordered above.

Date of Award: June 1, 2010

PANEL: Pacific Regular

AWARD SUMMARY

PROCEDURAL MATTERS

This matter was convened pursuant to the parties' 2006-2011 collective bargaining agreement (Joint Exhibit No. 1, hereinafter "National Agreement") at San Francisco, California, on February 19, 2010. Both parties were represented, presented documentary evidence and called witnesses who testified under oath administered by the Arbitrator. The parties submitted posthearing briefs which were received in the Arbitrator's Texas office on April 10, 2010, on which date the record was closed.

ISSUE

The parties were unable to agree on a statement of the issue to be resolved. The Union proposed the following issue:

1. Did Management violate the National Agreement when they changed regular starting times effective July 11, 2009, from 7:30 a.m. to 8:00 a.m.?

2. If so, what is the appropriate remedy?

Management, on the other hand, proposed the following issue:

1. Did Management violate M-39, Supervisor's Handbook, Section 122.22.b, when, on July 11, 2009, it changed the regular letter carriers' start time from 7:30 a.m. to 8:00 a.m.?

Having now had the opportunity to review the entire file, including the parties' arguments as to the issue, I find the following statement of the issue fairly characterizes the parties' dispute and will lead to its resolution:

1. Did Management violate the National Agreement when it changed carriers' regular starting times from 7:30 a.m. to 8:00 a.m. effective July 11, 2009?

2. If so, what is the appropriate remedy?

RELEVANT PROVISIONS OF THE NATIONAL AGREEMENT

The relevant provisions of the National Agreement are:

ARTICLE 3

MANAGEMENT RIGHTS

The Employer shall have the exclusive right, subject to the provisions of this Agreement and consistent with applicable laws and regulations:

A. To direct employees of the Employer in the performance of official duties;

. . .

C. To maintain the efficiency of the operations entrusted to it;

D. To determine the methods, means, and personnel by which such operations are to be conducted;

. . .

ARTICLE 41

LETTER CARRIER CRAFT

Section 1. Posting

A. In the Letter Carrier Craft, vacant craft duty assignments shall be posted as follows:

. . .

4. No assignment shall be posted because of a change in starting time or in non-scheduled days (except as provided in Section 1.a.5 below). No

> overtime payment will be made for a permanent change in starting time.
>
> . . .

FACTS

This dispute arose when then-Officer in Charge Gaskill changed the starting time for regular carriers at the Loyola Corners facility of the Los Altos, California, Post Office from 7:30 a.m. to 8:00 a.m. effective July 11, 2009.[1] The reasons asserted for the modification were changes in the delivery truck run times and Gaskill's inspection of the Mail Arrival Profile (hereinafter "MAP"). According to Gaskill, the change was intended to be permanent. However, when new Postmaster Mahal revisited the matter of starting times on November 14, 2009, he changed them back to 7:30 a.m.[2]

The Union grieved the change and the parties processed the grievance through the prescribed steps of the grievance procedure. When no agreement was reached, the grievance came on for hearing before the undersigned as noted above.[3]

DISCUSSION AND ANALYSIS

The Union contends initially that it established a *prima facie* case of the Employer's arbitrary and capricious decision in violation of the National Agreement since no carriers were standing around waiting for mail, 80% of the mail was at the

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1 The same change was implemented on the same date at the Los Altos Main facility.

2 All dates hereinafter are 2009 unless otherwise specified.

3 A similar grievance numbered H02-340-09C was filed with respect to the Los Altos Main facility change in starting time. On September 23 the parties agreed to "combine" the two grievances "into one representative grievance" and that "the representative grievance will be grievance number H02-320-09C," the instant grievance.

carriers' cases by 7:30 a.m. and all routes were at least eight hours in length. At that point, according to the Union, the burden of proof shifted to the Employer to demonstrate that it had legitimate operational reasons to make the change in starting time. In the Union's view, because the Employer did not make such a showing, it must be found to have violated the National Agreement and thus obligated to pay all affected letter carriers out-of-schedule pay from July 11 to November 14.

The Employer asserts it did not violate the National Agreement by changing the starting time from 7:30 a.m. to 8:00 a.m. Instead, it argues the National Agreement and the M-39 reserved to it the right to make the change. It also contends the Union failed in its duty to bargain in good faith requiring it to put the Service on notice at Formal Step A of how it believed the Employer had violated the Agreement, thereby calling into question the propriety of the appeal to Step B and ultimately to arbitration. As to the merits, the Employer argues not only that the Union failed to make out a *prima facie* case of a violation but that the Employer demonstrated that the change in question was both permanent and for operational reasons. Accordingly, the Employer asserts that no violation occurred, no remedy is called for and the grievance should be dismissed.

Decision of the Arbitrator

Having now had the opportunity to consider the entire record in this matter, including the parties' posthearing briefs and the citations contained therein, I have determined to agree with the Union that Management violated the National Agreement when it changed carriers' regular starting times from 7:30 a.m. to 8:00 a.m. effective

July 11, 2009. While I have studied all the evidence submitted and considered each argument raised by the parties, the following discussion will address only those considerations I found controlling or necessary to make my decision clear.

As regards the procedural arguments raised by the Employer, this case presented challenges for both sides stemming from the fact that Postmaster Mahal, the Service's Formal Step A representative, was newly assigned and uninformed as to specific circumstances existing on July 11. That fact, combined with intervening work and personal emergencies he was required to attend to, caused the Formal Step A meeting to be both twice delayed and unenlightening, ultimately resulting in an exchange of limited information when Mahal had no written response to the grievance to present to Hook. I lay this result principally at the feet of the Service since Mahal, in light of his newness and lack of July 11 perspective, was arguably a counterproductive choice for Formal Step A representative. As for the Union, its Formal Step A representative, Branch Executive Vice President Hook, admittedly refused to present her detailed written position statement to Mahal in view of the latter's lack of preparedness at the eventual October 28 Formal Step A meeting.

However, I am satisfied that Mahal understood the thrust of the grievance. Not only did he concede at hearing that he knew it was filed to contest the July 11 change in starting time, Hook's testimony that he showed her and Union President Gardea, who accompanied Hook to the October 28 meeting, a copy of a document, apparently an October MAP, in an effort to show them that 80% of the mail was not at carriers' cases by 7:30 a.m. is undisputed. He also testified that he "reviewed the mail volume and

transportation" to the facilities before writing his contentions for the B Team, thereby showing that he had an understanding as to how to defend against the grievance as of October. Thus, I cannot agree with the Employer that the Union failed in its obligations at the Formal Step A meeting to the point of undercutting either the Step B meeting, where more information was shared by the parties, or this proceeding.

While the JCAM, at Section 15.2, Formal Step A (d), places an obligation on the Union to "make a full and detailed statement" of facts, contractual provisions relied on and remedy sought at Formal Step A, nothing requires the Union to do so when the Employer representative is unprepared to satisfy the Employer's similar burden. In the present case, whereas Hook was prepared to serve Mahal with her presentation in writing on October 28, Mahal stated that he had not had time to put together such a presentation and thought they would do it together. At that point, Hook agreed to one last extension to 4:00 p.m. that day so that Mahal could comply. When he later advised her he could not do so and stated he would send his presentation directly to the B Team, Hook did the same as she had told him she would do. Thus I believe any failure on the part of the Union to fully apprise the Employer of its facts, contractual provisions relied on and remedy sought at Formal Step A was caused by the Employer.[4]

In response to the parties' contentions regarding the matter of burdens, I also do not agree with the Employer. Thus I believe the Union presented sufficient information at hearing to make out a *prima facie* showing of a violation, thereby causing a shift in the burden of proceeding to the Service. This is true since the contemporaneous MAP

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[4] I also believe any shortcomings in the Union's approach were cured at Step B as permitted by JCAM Section 15.2, Formal Step A (g).

appearing at Joint Exhibit No. 2, page 22, while not proving Hook's contention that "80 percent of the carriers' daily mail to be cased" was "on or at their cases when they report for work" at 7:30 a.m., a matter that management may consider when considering changing the schedule, according to Section 122.11(b) of the M-39, clearly was evidence in support of that assertion since it showed that most mail had arrived at the facility on trucks by the old 7:30 a.m. starting time.[5] Thus it was unnecessary to rely on the hearsay evidence provided by Hook to the effect that carriers were working eight hours or more and were not standing around waiting for mail, which had led her to believe that inefficiencies did not exist before the change. However, I wish to note that this is a case in which the Union could make a strong argument that I should do so notwithstanding the hearsay nature of the evidence since, although Mahal testified (and the parties stipulated that Gaskill, if asked, would have testified) contrary to Hook that they did not receive requests for information from her, the Step B management representative conceded that requests for "the work load report for 8/28/09 and the overtime alert reports for each week since 7/11/09" were made but the reports were never furnished to the Union.[6]

As the Employer noted on brief, Arbitrator Snow opined In *Case No. F94N-4F-C 96019290*, "The burden of proof is on the party who asserts the affirmative of an issue." However, Arbitrator Snow went on in that decision to state:

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[5] I disagree with the Union that the MAP constituted new evidence offered for the first time at hearing since it was raised by Gaskill in his August 7 interview as a reason for the change and it was thereafter referenced on page 2 of the November 27 Step B Decision.

[6] Joint Exhibit No. 2, page 6. Although not made to either Gaskill or Mahal or by Hook, such a request was indeed made in writing to Supervisor Theresa Chan on August 28 by Branch 1427 Steward Charles Chan and appears on page 40 of Joint Exhibit No. 2.

> . . . if a party were required to prove as its initial claim that the other party did not have legitimate reasons of efficiency for making a decision, it would be faced with proving a negative assertion. In such a circumstance, the burden of going forward with the evidence could be shifted by slight proof because essential evidence to proving the negative would lie within the primary control of the other party.[7]

Here I believe that requirement for "slight proof" was satisfied. Therefore, the obligation shifted to the Service to show that the change at issue was made in line with its rights reserved in Article 3 of the National Agreement and was thus proper.

Turning next to the Employer's evidence, I agree with the Union that the requisite showing to overcome the Union's *prima facie* case was not made by the Employer. While Gaskill asserted in his August 7 investigatory interview that the starting time was changed "for operational needs," that he consulted the MAP, that the previously separate trucks bringing mail to the Los Altos Main and Loyola Corners facilities had been combined and that the 7:55 a.m. last run contained "about 20% of the automatic letters and 100% of DOS," he added little at hearing.[8] Moreover, he testified that the MAP does not demonstrate how much mail was at the cases but merely amounted to a "projection" of the mail that would be on the 5:50 a.m. truck. As a result, nothing probative of the question whether inefficiencies existed which required changing the starting time from 7:30 a.m. to 8:00 a.m. was provided by the Employer.[9] As Arbitrator Snow also said in the aforementioned decision, "A party to whom the burden of going forward with the evidence has shifted cannot overcome its burden merely by asserting

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7 Pagination not supplied.

8 See, answers given by Gaskill during his interview in Joint Exhibit No. 2, pages 24-25.

9 As I advised at hearing, the *ex post facto* evidence submitted by the Employer in the form of "clips" from the MAQ/PAQ made part of Mahal's October 29 contentions to the B Team are not entitled to weight.

that the other party has failed to carry its burden of proof."[10] Thus I have no option but to find that the Union has prevailed in the grievance.

Remedy

The Union requests that each affected carrier be paid out-of-schedule time for the time he/she was required to work out of his/her regular schedule during the period July 11 to November 14. This strikes me as an appropriate remedy for the violation found. See the decision in *Case No. E94N-4E-C 99210007/NALC Local Grievance No. 10099C* (Rehmus, December 17, 2001), contained in Joint Exhibit No. 2 at pages 27-39, wherein the arbitrator relied for authority on Section 434.6 of ELM 15.1. I recognize the Employer argues that Article 41.1.A.4 of the National Agreement provides, "No overtime payment will be made for a permanent change in starting time." However, while I recall that Gaskill stated in his August 7 interview that he intended the schedule change to be a permanent one, it is not overtime pay but out-of-schedule premium pay the Union has requested.

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[10] *Id.*, pagination not provided.

AWARD

I. It is the Award of the Arbitrator that Management violated the National Agreement when it changed carriers' regular starting times from 7:30 a.m. to 8:00 a.m. effective July 11, 2009.

II. It is therefore Ordered that the Employer pay affected regular letter carriers one-half hour out-of-schedule pay for each workday he/she was required to report at 8:00 a.m. rather than 7:30 a.m. between July 11, 2009, and November 14, 2009.

III. The Arbitrator hereby reserves jurisdiction for sixty (60) calendar days from the date of this Award for the limited purpose of assisting the parties as may be necessary in connection with the implementation of the remedy ordered above.

M. Zane Lumbley, Arbitrator

June 1, 2010
Date

Exhibit 9

C-21452

REGULAR ARBITRATION PANEL

In the Matter of Arbitration	)	
	)	
between	)	
	)	Grievant: George Rankin
UNITED STATES POSTAL SERVICE	)	
	)	Case No.: F94N-4F-C 96019290 95
and	)	
	)	
NATIONAL ASSOCIATION OF LETTER CARRIERS	)	

BEFORE: Carlton J. Snow, Professor of Law

APPEARANCES: For the Employer: Mr. Dave Beauvais

For the Union: Mr. Phil Russ

PLACE OF HEARING: Palos Verdes Peninsula, California

DATES OF HEARINGS: August 15, 2000
August 21, 2000

AWARD

Having carefully considered all evidence submitted by the parties concerning this matter, the arbitrator concludes that the Employer violated the parties' collective bargaining agreement by adjusting and abolishing the grievant's assignment to Intercity 1 without following mandated contractual procedures. Since no remedy was explored at the arbitration hearing, the parties shall have 90 days from the date of this report to attempt to fashion an appropriate remedy. Either party may activate the arbitrator's jurisdiction during this time to determine a remedy if negotiations prove to be unproductive. It is so ordered and awarded.

Respectfully submitted,

Carlton J. Snow
Professor of Law

Date: 11-27-00

REGULAR ARBITRATION PANEL

IN THE MATTER OF ARBITRATION BETWEEN UNITED STATES POSTAL SERVICE AND NATIONAL ASSOCIATION OF LETTER CARRIERS (Geoge Rankin Grievance) (Case No. F94N-4F-C 96019290 95)	ANALYSIS AND AWARD Carlton J. Snow Arbitrator

I. INTRODUCTION

This matter came for hearing pursuant to the 1994-1998 collective bargaining agreement between the parties. Due to a miscommunication between the parties, the hearing occurred in two segments. The first part of the hearing took place by telephone conference call on August 15, 2000. The remainder of the hearing occurred on August 21, 2000 in a conference room of the Postal Facility located at 944 Deep Valley Drive in Palos Verdes Peninsula, California. Mr. David Beauvais, Labor Relations Specialist, represented the United States Postal Service.

Mr. Phil Russ, Executive Vice-president, represented the National Association of Letter Carriers.

The hearing proceeded in an orderly manner. There was a full opportunity for the parties to submit evidence, to examine and cross-examine witnesses, and to argue the matter. All witnesses testified under oath as administered by the arbitrator. The arbitrator tape-recorded the proceeding as an extension of his personal notes. The advocates fully and fairly represented their respective parties.

There were no challenges to the substantive or procedural arbitrability of the dispute, and the parties stipulated that the matter properly had been submitted to arbitration. They authorized the arbitrator to retain jurisdiction in the matter for 90 days after issuing an award. The parties elected to submit the matter on the basis of evidence presented at the hearing as well as oral closing arguments after which the arbitrator officially closed the hearing. An injury to the arbitrator's hand followed by his secretary's eye surgery delayed preparation of a report.

II. STATEMENT OF THE ISSUE

The issue before the arbitrator is as follows:

Did the Employer violate Articles 5, 7, 13, 19, or 41 of the National Agreement when it performed a minor adjustment and subsequently abolished the Intercity 1 assignment? If so, what is the appropriate remedy?

III. RELEVANT CONTRACTUAL PROVISIONS

ARTICLE 3 - MANAGEMENT RIGHTS

The Employer shall have the exclusive right, subject to the provisions of this Agreement and consistent with applicable laws and regulations:

A. To direct employees of the Employer in the performance of official duties;

C. To maintain the efficiency of the operations entrusted to it.

D. To determine the methods, means, and personnel by which such operations are to be conducted.

ARTICLE 5 - PROHIBITION OF UNILATERAL ACTION

The Employer will not take any actions affecting wages, hours and other terms and conditions of employment as defined in Section 8(d) of the National Labor Relations Act which violate the terms of this Agreement or are otherwise inconsistent with its obligations under law.

ARTICLE 19 - HANDBOOKS AND MANUALS

Those parts of all handbooks, manuals and published regulations of the Postal Service that directly relate to wages, hours or working conditions, as they apply to employees covered by this Agreement, shall contain nothing that conflicts with this Agreement, and shall be continued in effect except that the Employer shall have the right to make changes that are not inconsistent with this Agreement and that are fair, reasonable, and equitable. This includes, but is not limited to, the Postal Service Manual and the F-21, Timekeeper's Instructions.

IV. STATEMENT OF FACTS

In this case, the Union challenged the Employer's decision to alter and abolish the Intercity 1 assignment held by the grievant. The grievant served as a City Letter Carrier and Chief Shop Steward at the Palos Verdes Post Office. Since 1989, the grievant's full-time assignment was Intercity 1, and it was comprised of a combination of duties, including collections, express mail, and special mail. On September 13, 1995, management made a minor adjustment to Intercity 1 by instructing the grievant to report to Unit C for router duties, effective September 14, 1995. The route was also altered by eliminating the Redondo Beach and San Pedro runs, effective September 16, 1995.

During the week of September 25-29, 1995, an office-wide inspection took place. The inspection of the grievant's route included the Palos Verdes branch run as well as the Redondo run (except on September 26), but the inspection did not include the San Pedro run. On November 3, 1995, a notice to all employees announced the elimination of Intercity 1. The elimination became effective on January 1, 1996.

The Union filed separate grievances with regard to the minor adjustment of Intercity 1 (Grievance No. 95PVC 139) and the abolishment of Intercity 1 (Grievance No. 95PVC 187). After denials at Steps 1 and 2, the matter proceeded to Step 3. During Step 3 on January 16, 1996, the parties agreed to consolidate the two grievances; and subsequently the Employer denied the combined grievance. On February 2, 1996, the Union filed a complaint with the National Labor Relations Board alleging that the Employer violated Sections 8(a)(1) and 8(a)(3) of the National Labor Relations Act by disciplining the grievant for engaging in union activities and not bargaining with the Union. On February 9, 1996, the Union submitted a request for arbitration of the consolidated grievance. On March 20, 1996, the National Labor Relations Board referred the unfair labor practice complaint to arbitration pursuant to *Collyer Insulated Wire*. (*See* 192 NLRB 837 (1971).)

V. POSITION OF THE PARTIES

A. The Union

The Union maintains that the Employer improperly adjusted and abolished Intercity 1. According to the Union, the Employer used invalid data to evaluate the routes in violation of M-39 guidelines. Since the grievant started the route in 1989, there allegedly were no route inspections until September 25, 1995. The Employer's estimate of 119 minutes for the San Pedro run, Redondo Beach, and Palos Verdes branch runs allegedly failed to isolate the number of minutes dedicated to the various runs from other combined duties performed on the way to the selected offices. Moreover, the Union argues that any commitment to Delivery Point Sequencing had or would have no effect on the grievant's route because the grievant did not sort mail.

The Union contends that, during the inspection of September 25-29, 1995, several inaccuracies occurred. The Employer allegedly failed to consider the hours of overflow that the grievant turned over to light and limited duty employees in order to assist him in completing his route. Because the Redondo run was not performed on September 26 and the Redondo carrier took express deliveries before the grievant arrived on September 25, the inspection average for that run and express deliveries

was inaccurate, according to the Union. Despite the numerous alleged inaccuracies, the Union argues that inspection data, nevertheless, showed that the grievant's route averaged 8.22 hours a day. Based on that fact and adding the runs which failed to be included in the inspection because of the minor adjustment, the Union contends that the original Intercity 1 route averaged 9.22 hours a day. The Union maintains that the Employer never consulted the grievant about the adjustment, or the abolishment, or the data collected on his route. The failure to do so allegedly violated M-39 guidelines as well as Article 5 of the parties' collective bargaining agreement.

The Union also contends that the Employer's concerns with efficiency were misplaced. While recognizing that the San Pedro run was no longer needed, the Union argues that the Employer failed to consider the fact that it was performed in conjunction with the Branch run as well as in connection with making express deliveries. Second, the Union contends that the Redondo run was also performed in conjunction with making express deliveries. The Union maintains that, during the ten years the grievant performed the Redondo run, there were no more than two occasions when he waited for mail or had no express mail to pick up. The grievant allegedly resolved even this difficulty by calling ahead to make

certain that Redondo had mail for him. Third, the Employer stipulated that transporting Branch Office mail was assigned to a clerk for the sole purpose of transporting the mail to the Branch. The Union argues that this run also had been performed in conjunction with express mail deliveries.

The Union contends that the Employer violated the parties' National Agreement by transferring runs to limited and light duty employees. The Employer stipulated that the delivery of express and special delivery mail had been assigned to limited and light duty employees. They were Employees Bartleson and Wong. Additionally, a limited duty carrier in Redondo helped perform such services. It was also stipulated that the Branch run had been assigned to a clerk.

Finally, the Union maintains that the adjustment and abolishment of Intercity 1 constituted retribution. It allegedly was retribution imposed by management on the grievant for engaging in union activities and, in the opinion of the Union, violated the National Labor Relations Act. According to the Union, there was no reason for the abolishment because all work on Intercity 1 was still being performed. The adjustment and abolishment allegedly were achieved without due process, as required by the parties' National Agreement. Other carriers allegedly had less than eight hours of work, while the grievant still had eight hours of

work. Since the relevant Postmaster took her position, the Union contends that grievances had doubled and that, as Chief Steward, the grievant obtained a number of significant awards against the Postmaster who was in office at the time of the grievance.

B. The Employer

The Employer maintains that management properly adjusted and abolished Intercity 1. According to the Employer, the actions of management were consistent with Article 3 which authorizes the Employer to maintain efficiency and to determine appropriate methods of operation. The Employer argues vigorously that the challenged operational changes generated efficiencies and were devoid of any other motivations. As the Employer sees it, a Zip Code change in San Pedro caused the San Pedro office to move to Palos Verdes. Because San Pedro carriers were working out of Palos Verdes, there was no need for the grievant to take mail to San Pedro. Second, the Redondo Beach run occasionally had no express mail for the grievant or, alternatively, required that he wait for the express mail to arrive. Elimination of the run insured that there was no waiting, no

needless trips, and no wasted time calling Redondo Beach to inquire if the grievant needed to make the run. Third, the Palos Verdes Branch Office eliminated a full-time clerk, which made it necessary for a Main office clerk to box and sort the mail. The clerk also delivered the mail between the offices to prevent duplicative runs by the grievant and the clerk. Fourth, the abolishment of Intercity 1 eliminated unproductive time spent on rest breaks, comfort stops, vehicle maintenance, and special instructions, in the opinion of the Employer.

The Employer contends that it complied with the parties' agreement when abolishing Intercity 1. According to the Employer, the route was an eight-hour shift; and after the minor adjustment, it was reduced by 119 minutes. The institution of delivery point sequencing in 1996 allegedly eliminated carrier office duties and further reduced minutes from the route. The Employer maintains that there was no reason to consult the grievant due to the fact that the decision to abolish the route was made prior to the inspection, and the grievant allegedly had knowledge of that decision. As the changes just described reduced the route to under eight hours, the Employer contends that it had authority to terminate the assignment pursuant to the M-39 Handbook.

It is also the position of the Employer that it had authority to reassign any remaining duties of Intercity 1 to light and limited duty employees because doing so involved no detriment to the grievant. The Employer contends that the grievant continued to work a full shift and later successfully bid on another route. Hence, the Employer maintains that reassigning the duties to limited and light duty employees did not constitute a contractual violation.

Finally, the Employer categorically rejects the assertion that changes in Intercity 1 were a result of the grievant's union activities. According to the Employer, the route abolishment was due to managerial concerns with efficiency as well as with making legitimate operational changes. According to the Employer, there was no hint of anti-union animus in the changes that affected the grievance. Hence, the Employer concludes that no contractual violation occurred and that the grievance must be dismissed.

VI. ANALYSIS

A. Burden of Proof

A common sense approach to allocating the burden of proof and the burden of going forward is helpful in resolving this dispute. A party who is allocated the burden of proof must prove a fact or facts in dispute. As one court observed, the burden of proof can be described as "the duty resting upon one party or the other . . . to establish by a preponderance of the evidence a proposition essential to the maintenance of the action." (*See Kohlsaat v. Tarkersburg & Marietta Sand Co.*, 226 F. 283, 284 (4th Cir. 1920).) The burden of proof must be contrasted with the burden of going forward. The burden of going forward with the evidence may shift from party to party during an arbitration proceeding.

The burden of proof is on the party who asserts the affirmative of an issue, and it remains with that party. But the burden of going forward with the evidence is always on the party against whom a decision would be made if no further evidence were submitted to the arbitrator. A party to whom the burden of going forward with the evidence has shifted cannot overcome its burden merely by asserting that the other party has failed to carry its burden of proof. These evidentiary concepts involve far more than mere legal jargon and provide a helpful analytical framework for sorting out

disputed facts and making objective decisions. In other words, there is a shifting burden of persuasion that must be borne by each party in order to support or justify its claim without regard to who might be said to bear the burden of proof.

Once a party with the burden of proof has done more than merely assert a claim but has gone forward and submitted evidence to establish the validity of a claim, the risk of nonpersuasion shifts to the other party. In some cases, even if a party must prove the universal negative, the obligation to do more than merely assert a claim and to support such a claim with actual evidence remains with the party asserting a violation of its rights. This is not a discipline or discharge case, and the initial responsibility remained with the Union. The "universal negative" argument, however, helps determine the location of the burden of going forwrd with the evidence. What many decision-makers have concluded is that, if a party initially is faced with proving a universal negative, it will require only slight proof to shift the burden of going forward with the evidence to the other party. (*See, e.g., Giblin v. Dudley Hardware Co.*, 117 Alt. 418 (1922); *Joost v. Craig*, 131 Cal. 540, 63 Pac. 840 (1901).) For example, if a party were required to prove as its initial claim that the other party did not have legitimate reasons of efficiency for making a decision, it would be faced

with proving a negative assertion. In such a circumstance, the burden of going forward with the evidence could be shifted by slight proof because essential evidence to proving the negative would lie within the primary control of the other party.

B. The Right to Make Assignments

Article 3 of the National Agreement is clear about the fact that management possesses an exclusive right to "maintain the efficiency of the operations entrusted to it." (*See* Joint Exhibit No. 1, p. 5.) It is for management to direct and assign employees, to maintain efficiency, and to determine the methods and personnel by which operations are to be conducted. Such rights, however, are subject to any restrictions in the rest of the parties' agreement. Article 19 incorporates by reference the M-39 Handbook as part of the parties' negotiated agreement. Section 141.113 of the M-39 Handbook requires that management follow definite adjustment procedures.

Procedures set forth in the M-39 Handbook for a minor adjustment emphasize the need for "reasonably current" count and inspection data for the route with the specific carrier. Sections 141.19 and 251 of the M-39 Handbook specify that Forms 1840 and 3999 are to be

used in calculating hours. Consultation with the carrier is required pursuant to Sections 141, 243, 252, and 254. Moreover, notice to the Union is required in Section 141. Additionally, Article 5 of the parties' negotiated agreement imposes notice and conference obligations on the Employer.

The arbitrator received unrebutted testimony that Intercity 1 had not been inspected by the Employer since 1989. Moreover, the carrier was not consulted regarding his hours or the adjustments made to his route prior to September 14, 1995. Such evidence was supported by the inspection data from 1995. It contained no reference to carrier comments. (*See* Joint Exhibit No. 3, pp. 6-14.) Notice to the Union came in the form of a memorandum given to Shop Steward Joe Shay on September 13, 1995, the day before the adjustment became effective. (*See* Joint Exhibit No. 3, p. 49.) The evidence went unrebutted.

The arbitrator received no other documentation of earlier inspections except a time sheet used on September 13, 1995 to time the three runs eliminated from Intercity 1. (*See* Joint Exhibit No. 3, p. 4.) This particular document is not a form referred to in M-39 Handbook procedures. Evidence submitted to the arbitrator failed to support a conclusion that the Employer fully implemented or enforced M-39 adjustment procedures as outlined in its handbook. While the Employer

retained a contractual right to make minor adjustments, the right is subject to procedures referenced in or incorporated by the parties' negotiated agreement. The fact that the M-39 procedures were not followed in this case constituted a violation of the parties' National Agreement.

C. The Right to Abolish an Assignment

Like the right to make adjustments, abolition of an assignment remains within the retained rights of management, subject to the parties' negotiated agreement. Section 243.22 of the M-39 Handbook provides for eliminating routes that require less than eight hours in duration. In the absence of other references to abolishing assignments in the parties' National Agreement, a useful source of guidance is to be found in arbitration decisions on the subject. The parties submitted a profusion of material with respect to the Employer's right to abolish assignments. Most of the Employer's data arose in disputes with another collective bargaining unit. (*See* Employer's Exhibit Nos. 2, 3, 4, 5, 7, and 8.) Some of the decisions arose under earlier collective bargaining agreements between the parties. At least one of the decisions did not implicate the propriety of procedures used under the M-39 Handbook, as is the case in this dispute. (*See* Employer's Exhibit No. 10.) Another of the decisions was different from the fact

pattern in this dispute in that it involved inspections prior to the abolishment that showed the existence of routes requiring less than eight hours to perform the work. (*See* Employer's Exhibit No. 11.) Instructive guidelines found in one of the decisions merit repetition. Arbitrator Gentile stated in March, 2000:

> Applying the standards of review to test an abolishment found in the arbitral authority, these are the inquiries:
>
> > Do the facts establish management's decision was either arbitrary (without a factual foundation); capricious (without a full consideration of efficiency, reasonable business considerations and not the result of impulsive decision-making); unreasonable (without a fair, realistic and practical balance of the attendant concerns); or discriminatory (affected employees were treated without a reasonable and rational justification for how the abolishment took place).
> > (*See* Employer's Exhibit No. 11, p. 11.)

Evidence submitted to the arbitrator established that the Employer's decision in this case was not consistent with relevant guidelines. When asked if the grievant was working an eight hour day "right after the minor adjustment," Postmaster Joan Durazo testified:

> I would assume he was.
> He is an eight hour regular employee.

Inspection data for September 25, 1995 indicated that the grievant's routes required an average of 8.22 hours a day. (*See* Joint Exhibit No. 3, pp. 6-14.) That evidence stood unrebutted. Additionally, contentions that the

inspection process failed to include auxiliary assistance hours and also that not all runs were performed on certain days remained unrebutted. The arbitrator received sufficient evidence from the Union with regard to these matters to shift the burden of going forward with the evidence to the Employer, and management did not do so. Legitimate questions were also raised about the inspection reports because the inspection runs included a mixture of the original routes and the adjusted routes. It is reasonable to conclude that the Employer did not know the actual duration of Intercity 1 before or after the adjustment. The inability of the Employer accurately to classify Intercity 1 as either above or below eight hours supported a conclusion that M-39 procedures had been violated.

The Employer failed to follow M-39 procedures in this case. This left management with an uncertain evaluation of the routes. Such facts support a conclusion that management acted unreasonably in making a decision to abolish the route without a fair balancing of all relevant concerns as is required by the M-39 procedures. In the absence of relevant data, the Employer could not have fully considered the efficiency of its decision. It is reasonable to conclude that making a decision under such circumstances was arbitrary and capricious.

D. The Unfair Labor Practice Complaint

The Union filed a complaint with the National Labor Relations Board alleging that abolishing Intercity 1 constituted disciplinary action against the grievant due to his union activities and that such discipline violated Sections 8(a)(1) and 8(a)(3) of the National Labor Relations Act. Pursuant to *Collyer Insulated Wire*, the National Labor Relations Board deferred the matter to arbitration on March 20, 1996. NLRB deferral policy requires (1) that an arbitration proceeding be fair and regular; (2) that the Unfair Labor Practice issue which gave rise to the charge be considered and decided by the arbitrator; and (3) that any arbitration award be consonant with purposes and policies of relevant labor legislation. (*See Spielberg Manufacturing Company*, 112 N.L.R.B. 1080 (1955); and *Olin Corporation*, 268 N.L.R.B. 573 (1984).)

The parties submitted evidence in arbitration relevant to resolving the unfair labor practice dispute. By making a change in the grievant's assignment, management modified a condition of his employment. The Union received notice of the minor adjustment the day before the adjustment became effective. (*See* Joint Exhibit No. 3, p. 49.) A memorandum on an office bulletin board directed to all employees on November 3, 1995 gave notice of the abolition of Intercity 1. (*See* Joint

Exhibit No. 2, p. 11.) The abolishment became effective on January 1, 1996, 59 days after the posting. Section 8(b) of the National Labor Relations Act imposes a duty on the parties to bargain collectively and requires that they confer in good faith. Modification of a term or condition requires 60 days of notice, and the Union did not receive reasonable notice in this case.

The Employer also failed to bargain with the Union about the unilateral change in working conditions. No evidence submitted to the arbitrator established that the Employer conferred, consulted, or otherwise discussed with the Union the substantial change in the grievant's working conditions. The failure to bargain was inconsistent with requirements of the National Labor Relations Act. Such conduct was inappropriate in view of the parties' contractual and statutory obligations.

AWARD

Having carefully considered all evidence submitted by the parties concerning this matter, the arbitrator concludes that the Employer violated the parties' collective bargaining agreement by adjusting and abolishing the grievant's assignment to Intercity 1 without following mandated contractual procedures. Since no remedy was explored at the arbitration hearing, the parties shall have 90 days from the date of this report to attempt to fashion an appropriate remedy. Either party may activate the arbitrator's jurisdiction during this time to determine a remedy if negotiations prove to be unproductive. It is so ordered and awarded.

Respectfully submitted,

Carlton J. Snow
Professor of Law

Date: 11-21-00

Exhibit 10 C-23986

REGULAR ARBITRATION PANEL

In the Matter of Arbitration	)	
	)	
between	)	Grievance: Class Action
	)	
UNITED STATES POSTAL SERVICE	)	Post Office: Rialto, California
	)	
	)	Case No.: F98N-4F-C 02062648
and	)	3982102C
	)	
NATIONAL ASSOCIATION OF LETTER CARRIERS	)	

BEFORE: Carlton J. Snow, Professor of Law

APPEARANCES: For the Postal Service: Mr. Timothy Arntz

For the Union: Mr. Manuel L. Peralta

PLACE OF HEARING: Rialto, California

DATE OF HEARING: November 15, 2002

AWARD

Having carefully considered all evidence submitted by the parties concerning this matter, the arbitrator concludes the Employer violated the parties' National Agreement when it changed the employees' Start Time in this case. The Employer shall reinstate the original Start Time of 8:15 A.M., unless management can prove compliance with factors in Section 122.11 of the M-39 Handbook. The arbitrator shall retain jurisdiction in this matter for 90 days from the date of the report in order to resolve any problems resulting from the remedy in the award. It is so ordered and awarded.

Respectfully submitted,

Carlton J. Snow
Professor of Law

Date January 22, 2003

IN THE MATTER OF ARBITRATION BETWEEN UNITED STATES POSTAL SERVICE AND NATIONAL ASSOCIATION OF LETTER CARRIERS (Class Action Grievance) (Case No.: F98N-4F-C 02062648 3982102C	)	ANALYSIS AND AWARD Carlton J. Snow Arbitrator

I. INTRODUCTION

This matter came for hearing pursuant to a collective bargaining agreement between the parties effective from 1998-2001. A hearing occurred on November 15, 2002 in a conference room of the postal facility located at 241 West Rialto Avenue in Rialto, California. Mr. Timothy Arntz, Labor Relations Specialist, represented the United States Postal Service. Mr. Manuel L. Peralto, Regional Administrative Assistant, represented the National Association of Letter Carriers.

The hearing proceeded in an orderly manner. There was a full opportunity for the parties to submit evidence, to examine and cross-examine witnesses, and to argue the matter. All witnesses testified under oath as administered by the arbitrator. The arbitrator tape-recorded the proceeding as an extension of his personal notes. The advocates fully and fairly represented their respective parties.

There were no challenges to the substantive or procedural arbitrability of the dispute, and the parties stipulated that the matter properly had been submitted to arbitration. The parties authorized the arbitrator to retain jurisdiction in the matter for 90 days after issuance of a decision, and they submitted the matter on the basis of evidence presented at the hearing as well as oral closing arguments, and the arbitrator officially closed the hearing on November 15, 2002. An ear infection slowed production of a report.

II. STATEMENT OF THE ISSUE

The issue before the arbitrator is as follows:

Did the Employer violate the parties' National Agreement and/or Local Agreement when it changed the start time from 8:15 A.M. to 8:40 A.M. and, then, to 8:30 A.M.? If so, what is the appropriate remedy?

III. RELEVANT CONTRACTUAL PROVISIONS

ARTICLE 3 - MANAGEMENT RIGHTS

The Employer shall have the exclusive right, subject to the provisions of this Agreement and consistent with applicable laws and regulations:

A. To direct employees of the Employer in the performance of official duties;

C. To maintain the efficiency of the operations entrusted to it;

D. To determine the methods, means, and personnel by which such operations are to be conducted;

F. To take whatever actions may be necessary to carry out its mission in emergency situations, i.e., an unforeseen circumstance or a combination of circumstances which calls for immediate action in a situation which is not expected to be of a recurring nature.

ARTICLE 19 - HANDBOOKS AND MANUALS

Those parts of all handbooks, manuals and published regulations of the Postal Service, that directly relate to wages, hours or working conditions, as they apply to employees covered by this Agreement, shall contain nothing that conflicts with this Agreement, and shall be continued in effect except that the Employer shall have the right to make changes that are not inconsistent with this Agreement and that are fair, reasonable, and equitable.

IV. STATEMENT OF FACTS

In this case, the Union challenged the decision of the Employer to change the Start Time of employees. On December 29, 2001, the Employer changed the Start Time of Letter Carriers from 8:15 to 8:40 A.M. Management explained to employees that the time change needed to be made in an effort to increase productivity. In a memorandum to Letter Carriers, the Employer stated that the "case feet per hour" was then 2.9 but that it should be 3.60 feet per hour. (*See* Joint Exhibit No. 2, p. 17.) The "case feet per hour" is the total caseable mail divided by the minutes used to case the mail. The Employer also cited other productivity goals of reducing sick leave and overtime as a justification for the operational change of the Start Time.

The Union challenged the decision of the Employer to make the time change and cited Section 122.11(b) of the M-39 Handbook. Section 122.11(b) requires the Employer to set work schedules to coincide with the receipt and dispatch of mail. The M-39 Handbook states that:

> At least 80% of the carriers' daily mail to be cased should be on or at their cases when they report to work.

On January 12, 2002, the Union requested time card "rings" from December 1, 2001 through January 12, 2002 for all clerks and casual workers at the Annex and "data showing daily mail volume distributed to routes prior to 'begin tour' from January 1, 2001 to December 31, 2001." (*See* Joint Exhibit No. 2, p. 11.) Management believed that the Information Request was unreasonable and informed the Union that "if we furnish you with this we are going to charge the union for the time it takes us." (*See* Joint Exhibit No. 2, p. 11.) Approximately 90 days later the Union received some of the requested information.

In February, the Union grieved management's decision to change the Start Time. Steward Farley testified that at least two or three "Step A" meetings took place. As a part of the Union's investigation into the dispute, Steward Farley interviewed the Employer's Step A representative and Officer in Charge, Mr. Elijah Stephens. Mr. Stephens told Mr. Farley

that the first truck arrives at the facility at 5:00 A.M.; the second truck arrives at 6:00 A.M.; and the final truck is expected to arrive at 8:00 A.M. (*See* Joint Exhibit No. 2, p. 14.)

When asked how management determines that 80% of the mail is at the carrier's case, Mr. Stephens stated that, "We count the mail every day." (*See* Joint Exhibit No. 2, p. 14.) Mr. Stephens also stated, however, that he did not know the volume of mail for three routes at the center of the conflict. (*See* Joint Exhibit 2, p. 15.) What Mr. Stephens knew was that, if the trucks were on time, 80% of the caseable mail will be at the carriers' case in a timely fashion. (*See* Joint Exhibit No. 2, p. 15.) In a 20-day period from December 27, 2001 through January 16, 2002, the 6:00 A.M. truck was late an average of 10 minutes on 13 of the 20 days. For the same time period, the 8:00 A.M. truck was late an average of 21 minutes on 15 days. (See Joint Exhibit No. 2, p. 80.)

According to Shop Steward Farley, the Employer never established when the mail was received at the carriers' cases prior to the allegedly improper time change. Mr. Farley also testified that, prior to the emergence of the grievance, Letter Carriers never had to wait for the mail. Nor did he have knowledge of anyone else who had to wait. When the

parties were unable to resolve their differences, the matter proceeded to arbitration.

V. POSITION OF THE PARTIES

A. The Union

The Union argues that the Employer violated the parties' National Agreement when it changed the Start Time from 8:15 to 8:40 A.M. The Union asserts that the Employer is relying on an internal productivity standard, rather than relying on the M-39 Handbook. The Union contends that the M-39 Handbook requires management to fix schedules so that at least 80% of the mail is in carriers' cases when they report to work. The Union contends that management cannot tell from the Mail Volume Report when 80% of the mail is at the carriers' cases. Hence, the Union concludes that the Employer violated the parties' agreement by making the time change in the absence of an appropriate justification for doing so.

B. The Employer

The Employer argues that it is completely within management's right to alter the Start Time based on the "management rights" provision of the National Agreement. According to the Employer, management changed the Start Time in this case to increase productivity. It is the position of the Employer that the change in starting time was due to low mail volume, dispatch trucks arriving late, and a poor mail flow. The Employer asserts that managers made employees aware of these problems and changed the Start Time in an effort to overcome the productivity deficiencies.

The Employer points out that the time change was pushed forward by 25 minutes and made "out-of-schedule" premium pay inaccessible to employees. Although only a 25 minutes change, it allegedly had a significant impact on the efficiency of the operation and, according to the Employer, "produces better productivity since it is not necessary for the carrier to wait for DPS volume or go to streets and return when DPS is available because of a late truck." *See* Joint Exhibit No. 2, p. 183.) In view of the positive impact on the efficiency of the operation, the Employer concludes that the changed Start Time did not violate the agreement of the parties and that, therefore, the Employer must prevail in this case.

VI. ANALYSIS

The Union objected in this case when, on December 29, 2001, the Employer unilaterally changed the Start Time of employees from 8:15 to 8:40 A.M. It is indisputable that the Employer has a right to determine the method, means, and personnel by which operations are to be conducted and also to make reasonable decisions that maintain the efficiency of the operation. Managerial control of work schedules, however, is not totally unfettered or without limitations. The M-39 Handbook specifies that schedules must be fixed to coincide with the receipt and dispatch of mail. Section 122.11(b) of the M-39 Handbook states:

> Consider the following factors in establishing schedules:
>
> (b) Fix schedules to coincide with receipt and dispatch of mail. At least 80% of the carriers' daily mail to be cased should be on or at their cases when they report for work. (*See* Joint Exhibit No. 2, p. 172, emphasis added.)

The instruction is not a suggestion but is stated as an imperative. The Handbook, which pursuant to Article 19 of the labor contract has been incorporated into the parties' collective bargaining agreement, eliminates a manager's unfettered control over Start Times. Start Times remain within management's control but must be exercised after giving due deference to the M-39 Handbook.

The Employer responded to the Union's case by asserting that management made a change in the Start Time to increase productivity and efficiency. An arbitrator is as obliged to follow contractual procedures as is a manager, and the parties' agreement expressly states that a factor a manager must consider in establishing the work schedule at a facility is the fact that 80% of the mail must be present at the carriers' cases when they report to work. The arbitrator did not receive proof from management covering this crucial evidentiary link. The Employer did not establish whether or not 80% of the mail had been delivered to cases at the original Start Time prior to management's changing the work schedule. What the Employer premised its case on was the fact that the 6:00 A.M. and 8:00 A.M. trucks were frequently late, and this fact alone allegedly justified changing the Start Time. (*See* Joint Exhibit No. 2.)

Part of the evidence used by management to support its decision failed to be persuasive. Management relied, in part, on the fact that the 6:00 A.M. trucks were generally late over a 20 day period from December 27, 2001 to January 16, 2002. But such evidence was far from conclusive in light of the fact that the Letter Carriers' Start Time was normally 8:15 A.M. The on average 15 minute delay of the 6:00 A.M. truck failed to provide sufficient justification for management's decision. It, however, is relevant that the 8:00

A.M. trucks were an average of approximately 20 minutes late over the same 20 day period and were late 15 of the 20 days. (See Joint Exhibit No. 2, p. 80.)

It was reasonable for management to take such a delay into consideration when setting the work schedule, but the time frame considered by management occurred immediately after the holiday season and provided circumstances that logically contributed to the lateness of the trucks. A 20 day test period under such circumstances failed to provide sufficient evidence of a clear pattern of lateness that justified the change. The point is that the lateness of the 8:00 A.M. trucks, without other supportive data, failed to establish that less than 80% of the mail was at the carriers' cases when they arrived for work. The point is that the Union, as the moving party, established a prima facie case that the Employer was not complying with the M-39 Handbook.

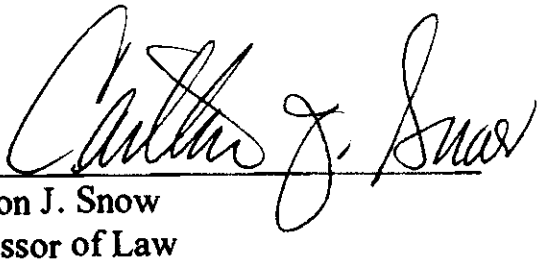
Once the Union made a prima facie case, the burden of going forward with the evidence shifted to the Employer to prove that it complied with the parties' agreement. The Employer elected to present no witnesses at the hearing and offered only a limited explanation to justify the schedule change, namely, to foster productivity. In the absence of evidence, it cannot be concluded that the Employer carried its burden of going forward with the

evidence. Management did not establish that it complied with relevant contractual provisions or that it gave consideration to the amount of mail actually at the carriers' cases at the start of the shift prior to making the schedule change. In order to justify a change in the work schedule, management must show (once the Union presents a prima facie case) it complied with the parties' agreement and considered the factors set forth in Section 122.11 of the M-39 Handbook before changing the Start Time.

AWARD

Having carefully considered all evidence submitted by the parties concerning this matter, the arbitrator concludes the Employer violated the parties' National Agreement when it changed the employees' Start Time in this case. The Employer shall reinstate the original Start Time of 8:15 A.M., unless management can prove compliance with factors in Section 122.11 of the M-39 Handbook. The arbitrator shall retain jurisdiction in this matter for 90 days from the date of the report in order to resolve any problems resulting from the remedy in the award. It is so ordered and awarded.

Respectfully submitted,



Carlton J. Snow
Professor of Law

Date January 22, 2003

ARTICLE 19 HANDBOOKS AND MANUALS

Those parts of all handbooks, manuals and published regulations of the Postal Service, that directly relate to wages, hours or working conditions, as they apply to employees covered by this Agreement, shall contain nothing that conflicts with this Agreement, and shall be continued in effect except that the Employer shall have the right to make changes that are not inconsistent with this Agreement and that are fair, reasonable, and equitable. This includes, but is not limited to, the Postal Service Manual and the F-21, Timekeeper's Instructions.

Notice of such proposed changes that directly relate to wages, hours, or working conditions will be furnished to the Union at the national level at least sixty (60) days prior to issuance. At the request of the Union, the parties shall meet concerning such changes. If the Union, after the meeting, believes the proposed changes violate the National Agreement (including this Article), it may then submit the issue to arbitration in accordance with the arbitration procedure within sixty (60) days after receipt of the notice of proposed change. Copies of those parts of all new handbooks, manuals and regulations that directly relate to wages, hours or working conditions, as they apply to employees covered by this Agreement, shall be furnished the Union upon issuance.

Article 19 shall apply in that those parts of all handbooks, manuals and published regulations of the Postal Service, which directly relate to wages, hours or working conditions shall apply to CCA employees only to the extent consistent with other rights and characteristics of CCA employees provided for in this Agreement and otherwise as they apply to the supplemental work force. The Employer shall have the right to make changes to handbooks, manuals and published regulations as they relate to CCA employees pursuant to the same standards and procedures found in Article 19 of the National Agreement.

[see Memo, page 214]

This Memo is located on JCAM pages 19-2 and 19-3.

Handbooks and Manuals. Article 19 provides that those postal handbook and manual provisions directly relating to wages, hours, or working conditions are enforceable as though they were part of the National Agreement. Changes to handbook and manual provisions directly relating to wages, hours, or working conditions may be made by management at the national level and may not be inconsistent with the National Agreement. A challenge that such changes are inconsistent with the National Agreement or are not fair, reasonable, or equitable may be made only by the NALC at the national level.

A memorandum included in the 2019 National Agreement establishes a process for the parties to communicate with each other at the national level regarding changes to handbooks, manuals, and published regulations that directly relate to wages, hours, or working conditions. The purpose of the memorandum is to provide the national parties with a better understanding of their respective positions in an effort to eliminate

Exhibit 12 (if applicable)

Carrier statements that management has threatened to change the start time due to performance - bad office times etc., or is threatening to do so if performance does not improve.

(Statements in carrier's own words are best)

Exhibit 13

Copy of request for Information submitted by the union. This request should include:

- Basis for start time change
- times and percentages of working mail distributed to carrier's cases for the 6 month period prior to the proposed start-time change
- Any email correspondences from District, Area, etc regarding start time changes

Exhibit 14

Management's response (in writing) to the information request in exhibit 13