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**In the Matter of the National Arbitration Between**

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| <b>UNITED STATES POSTAL SERVICE</b>   | ) |                                     |
|                                       | ) |                                     |
| <b>and</b>                            | ) | <b>Case No. Q11N-4Q-C 14032224)</b> |
| <b>NATIONAL ASSOCIATION OF LETTER</b> | ) |                                     |
| <b>CARRIERS, AFL-CIO</b>              | ) |                                     |

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**Before:** Dennis R. Nolan, Arbitrator

**Appearances:**

**For the USPS:** Lucia R. Miras, Counsel, Washington, DC

**For the NALC:** Peter DeChiara, Cohen, Weiss and Simon LLP, New York, NY

**Place of Hearing:** Washington, D.C.

**Date of Hearing:** January 29, 2015

**Date of Award:** June 29, 2015

**Relevant Contract Provision(s):** Article 19; Handbook M-39

**Contract Year:** 2011-2016

**Type of Grievance:** Contract Interpretation

**Award Summary:** Section 126.3 of Handbook M-39 does not “directly relate” to wages, hours, or working conditions and is therefore not incorporated into the Agreement by Article 19. For that reason, Section 126.3 does not create rights enforceable by bargaining unit employees through the grievance procedure. The grievance is denied.

*Dennis R. Nolan*

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Dennis R. Nolan, Arbitrator

## OPINION

### I. Statement of the Case

The NALC filed a local level class action grievance in Florida in May of 2013 to remedy an alleged violation of Section 126.3 of the M-39 Handbook. The parties could not resolve the dispute in the grievance process, so the Union demanded arbitration. On March 10, 2014, the Postal Service decided that the grievance raised an interpretive issue within the meaning of Article 15. That eventually led to this national level arbitration.

The arbitration hearing took place in Washington, DC on January 29, 2015. Both parties appeared and had full opportunity to testify, to examine and cross-examine witnesses, and to present all pertinent evidence. Both parties filed lengthy post-hearing briefs, supplemented by statements about an arbitration decision issued after they submitted their briefs.

### II. Statement of the Facts

This case began two years ago in Florida when Local 599 filed a grievance alleging that the Postal Service violated the Agreement by not following Section 126.3 of Handbook M-39. The specific complaint was that Management did not schedule known replacements for known vacancies in advance, as Section 126.3 directs. While the grievance was headed toward regular arbitration, Management asserted on March 10, 2014 that it posed an “interpretive issue within the meaning of Article 15 of the 2011 National Agreement.” That diverted the grievance from regular arbitration and to national arbitration.

In Management’s phrasing, the interpretive issue was whether Section 126.3 created a contractual obligation to schedule employees on overtime to cover “known vacancies” when completing the weekly schedule. That phrasing actually includes two distinct issues. One is whether Section 126.3 creates *any* contractual obligation subject to the grievance procedure. The other, if Section 126.3 does create some obligation, is whether it requires the use of overtime.

The key to the contractual obligation question is Article 19 of the Agreement. Article 19 states that parts of handbooks “that directly relate to wages, hours or working conditions” of bargaining unit employees “shall contain nothing that conflicts with this Agreement.” Although Article 19 does not state it specifically, a reasonable interpretation is that handbook provisions that *do* directly relate to bargaining unit employees’ wages and hours are binding and may be enforced through the grievance procedure.

Because the sole issue in this case is contractual, there are no serious factual disputes. The testimony was therefore quite limited. The sole Union witness, Vice President Lew Drass, talked mainly about the impact of scheduling on employees and also stated the Union’s position that advance scheduling does not necessarily require the use of overtime.

The Postal Service's main witness was Kevin Rachel, formerly Manager of Collective Bargaining and Labor Arbitration and now retired. He worked with Article 19 often in the 1990s and had created a binder of reference materials for his successors, which was introduced at the hearing as Tab 4. That compilation provides certain bargaining history about the section. He also discussed several arbitration awards addressing the issues involved in this case.

The other Management witness was Rick Helser, a City Delivery Specialist. He testified about how he used Form 3997 and other documents in his work. The new delivery operating system, DOIS, uses three forms that collectively replicate Form 3997.

### **III. The Issue**

The Agency defines the issue this way: Does Section 126.3 of Handbook M-39, Management of Delivery Services, create a contractual obligation for management to schedule in advance individual employees on overtime to cover "known vacancies" when completing the weekly schedule?

The Union agrees that one issue is whether Section 126.3 creates a contractual obligation. It disagrees with the Postal Service over whether that section, even if contractually binding, would require assignment on overtime.

These two versions are essentially the same. Both parties understand that the key question is whether Section 126.3 creates a contractual obligation enforceable under the negotiated grievance procedure. If so, both agree that the next question is just what that obligation is.

### **IV. Pertinent Authorities**

#### **2011-2016 AGREEMENT**

#### **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. . . .

#### **M-39 Handbook**

##### **111.1 General**

All delivery service managers are responsible for developing and maintaining their units at a high degree of efficiency and for assuring that USPS standards are maintained. Through these broad guidelines, plus skill, knowledge, and experience, delivery service managers can be aware of whether subordinate managers and delivery employees are achieving USPS goals of service to the public. Emphasis is placed upon the constant need for close coordination between mail processing and delivery managers so the most practical and cost effective work methods possible can be implemented.

- 126.3 Complete PS Form 3997, *Unit Daily Record*, as per instructions on the form or electronic equivalent from a nationally approved computer system that provides equivalent information. (See Exhibit 126.3.) Prepare PS Form 3997 several days in advance. Since scheduled absences and scheduled replacements are known, add only the unscheduled absences and their unscheduled replacements. [Form 3997, *Unit Daily Record*, immediately follows Section 126.3 in the Handbook.]

## V. The Union's Position

The Union's position is quite simple. It argues that Section 126.3 imposes a contractual obligation because it directly relates to bargaining unit employees' wages and hours. Because the section regulates scheduling, it obviously relates to employees' hours. That is what several regional arbitrators have held. The cases relied on by the Postal Service to show that Section 126.3 is not binding do not support its position. One arbitrator merely said that Section 126.3 does not require the scheduling of overtime, which the Union does not dispute. Another held that Management could not be required to assign Transitional Employees in advance for specific post offices.

Section 126.3 obliges Management to schedule known replacements for vacancies that are known in advance. The section directs Management to complete Form 3997 several days in advance; because "scheduled absences and scheduled replacements are known," the manager need only add the unscheduled absences and their replacements. That is true both for the paper Form 3997 and for its "electronic equivalent." Management's objections to that interpretation lack merit. It does not matter whether Form 3997 is called a Unit Daily Record. Nor does it matter that the section does not directly relate to other negotiated provisions; the test under Article 19 is whether it relates to employees' hours.

Management cited several arbitration awards interpreting Section 126.3 but none of them help its case. Several regional awards, on the other hand, do establish that Section 126.3 creates enforceable rights under Article 19.

While an award of overtime may be an appropriate remedy in some cases, Management may be able to avoid overtime by scheduling as the replacement an unassigned regular, a full-time or part-time flexible, or a city carrier assistant. At other times such as choice vacation periods, overtime may be the only way to schedule replacements.

## **VI. The Postal Service's Position**

The Postal Service's initial point is that the M-39 Handbook is not incorporated into the Agreement by Article 19 because the relevant parts do not "directly relate" to wages, hours, or working conditions. As Arbitrator Mittenthal pointed out in Case H4C-NA-C 81 (June 20, 1990), regulations that are only "indirectly related" to wages or hours "cannot violate Article 19." Merely having "a potential effect" on employee behavior is not enough to bring a regulation under Article 19.

Section 126.3 is merely an instruction from management to managers on how to schedule employees. It does not provide bargaining unit employees a right to have any type of employee scheduled in advance for a known vacancy. Article 8 and the Joint Contract Administration Manual (JCAM) govern scheduling; neither mentions Section 126.3 or the Form 3997 addressed in that section. As previous arbitrators have held, an internal management document that is not distributed to employees does not create enforceable rights under Article 19.

Form 3997 is a record of work, not a schedule. The instructions on the back of the form direct supervisors to "record" the total work hours by route. The form is not complete until the end of the day or even the next morning. Supervisors *may* use that form as a planning but are not required to do so. They do not share the form with employees. Similarly, DOIS, the "electronic equivalent" of Form 3997 is not a schedule. Portions of the information included on form 3997 appear on three DOIS reports. They too are internal management documents that carriers do not see.

Even if Section 126.3 were enforceable, it does not require what the Union seeks. All that section does is direct supervisors to record their scheduling; it does not require an advance schedule as the Union now seeks. In the 50 years of its existence, Section 126.3 was never intended or understood to have the meaning the Union now gives it. Moreover, supervisors have the authority to schedule replacements as needed, so even creating a Form 3997 in advance would not guarantee that the designated employees will actually be put on the Weekly Schedule.

## **VII. Discussion**

The critical preliminary question in this case is whether Section 126.3 creates enforceable rights under Article 19 of the Agreement. According to Article 19 and the main arbitrable interpretations, parts of handbooks that "directly relate" to the wages, hours, or working conditions of bargaining unit employees may "contain nothing that conflicts with" the Agreement and "shall be continued in effect," subject only to management's right to make "fair, reasonable, and equitable" changes that are consistent with the Agreement.

On that much everyone agrees. They differ on whether that section "directly" relates to the covered topics. If it does, it binds the Postal Service for the purposes of this grievance. The next step would be to determine just what the section requires — whether, in effect, Section 126.3 and Form 3997 oblige management to schedule employees in advance so that they are entitled to certain

work, or whether the purpose is just to create a record of actual assignments. If it does not “directly” relate to bargaining unit employees’ wages, hours, and working conditions, however, the inquiry is at an end: Section 126.3 would not bind the Postal Services for the purposes of this grievance. Because the grievance relies entirely on the Union’s interpretation of that section, the grievance would therefore have to be denied. Any “indirect” effect on wages or hours is irrelevant to the issue in this case.

### **A. Arbitral Precedent**

Answering that question requires a brief review of the main arbitral precedents. The first case relied on by the Postal Service, Arbitrator Richard Mittenthal’s 1990 decision in an APWU grievance, H4C-NA-C 81, mainly emphasized Article 19’s use of the term “direct.” He distinguished direct relationships from those that are indirect or unrelated. Importantly, he also stated that the subject matter of the regulation, not its effect, determines whether Article 19 applies.

The second case on which the Postal Service relies is Arbitrator Howard Gamser’s 1982 decision in another APWU grievance, H8C-NA-C 61. The main importance of that decision is the arbitrator’s distinction between internal management documents that instruct managers about how to carry out their jobs and thus do not directly affect employee rights, and other documents that change existing employee rights or create new requirements.

The tricky part, of course, is to determine which is which. On that point, the Postal Service points to a third decision, my 2002 award in an NALC case, Q98N-4Q-C01090839. I noted there that the publication at issue was distributed to employees and included instructions to them about obtaining FMLA rights. It was not, therefore, simply an internal management communication intended only to direct managers.

Applying the Gamser distinction to a different document, Arbitrator Shyam Das found in an a 2009 APWU case, Q94T-4Q-C 9809959, that a bulletin to managers about when employees should perform preventive maintenance tasks and how long that should take did not directly relate to wages or hours and thus was outside the scope of Article 19.

Finally, on June 15 the Postal Service submitted a recent decision by Arbitrator Stephen Goldberg in an APWU case, Q06C-4Q-C 10033773. The Postal Service had rescinded Handbook AS-707 F and replaced it with Publication 156. Both dealt with contract postal units. Arbitrator Goldberg agreed with the Postal Service that the parts of Handbook AS-707 F that “provide guidance to managers, and do not establish rules that employees must follow, nor impact existing employee rights or benefits, do not ‘directly relate to wages, hours or working conditions’” and thus do not fall within Article 19. He reached that conclusion in part because there was no evidence that there was no evidence he handbook was ever intended to protect the Union’s claims to work.

The Union responded the next day. It pointed out that the handbook in Arbitrator Goldberg’s case really had nothing to do with wages, hours, or working conditions. Moreover, one of the

arbitrator's reasons for his decision was that the APWU had not participated in drafting the handbook in question. That, it asserts, is irrelevant to the instant case because the only question at issue is whether Section 126.3 directly relates to hours or working conditions; how the section was drafted makes no difference.

While the Union undoubtedly would have preferred different emphases, it does not challenge any of those decisions. Instead, it primarily relies on several regional awards that, in contrast to the national awards cited by the Postal Service, specifically addressed Section 126.3.<sup>1</sup> The difficulty with relying on regional awards in a national level interpretive case like this is that regional level arbitrators lack authority to interpret the national Agreement and manuals. While regional arbitrators do not always restrain themselves from doing so, the limitation on their powers means at the least that their interpretations carry less weight. Nevertheless, for whatever help they may offer, I review the cited regional and summarize some of the holdings here.

Arbitrator Jonathan Klein held in C01N-4C0C 05149941 (2006) that Section 126.3 unambiguously required Form 3997 to be prepared several days in advance, and that included scheduled absences and replacements. He directed management to "cease and desist" from failing to schedule known vacancies in advance. Critically, though, he did not first interpret Article 19 to determine whether Section 126.3 was actually included in the Agreement by virtue of Article 19. In effect, what he said was that *if* the Section were binding by virtue of Article 19, he interpreted that section to require advance scheduling for known vacancies.

Arbitrator Marilyn Zuckerman reached a similar conclusion in Case B06N-4B-C 10205734 (2010). Relying in part on Arbitrator Klein's decision, she held that the application of Section 126.3 to the facts of her case was "non-interpretive and no different than what arbitrators on the regular panel do day-in and day-out." Like Arbitrator Klein, she held that Section 126.3 required management to complete Form 3997 and to schedule a carrier in advance for a known vacancy. And again like Arbitrator Klein, she did not address the preliminary interpretive question of whether Section 126.3 directly related to wages or hours.

The same is true of the other regional cases submitted by the Union with its brief. In Case K06N-4K-C 12299507 (2013), Arbitrator Mark Rosen directed management to comply with Section 126.3 but did not first decide whether Article 19 incorporated that section. In Case B06N-4B-C

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<sup>1</sup>The one national level case on which it relied was Case B94N-4B-C 97105300 (Stephen Briggs 2002). Although his case involved a different section, he noted that "The parties agree" that M-39 and M-41 directly related to wages, hours, or working conditions and therefore fell under Article 19. His brief statement about that agreement provides no explanation, nor does it quote any specific statements about the Postal Service's concession. That lack of explanation makes it impossible to determine whether the Postal Service was talking only about the portions of M-39 at issue in that case or whether it was making a definitive statement that *all* portions of two large handbooks "directly related" to wages and hours.

It seems highly unlikely that in a case focusing on one narrow point the Postal Service actually intended to concede that *every other* portion of the two handbooks was also subject to Article 19. For lack of clearer evidence, I do not find that Arbitrator Briggs's statement controlling here.

10406986 (2011), Arbitrator Anthony Ross found that management was obliged to schedule carriers in advance on Form 3997, even though he denied the grievance in that instance. NALC Exhibit 15 is particularly interesting because of its contrast with Arbitrator Mittenthal's award discussed above. Arbitrator Mittenthal held that the subject matter of the regulation, not its effect, determined whether the regulation directly related to wages or hours. Arbitrator Donald E. Olson, Jr., in Case F01N-4F-C 06017920 (2006) turned that principle on its head. Even after quoting Arbitrator Mittenthal, Arbitrator Olson held that Section 126.3 fell under Article 19 in that case precisely because management's scheduling decisions had a direct *impact* on employee hours and working conditions.

I have reviewed these decisions at length because both parties placed a great deal of weight on them. Here is where they leave us on the initial question of whether Section 126.3 creates binding rights under Article 19.

- First, the national level awards, which of course are the only ones with precedential effect on this case, agree that a handbook provision comes under Article 19 only if it "directly" relates to wages, hours, or working conditions.
- Second, According to Arbitrator Mittenthal, whose interpretation has not been challenged by any later national award, the key factor in determining whether there is a direct relation is the *subject matter* of the regulation, not merely whether it has an *effect* on working conditions.
- Third, according to Arbitrator Gamser, a management communication directing other managers how to their jobs is not within Article 19 if it does not change any rights granted in the Agreement.
- Fourth, as demonstrated in my 2002 award and in Arbitrator Das's 2009 award, one strong indicator of whether a regulation is intended to create enforceable rights is whether the document was distributed to employees. In my case, management distributed the publication to employees. I therefore found that it was intended to create enforceable rights and thus fell under Article 19. In Arbitrator Das's case, the bulletin was addressed only to managers and merely told them how to perform their own jobs; it therefore did not come under Article 19. Similarly, Arbitrator Goldberg's case involved parts of a handbook that "provide[d] guidance to managers," and neither created rules for employees nor affected existing employee rights and benefits. As a result, it was not directly related to wages, hours, or working conditions.
- Finally, the regional decisions generally hold that *if* Article 19 incorporates Section 126.3, that section then requires management to complete Form 3997 as a scheduling tool. Because the regional arbitrators lack authority to interpret the national Agreement, however, their interpretation of Section 126.3 does not come into play unless Article 19 actually incorporates that section.

## B. Analysis

After carefully considering the text of Section 126.3, the evidence about its history and use, the cited arbitral precedent, and the parties' arguments, I find that the section is not incorporated into the Agreement by means of Article 19.

The basis for any grievance must be found in the Agreement itself. In addition to the words of the Agreement, however, Article 19 provides for the incorporation of certain provisions from Postal Service handbooks and other communications. Article 19 defines the incorporated provisions as those that "directly relate to wages, hours or working conditions" of bargaining unit employees. The most important word in that sentence is "directly." Were that word not in Article 19, then every handbook provision that "relates to" working conditions, however remotely or indirectly, would be enforceable through the grievance procedure. Because it is there, however, Article 19 covers only those provisions with a very close relationship to the listed subjects.

In determining whether a provision directly relates to wages or hours, the most important factor, as Arbitrator Mittenthal pointed out, is the subject matter. Virtually everything that a manager does affects employees in some way or another. If simply having an effect on employees were the test, then virtually every handbook would be incorporated in the Agreement. The subject matter, then, must itself *directly* relate to wages, hours or working conditions.

Applying Arbitrator Mittenthal's test to Section 126.3, I find that the Union did not prove that Section 126.3 *directly* related to wages or hours. The subject matter of that section is an instruction to supervisors to complete a particular form, described as a "Unit Daily Record," several days in advance. Using that form does not assign or guarantee employees any hours. To be sure, using that form might award hours to some employees, but that concerns the form's effect, not its purpose. Even that limited effect would only be a byproduct of using the form to control scheduling, not its purpose.

Applying Arbitrator Gamser's test, I find that Section 126.3 does not change any rights granted in the Agreement. It simply tells managers how to perform their own jobs. It neither limits nor expands existing employee rights. It thus did not directly relate to employee hours.

Applying the test used by Arbitrators Das and Goldberg, I find that Section 126.3 was directed and published to managers rather than to bargaining unit employees. In Arbitrator Goldberg's words, it provided guidance to managers and neither created new rules for employees or changed existing ones. Again, the relationship to employee hours is at most indirect.

As in other contractual cases, the Union bears the burden of proof. Here, that requires the Union to show the *direct* relationship between the provision at issue and employee hours. It failed to do so; the grievance must therefore be denied.

**AWARD**

The grievance is denied.

*Dennis R. Nolan*

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Dennis R. Nolan, Arbitrator

**June 29, 2015**  
**Date**