REGULAR ARBITRATION PANEL

In the Matter of the Arbitration)	Grievant: Class Action
between)	Post Office: Tulsa, OK
United States Postal Service)	USPS Case No. G11N-4G-C 16123222
and)	NALC DRT: 04365246
National Association of Letter Carriers, AFL-CIO)	

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BEFORE: Louise B. Wolitz, Arbitrator

APPEARANCES:

For the U.S. Postal Service:	Paul E. Evans
For the NALC:	Christy Bowers
Place of Hearing:	2132 S 91st East Avenue, Tulsa, OK
Date of Hearing:	December 2, 2016
Briefs Postmarked:	December 15, 2016
Briefs Received:	December 19, 2016
Date of Award:	January 24, 2017

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Award Summary:

We must find that management violated Article 19 of the National Agreement via the M-39 Handbook when using covert techniques to spy on Letter Carrier Martin Smith on February 1st, 2016. The grievance is sustained. In remedy, we order management to cease and desist observing carriers in violation of M-39 134.21 and 134.22. Furthermore, we find that the information gathered as a result of the observation of Letter Carrier Martin Smith is fruit of a poisoned tree, and, therefore, must be deleted from all records of the Postal Service and Carrier Smith. It is hereby rendered null and void, as though it had never been collected. It therefore must be deleted from any disciplinary or other action taken against Letter Carrier Martin Smith and never referred to again.

Louise B. Wolitz, Arbitrator 1/24/2017

RELEVANT PROVISIONS:

2011 – 2016 National Agreement between the National Association of Letter Carriers & the United States Postal Service

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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 changes. 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....

M-39 HANDBOOK

134.2 Techniques

134.21 The manager must maintain an objective attitude in conducting street supervision and discharge this duty in an open and above board manner.

134.22 The manager is not to spy or use other covert techniques. Any employee infractions are to be handled in accordance with the section in the current National Agreement that deal with these problems.

THE HEARING:

The hearing on this matter took place at 2132 S 91st East Avenue, Tulsa, OK on December 2, 2016. Each party had a full opportunity to present its evidence, witnesses and argument and to cross examine each other's witnesses. The parties entered Joint Exhibit 1, the National Agreement and JCAM and Joint Exhibit 2, the Case File. Management raised a procedural issue that this grievance is not

arbitrable. Each party presented an Opening Statement. The Union called witnesses Martin Everett Smith, City Carrier; Gregory A. Collins, City Carrier; and Ronnie Gene Porter, City Carrier, Steward and Formal A representative. The Postal Service called witness Scott Marcum, Postmaster of Perkins, Oklahoma at the time of this incident. All witnesses were sequestered and sworn. At the close of the hearing, the parties agreed to present briefs and arbitration citations to the arbitrator, postmarked December 15, 2016, which were timely received by the arbitrator. The arbitrator has carefully studied the Opening Statements of the parties, the evidence in the case file, her notes on the testimony, and the briefs and arbitration citations offered by the parties.

THE ISSUES:

1) Is this grievance arbitrable?

2) If the grievance is determined to be arbitrable, did management violate Article 19 of the National Agreement via the M-39 Handbook when using covert techniques to spy on carriers, and if so, what is the appropriate remedy?

IS THIS GRIEVANCE ARBITRABLE?

Position of the Postal Service:

Management argued at the opening of the hearing that this grievance is not arbitrable because the M-39 is a Management Handbook. Section 134.2, the provision at issue here, gives management instructions on what techniques are not allowed when conducting a street observation. Management contended that this section of the M-39 is not grievable because it does not directly related to wages, hours, or working conditions. The M-39 was not bargained over with any union, and has never been distributed to city carrier employees as specific employment instructions and/or craft employee requirements. Management cites a national arbitration award, Q11N-4Q-C 14032224, issued by Arbitrator Dennis R. Nolan on June 29, 2015. Arbitrator Nolan found that the M-39 section at issue in his grievance, *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.* Arbitrator Nolan therefore denied the grievance that was before him. Management argued that 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 provisions that "*related to*" working conditions, however remotely or indirectly, would be enforceable through the grievance procedure. Because the word "*directly*" is there, however, Article 19 covers only those provisions with a very close relationship to the listed subjects. In determining whether a provision is *directly* related to wages or hours, the most important factor, as Arbitrator Mittenthal pointed out, is the

subject matter. The subject matter must itself *directly* relate to wages, hours or working conditions. Management argues that in the case before us here, M-39, Section 134.2, does not "*directly*" relate to carriers' wages, hours and working conditions, the instructions are management communication directing other managers, and these instructions were never distributed to the employees. Management argues that Article 19 does not incorporate this section of the M-39. Consequently, this grievance is not arbitrable.

Position of the Union:

The Union argued that Arbitrator Nolan's award is not relevant to the case before us here. The issue there was not about working conditions, but about hours. It was about what management does in the office while carriers are on the street. That was not a working condition. The grievance before us here in this case involves a working condition. There have been many grievances filed under M-39 provisions about route observations. The provision at issue here is about how management is to treat carriers. This is a working condition. Management has to tell carriers that they are observing them when they are observing them.

Discussion:

We agree with the Union that the content of M-39 *134.22 (The manager is not to spy or use other covert techniques. Any employee infractions are to be handled in accordance with the section in the current National Agreement that deal with these problems.*) is *directly* related to working conditions. It is about how the carrier is to be observed when he is on the street. It could not be more *directly* or clearly related to a carrier's working conditions. This judgment is strengthened by the next sentence, which refers any infractions to be handled in accordance with the National Agreement.

Decision:

We therefore determine that this grievance is arbitrable

DID MANAGEMENT VIOLATE ARTICLE 19 OF THE NATIONAL AGREEMENT VIA THE M-39 HANDBOOK WHEN USING COVERT TECHNIQUES TO SPY ON CARRIERS, AND IF SO, WHAT IS THE APPROPRIATE REMEDY?

Position of the Union:

The Union argues that at Step B the parties agreed to the following undisputed facts: On 2/01/2016, Scott Marcum (Management) observed carrier on city route 80 (Martin Smith) at several locations on the route. These observations were from one to four blocks away. Management never approached or notified Mr.
Smith that he was being observed. Section 134 of the M-39 states: 134.21 "*The manager must maintain an objective attitude in conducting street supervision and*

discharge this duty in an open and above board manner" and 134.22: *"The manager is not to spy or use covert techniques. Any employee infractions are to be handled in accordance with the section in the current National Agreement that deal with these problems."* The language is perfectly clear. The Union asks for a ruling that management cease and desist covertly observing employees and that all members of management be instructed to comply. The Union pointed out that only the OIG, as part of an investigations, has the authority to covertly observe employees.

Union witness Martin Everett Smith testified that he has been a city carrier for 15 or 16 years. He verified his signed statement in the record (Joint Exhibit 2,p. 26): *On 2/1/16 At no time was I notified that I was being observed.* He found out only when he was approached with a proposed removal. He has been observed on his route before, but was always notified.

On cross examination, Mr. Smith said that previously, at the times he was notified, management notified him that they were performing a street observation. They gave him the numbers on the route that they would observe.

Union witness Gregory A. Collins testified that he has been a letter carrier for nine years, the steward at the main office for three years, and a sergeant at arms. This grievance is about management using covert techniques to spy on carriers. His requested remedy (joint Exhibit 2, p. 23) is that management cease and desist from spying and using covert techniques when observing carriers. He received the information about this incident on February 25, 2016 (Joint Exhibit 2, p. 12). He investigated the grievance. He went out to all the locations from which the carrier was observed (p. 24). The carrier had not been notified he was being observed. Scott Marcum is a member of management. The M-39 provision applies to him.

Union witness Ronnie Gene Porter testified that he has worked for the Postal Service for 22 or 23 years. He is a steward and Formal A representative. He met with Andy Jones on this grievance at Formal A. He submitted the Union's Formal A contentions (Joint Exhibit 2, pages 15-22). He determined that management violated Sections 134.21 and 134.22 of the M-39 Handbook. Management used covert techniques to spy on carrier Smith and then used these techniques to issue a notice of proposed removal to Mr. Smith. In remedy, the Union wants an order that Management cease and desist from spying and from using covert techniques when observing carriers, that Management will comply with sections 134.21 and 134.22 of the M-39 Handbook, and the Branch grievance number 138-16-00945 will be settled with the notice of proposed removal issued to Martin Smith on 2/23/2016 expunged and removed from all files.

The Union contends in its brief that the portion of Handbook M-39 violated within this grievance greatly impacts a letter carriers' working conditions. Letter Carriers perform street duties which are mostly unsupervised. Working unsupervised is part of a letter carrier's duties. Letter Carriers may be observed an any time. However, that observation is not to be performed covertly by management

personnel. Covert operations are the responsibility of the Office of the Inspector General. Thus, a working condition of a letter carrier is that you may be observed by management after notification or you may be observed by an OIG agent without notification.

The union has shown through testimony and documentary evidence that the Postal Service violated the National Agreement via Article 19, which includes Handbook M-39, Management of Delivery Service. There was no dispute that Letter Carrier Martin Smith was not notified that Postmaster Marcum was observing him. The facts of this case are simple and undisputed: On 2/01/2016, Scott Marcum (Management) observed carrier on city route 80 (Martin Smith) at several locations on the route. These observations were from one to four blocks away. Management never approached or notified Mr. Smith that he was being observed. Section 134 of the M-39 states: 134.21 *"The manager must maintain an objective attitude in conducting street supervision and discharge this duty in an open and above board manner"* and 134.22: *"The manager is not to spy or use covert techniques. Any employee infractions are to be handled in accordance with the section in the current National Agreement that deal with these problems."*

The Postal Service argues that City Letter Carriers can be observed while performing street duties, without notification, by any management level employee not employed as a Postal Inspector or an officer of the Office of Inspector General. If this were so, it would render the provisions providing instruction to management on the techniques of conducting street supervision meaningless. Handbook M39 provides guidelines from national to lower level management personnel. If management did not have to follow the provisions, they would not be in the handbook.

The language is clear and undisputed. Handbook M-39, Section 134.21 requires that in conducting street supervision, observations must be made in an open and above board manner. Management personnel may not spy or use covert techniques. The violation here is clear-cut. It is not required that a management employee wear camouflage to be spying or covert.

The Union requests that the arbitrator sustain this grievance in its entirety by finding that the Postal Service has violated Article 19 of the National Agreement, Handbook M-39 Sections 134.21 and 134.22. The Union requests that the Postal Service be ordered to cease and desist and that all data, remarks and contentions made by management related to the improper observation be stricken from the removal of Carrier Martin Smith.

Position of the Postal Service:

The Postal Service argued in its Opening Statement that on January 27-28, 2016, the Local Operations Office (LOC) which is located in Oklahoma City received RIMs/DMS data in regards to MSP scans being made by City Carrier Martin Smith as

he carried his daily assignment. On February 1, 2016, Perkins, Oklahoma Postmaster Scott Marcum participated in an investigation being conducted by the Local Operations Office (LOC) in regards to City Carrier Martin Smith's daily MSP scans on his assigned route. During this investigation on February 1, 2016, Postmaster Scott Marcum made numerous observations of the City Carrier arriving at designated MSP scan points and/or at other location points along Martin Smith's assigned route. During this time frame, Postmaster Scott Marcum had in his possession a USPS scanner and was in consistent contact with the Local Operations Office in regards to his locations and Martin Smith's current location. The LOC during this time frame was comparing individual scanner location pings from Marcum's and Smith's scanner location and RIMs/DMS data. Scott Marcum's notes are on page 24 of Joint Exhibit 2. The data is cited in the Notice of Proposed Removal issued to Martin Smith (Joint Exhibit 2, pages 39-43). The data explains the locations and time frames of the investigation. During this time frame on February 1st, 2016, Postmaster Marcum was parked along Martin Smith's route in open day light, at which time Postmaster Marcum completed surveillance of Mr. Smith's actions as he reached the assigned MSP scan point locations and other delivery points located on his route. Postmaster Marcum made notation of these actions by Martin Smith throughout the day. Postmaster Marcum provided the LOC with the same information throughout the day via cell phone. On February 23rd, 2016, Martin Smith was issued a Notice of Proposed Removal as reflected on pages 39-43 of the case file.

On March 4th, 2016, the union filed a grievance, #1358-16-0095 in regards to the Notice of Proposed Removal issued to Martin Smith. One of many of the union's contentions in this grievance was that management violated section 134.22 of the M-39 handbook (see above). On March 7th, 2016, the union filed the instant Class Action grievance #1358-16-0096 at the Informal A level of the grievance procedure in which the union alleged management violated section 134.22 of the M-39 handbook on February 1st, 2016, when PM Scott Marcum made observations on Martin Smith from one to four blocks away. On March 17th, 2016, the union appealed this grievance to the Formal A level. It could not be resolved. On March 28th, 2016, the union appealed the grievance to the DRT. On April 27, 2016, the DRT team reached an impasse in this matter.

Postal Service witness Scott Marcum testified that at the time of this incident, he was Postmaster of Perkins, Oklahoma. He is now OIC in Bixbee, Oklahoma. He has been with the Postal Service for 24 years. His notes on his observations on February 1, 2016 are on page 24 of Joint Exhibit 2. He was working for the LOC at the time. They asked him to go out and verify pings on Mr. Smith. The MSP scanner has GPS capability. It transmits every minute of the actual location of the scanner at that time. Mr. Marcum said that he is not Martin Smith's direct manager or supervisor. He was asked to verify the pings because on an earlier date, the pings did not match up with Mr. Smith's location. In the MSP data, each route has twelve scan points, in mail boxes. Mr. Marcum said that he has done other street surveillance operations regarding the RIMS data. He knows of other officials performing this type of street

observations regarding RIMs data. He has been doing this type of street observation for about a year. Each MSP is assigned an address in a data base.

Mr. Marcum said that he was driving a 2012 Corolla, his personal car. He was in the parking lot of a church, where he parked to observe Mr. Smith. Mr. Smith drove past the scanning point without stopping or scanning. He could see the mail box and the top half of the LLV. Mr. Smith did not stop. Mr. Marcum said that he was working for the LOC at the time, not performing a local street observation.

On cross examination, Mr. Marcum said that he had been an OIC in Stillwater, Oklahoma. He is not a postal inspector or OIG agent. There are no postal inspectors or OIG agents in the LOC. He was called by Jim Carter on February 1st to do this. He never notified the carrier that he was watching him. That was not what he was out there to do. He gave his street observations on page 24 to Jim Carter. Jim Carter is the Operations Support Specialist leading the LOC.

In its brief, the Postal Service said that the observation/surveillance conducted by Postmaster Marcum on February 1st, 2016 was not the typical street observation/surveillance that is normally performed when managers and/or supervisors do route inspections. The Postal Service argued that Section 134.2 of the M-39 only applies to how management must conduct a street observation. If a member of management sits and observes a carrier perform his duties, this does not affect the working conditions of the carrier. A manager watching a carrier, whether it be from near or far, does not affect the carrier's working conditions. There is no difference in management observing a carrier from within their vehicle and management observing a carrier from a remote location via RIMS GPS data. The union has failed to prove how this section of the M-39 directly relates to wages, hours, or working conditions.

The union's initial allegation is that management conducted *"a covert street observation on the grievant on February 1st, 2016."* The union bears the burden of proof in all contractual grievances. They have failed to do so in this case. The union does not provide any evidence to support their claim. Postmaster Marcum is the Postmaster of Perkins, Oklahoma and not a manager/supervisor over the grievant, Martin Smith. Postmaster Marcum testified that during his observation/surveillance of Martin Smith on February 1st, 2016, he parked his personal vehicle in open-clear view during these observations. This testimony went unchallenged by the union. Postmaster Marcum testified that he was parked during these observations from one block up to four blocks away when observing the grievant. This testimony went unchallenged by the union. Postmaster Marcum testified that during the day, he drove past the grievant on numerous occasions. This testimony went unchallenged by the union. Postmaster Marcum testified that he was not wearing any type of disguise during these observations of the grievant. This testimony went unchallenged by the union. Postmaster Marcum testified that he was not using binoculars or a spy glass during these observations of the grievant. This testimony went unchallenged by the union. Postmaster Marcum testified that he was

performing this specific surveillance/observation due to questionable RIMs/DMS/GPS scans being made by the grievant. This testimony went unchallenged by the union.

The union did not enter a single piece of evidence during the hearing to substantiate their claim that a carrier must be notified each and every time that management is in the process of making an observation/surveillance on a carrier. The union is requesting the arbitrator to provide them language which they would not be able to achieve in negotiations, that would restrict EAS personnel from ever performing an observation and/or surveillance on any city carrier unless that specific EAS personnel stops and informs that city carrier that he/she is being observed or is under surveillance. The arbitrator has no authority to grant such a change in the handbooks/manuals language.

DISCUSSION:

The language of M-39 *134.21 and M-39 134.22* is very clear. It is also very clear that the language is encompassed by Article 19 because it relates to a working condition:the conditions under which a letter carrier may be surveilled or observed. Surveillance must be conducted in an *open and above board manner. The manager is not to spy or use other covert techniques.* Postmaster Marcum did not inform the carrier that he was observing him. He did not identify himself to the carrier. He parked from one to four blocks away from the carrier. He did not conduct himself in an *open and above board manner.* In fact, the Postal Service has a clear method by which it can conduct covert surveillance of carriers when it has a suspicion that rules are being violated or the carrier is not conducting himself properly. Management contacts the Office of Inspector General and they determine whether or not to put the employee under covert surveillance. The surveillance is conducted by trained, licensed and deputized inspectors. The findings are contained in a Report. The information can then be used however management sees fit to correct a problem, if the problem is substantiated. Managers can conduct street observations of carriers by informing the carrier that they will be observed. In the case before us here, a manager conducted street observations without informing the carrier that he was being observed and then used the observations to provide the basis for a Notice of Removal. The manager was not a licensed inspector of any kind, an agent of the OIG or any other Postal police agency with trained inspectors and investigators. We find that the manager was clearly under the instructions of M-39 134.21 and 134.22. The manager clearly was not conducting surveillance in an *open and above board manner.* The carrier being observed was never informed that he was being observed. The observation was being conducted in a covert manner. The observation was clearly in violation of instructions in M-39 134.21 and 134.22.

DECISION AND AWARD:

Therefore, we must find that management violated Article 19 of the National Agreement via the M-39 Handbook when using covert techniques to spy on Letter

Carrier Martin Smith on February 1st, 2016.. The grievance is sustained. In remedy, we order management to cease and desist observing carriers in violation of M-39 134.21 and 134.22. Furthermore, we find that the information gathered as a result of the observation of Letter Carrier Martin Smith is fruit of a poisoned tree, and, therefore, must be deleted from all records of the Postal Service and Carrier Smith. It is hereby rendered null and void, as though it had never been collected. It therefore must be deleted from any disciplinary or other action taken against Letter Carrier Martin Smith and never referred to again.