C-36319

Regular Arbitration Panel

In the Matter of Arbitration	)		
	)	Grievant:	Class Action
between	)		
	)	Post Office:	Glenwood (Tri-City) IL
The United States Postal Service	)		
	)	GATS:	J19N-4J-C 22461876
and	)		
	)	DRT:	03-591877
National Association of Letter Carriers, AFL-CIO	)	Local:	TC-62-22
	)		

Before: Arbitrator J M. Sims

Appearances:

For the Postal Service: Gerald J. Sims

For the Union: Hope Miles

Place of Hearing: 701 W Holbrook Road
Glenwood IL 60425

Date of Hearing: 22 September 2023

Briefs Received: 09 October 2023

Date of Award: 12 October 2023

Award

Issue Statement One is sustained.

Issue Statement Two is sustained.

Remedy is awarded as specified at the end of the decision portion of this finding.

Procedural Matters

This matter came for hearing pursuant to a 2019-2023 National Agreement between the parties. The hearing occurred on 22 September 2023 in a conference room of the postal facility located at 701 W Holbrook Road, Glenwood, IL. Gerald J. Sims, Labor Relations Specialist, represented the United States Postal Service. Hope Miles, National Assigned Assistant, represented the National Association of Letter Carriers.

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 recorded the proceeding as an extension of his personal notes.

The parties elected to submit post-hearing briefs and the arbitrator officially closed the hearing on 09 October 2023 after receipt of the final brief by electronic format.

The Issue

Did management violate Article 5 and 19 (via M-39 Section 122) of the National Agreement when they changed the carrier starting times for city letter carriers from 8:00 am to 8:30 am in the Tri-City Post Office effective 07/02/2022. If so, what is the appropriate remedy?

Did management violate Article 15, 17 and 31 by failing to properly respond to the union's information request dated 06/27/22 and 06/28/22, even after a multitude of grievance settlements on the same issue? if so, what is the appropriate remedy?

Background

On 15 June 2022 a notice was posted for all letter carriers in the Tri-City office stating that the starting times were being changed from 08:00 to 08:30 effective 02 July 2022 until further notice. The union initiated an investigation, including a Request for Information (RFI) from the installation head, and subsequently filed a grievance claiming the change in start time was inconsistent with the National Agreement (NA) as well as the M-39 Handbook. The grievance was timely appealed to Step B, which impassed the dispute, and the grievance was ultimately appealed to arbitration.

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;

B. To hire, promote, transfer, assign, and retain employees in positions within the Postal Service and to suspend, demote, discharge, or take other disciplinary action against such employees;

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;

E. To prescribe a uniform dress to be worn by letter carriers and other designated employees; and

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 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.

Handbook M-39 Management of Delivery Services

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.

Position of the Union

On 15 June 2022 management posted a notice that carrier start times would be changed to 08:30 effective 02 July 2022. The notice stated:

> *Effective July 2, 22, AN assigned carriers starting time will be 8:30 am until further notice, Lavon B Whitley Sr.*

JCAM page 5 –1 provides in relevant part:

> ***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.*

The JCAM goes on further to clarify that:

> *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.*

In this instance the decision to change start times is reserved in Article 3 but is restricted to the specific provision of *Handbook M-39* section 122.11. National Arbitrator Carlton Snow interpreted regulations pertaining to managerial control of work schedules. Snow opined that the aforementioned instruction was not a suggestion but was imperative. He opined:

> *...start times remain within management's control but must be exercised after giving due deference to the M-39 handbook.*

Snow clarified that:

...managerial control is not totally unfettered or without limitation.

and that:

Handbook M 39 specifies that schedules must be fixed to coincide with the receipt and dispatch of mail.

The union challenged the decision to change the start times. Management stated that the basis for changing the start time was to cut down on the impact of late transportation, eliminate carriers waiting on mail impacting the office percent to standard, and allow additional time for the clerk operation to be successful in completing the processing for Function 2.

The union submitted two information requests to Postmaster Whitley requesting copies of the truck schedules transporting mail to the Tri-City facility for the last 3 months and a reason why the carriers start time was changing from 08:00 to 08:30. Steward John Poskin also requested any and all information management ~~h~~ relied upon to change the start time at the Tri City Facility, and the Distribution Up Time (DUT) report for the last 3 months. According to Poskin, Whitley did not respond to the information request. Poskin testified that, in fact, Whitley stated he did not know what a DUT report was and that the truck schedules were unavailable to provide to the union.

The union contends that the service's failure to provide information requested affected the union's ability to enforce or administer the collective bargaining agreement, delayed the investigation, and hampered the union's ability to establish a prima facie case.

Despite Whitley's failure to bargain in good faith, the service failed to provide evidence that they implemented a permanent start time change in accordance with *M39 Handbook*. The service violated the parties' agreement by making the time change in the absence of an appropriate justification for doing so.

The union proves that the start time change was implemented throughout the Illinois 2 District by upper leadership and was not implemented in response to specific mail volumes of the Tri-City Installation. The data provided by Whitley was not relied upon when the start time change was implemented.

The union provided testimony from two long standing city letter carriers attesting that most of the mail was in the station and at their cases at 08:00 prior to the 02 July 2022 start time change. These carriers testified that upon their arrival to work, prior to the start time change, their DPS (which is on the 6:45 truck) was already staged in the station.

Handbook M 39, Sec 122.11. F provides in relevant part:

> *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.*

The service has failed to show late leaving times of the letter carriers prior to making the start time change. The service has also failed to show a change in mail volumes when deciding to make this permanent start time change.

The service representative at the DRT has stated that the union failed to shift the burden to management in establishing any percentage of mail was available to them on any consistent basis at any time during the day. We argue that the service has failed to prove that "at least 80%" of the mail arriving or the point at which any percentage significantly lower than 100% was arriving and at the carriers' cases. In fact, we argue that management would be unable to pinpoint, based on the data they provided, the exact time at which the 80% threshold was met on any date provided.

The union has presented a prima facie case, and the service provides no responses or rebuttals to address the union's assertions of bad faith bargaining in the grievance process. The service failed to provide a position statement at the Informal step and brought forth procedural arguments of timeliness at the Formal Step A without any discussion or explanation of why. Furthermore, Whitley was dishonest and acted in a way deemed underhanded, willful, and egregious; cherry picking certain favorable data and providing information four months from the date of the union's request in an attempt to delay and derail the union's investigation.

Without the service being able to provide any relevant data justifying this change, the union is asking that the arbitrator rescind the start time change and mandate an instructional cease and desist for future violation of Article 19 via *Handbook M-39* Section 122.11, Articles 15, 17 and 31 of the NA.

The union is also asking that you deem the schedule change as being a temporary change and award out of schedule premium to the letter carriers of Tri-City working outside of and instead of their regular base schedule time of 08:00 starting from 02 July 2022 in accordance with the provisions of Article 8 of the NA and restore the start times to their original time of 08:00.

Further, the union is seeking a compensatory award to be paid to every class action grievant of the Tri-City Installation for management's noncompliance of the aforementioned Formal Step A grievance settlements included in the case file, for management's willful and deliberate failure to comply with the union's information requests, and their failure to bargain in good faith. The union welcomes all additional remedies you deem necessary to resolve this grievance, and a coercive remedy to prevent future similar violations of this type in this installation.

The union called three witnesses and presented four prior arbitration awards for persuasive value, (Brown, Olson, Talmadge, and Sammarco).

Position of the Agency

This is a contractual grievance and the union is the moving party who bears the burden of proof and the burden of persuasion regarding their claim that the Service violated the terms of the NA, specifically Articles 5 and 19 (via M-39 Section 122), when the start times at the Tri-City Post Office were changed from 08:00 to 08:30. This change was made for efficiency reasons. Management at the Tri-City Post Office changed the carrier's start times based on the number of late motor vehicle trips that were arriving almost daily (J-3 Pages 93 – 101). The change reduces the amount of time carriers were standing around waiting for mail by thirty (30) minutes.

Section 122.11 of the *M-39 Handbook* is intended to assure that carrier start times are not established so early or disparately that they would interfere with either office efficiencies or the consistency of mail delivery times. Section 122.11.b of the M-39 specifically provides that schedules should be fixed to assure that at least 80% of the carriers' daily mail to be cased should be at the carriers' cases when they report for work. The union only focuses on the 80% as an absolute figure, when in fact, it is just a guideline to be considered in the full context of all provisions of Section 122.11; as well as the factual circumstances that exist at the station.

Section 122.11 is to assure that the carriers have a sufficient amount of mail to keep them productive while at work.

The caseable mail volumes have dropped; the volume of parcels to be delivered by the carriers has increased drastically. Taken together with the requirement for clerks to manually distribute letters and flats to the carriers' cases, to distribute mail to the hot case, to handle the accountable mail, and to scan and distribute parcels to the carriers after it is unloaded from the truck, the movement of mail to the carriers for delivery takes longer than before. These tasks are currently not completed by the clerks until approximately 09:11 each morning. As the new scheduled *Up Time* with the change is 08:30, this is approximately 41 minutes late each day (J-3 Page 102).

Distribution Up Time Report

9:11	10:24	9:16
9:06	8:47	9:47
9:20	8:53	9:05
10:02	8:44	8:44
9:21	9:10	9:45
9:12	9:01	8:47
9:21	9:09	9:10
9:18	8:53	8:27
9:40	8:40	8:50
9:25	9:33	9:05
		8:46

Average Actual Up Time 9:11

This is a contractual grievance in which the union must establish a prima facie case that a violation has occurred, which they failed to do. The NALC relied on questionnaires given to the carriers at the Tri-City Post Office after the start time change. The union believes they have made a prima facie case based on these items alone. Through testimony, management shows these reports do not prove what the union thinks they prove. Also, management demonstrates that the questionnaires filled out by the carriers are irrelevant to this case.

The union contends a violation of Article 5, as they believe management took unilateral action when the start times were changed. Article 5 prohibits management from making unilateral changes to wages, hours, or working conditions. When changing local start times management must consider the criteria contained within M-39 122.11. More to the point, if the starting times were a unilateral action or defined as a past practice as the union contends, we would expect to see them subject to joint discussion via Article 30 of the NA which pertains to local implementation. There is no mandatory discussion to be entered into with the employees or the union regarding starting time changes because they are not subject to Article 5.

The union contends management is in violation of Article 19 through the M-39, Section 122. Section 122 gives management different factors to consider when establishing schedules. The testimony presented is that management did consider those factors prior to deciding to change the start times. In this instance, management exercised its rights under Article 3 of the NA, which states in part:

> *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:*

The union is attempting to take this right away and make their own determination when the start times should be changed for their own convenience, no matter how inefficient it may be. The Service demonstrates that the decision made to change start times is the more efficient decision.

The union relies heavily on a Regional Level arbitration as the basis for their contention of a contractual violation (J-3 Pages 61–75). Even though this is a regional decision, the fact circumstances are not the same.

The union claims there is a multitude of grievance settlements on management's failure to fulfil requests for information. This statement is not true, as the only evidence provided to support this claim are three grievances that the parties settled at Formal A (J-3 Pages 36– 40).

These three settlements are all related to the same incident that occurred on 10 March 2022. They were all settled on 26 April 2022. Therefore, in reality that is only one incident. Also, the NA Article 15.2 Formal Step A (e), clearly states that Formal A settlements will not be a precedent for any purpose unless the parties specifically agree. Therefore, for the union to use these settlements in this grievance is bargaining in bad faith.

Regarding the union's remedy request, in the regional case in which the union relies so heavily, while Arbitrator Snow found management was in error for considering the busiest time of the year for their 20-day analysis, he did not pay any monetary remedy or any out of schedule remedy to the carriers. Clearly, the union is seeking undue enrichment in the instant case.

The union seeks, as a remedy, out of schedule pay. This is not at all grounded within the four-corners of the NA as a remedy, in the instant case. The JCAM page 8-5 explains the rules for Out-of-Schedule Premium. Nowhere in the case file is it contended this was a temporary schedule change. As such, out of schedule is not available as any type of remedy, regardless of outcome in this matter. The JCAM page 8-5 explains the rules for Out-of-Schedule Premium. In the letter carrier craft, the Out-of-Schedule Premium provisions are applicable only in cases where management has given advanced notice of the change of schedule by Wednesday of the preceding service week. In all other cases, a full-time employee is entitled to work the hours of his or her regular schedule or receive pay in lieu thereof and the regular overtime rules apply, not the Out-of-Schedule Premium rules.

Therefore, the union's main contention in this matter is the claim that Management violated Article 5 and Section 122 of the M-39 through Article 19. Management contends the union's claim that management's unilateral decision to change start times in violation of Article 5 has no merit. The Union cannot establish that the change in start times affected wages, hours, or working conditions. Management contends the union's claim that a violation of Section 122 of the M-39 through Article 19 is also flawed, as there is no evidence in the file that management did not consider the factors in section 122 of the M-39.

The Union carries a heavy burden in this grievance and must establish that a contractual violation exists and that employees have been harmed by the Service's decision to change the start times. The bottom line is this is NOT an Article 19 violation, The union has failed to show

management did not consider the factors in section 122 of the M-39. This is an Article 3 issue, where, in accordance with the contract, *the employer shall have the exclusive right, subject to the provisions of this agreement and consistent with applicable laws and regulations.*

As you are aware, the submission of new arguments, documentation, evidence, or an expansion of any argument by the union is prohibited from being introduced at a later step, in accordance with Arbitrator Das' Award (H4-NA-C72), Arbitrator Aaron's award (NC-E-11359), and Arbitrator Byars' award (HOC-NA-C38). Arbitrator Aaron has addressed any attempt to introduce new evidence at arbitration. Such attempts to introduce new evidence is simply, *arbitration by ambush*. That has clearly been the union's intentions at this arbitration hearing. Therefore, Mr. Arbitrator, the Postal Service respectfully requests you deny the grievance in its entirety.
The agency called one witnesses and presented eight prior arbitration awards for persuasive value, (Casciano, Duffy, Roberts, August, Hutt, Eisenmenger, Beirig, and Snow).

Discussion

This dispute asks two questions: was the start time change a violation of the NA, and did management violate the NA when it did not provide the information the union requested? The answer to the second question is much more straightforward and, in turn, relates directly to answer the first, in my opinion.

On 26 April 2022, approximately 50 days prior to the 15 June notice that starting times would be changed, Postmaster Whitley settled three grievances in the Tri-City office. Mr. Whitley agreed to Remedy #2 that states in relevant part:

> *Management violated Articles 15,17 and 31 of the National Agreement by failing to provide requested information to the union in this case.* ***Management agrees in the future that information will be provided*** *to the union within 72 hours of the information being requested unless the information is something that is not readily available. Any* ***information that is not readily available management shall supply the union an explanation as why it is not available and when the information will be available****. The reason for the delay must be a reasonable reason.* ***If said information requested does not exist management shall supply the union a written statement indicating that the information does not exist****.*
> [emphasis added]

Based on the clear and unambiguous language in this settlement, the agency agreed that in the future, which obligates management from that moment forward, it will supply requested information within 72 hours, or will provide the union with notice when it will be provided or will provide a written explanation why the information cannot be provided if it is unavailable. In my opinion, this settlement agreement is valid and may be cited and/or enforced by the union.

Once the start time change notice was posted on 15 June, the union exercised its right to request information from the postmaster that would demonstrate the basis for the decision to move the starting times by 30 minutes. The RFI was presented to the postmaster on 27 June requesting:

- *Any and all information management has relied upon to change the start time at the Tri-City Facility from 8:00 A.M. to 8: 30 A.M.*
- *DUT reports from last 3 months.*
- *Truck Schedules to drop of man in the A.M for last 3 months.*

Postmaster Whitley signed and accepted the RFI on 28 June.

Prior to the postmaster's acceptance of the RFI on 28 June the union renewed this request by email earlier on 28 June requesting:

- *Copy of truck schedules transporting mail to the Tri-City facility for the last 2 months*
- *Copy of DUT reports for last 2 months*
- *Reason why the carriers start time is changing from 8 A.M. to 8:30 A.M.*

The postmaster presented the union with ten pages of documents in mid-October of 2022, some three months after the union's RFI was submitted. Four of the ten documents presented were *Tri-City Daily Trip Logs*, five documents were *Mail Arrival Profile* reports, and one document was the *Distribution Up Time* (DUT) report.

Of the *Tri-City Daily Trip* documents submitted, only two of the four documents represented data before the starting time change, and of that, only ten specific dates were presented – not the two or three months requested. The five *Mail Arrival Profile* documents provided represented only five specific dates prior to the starting time change, and according to the testimony of the postmaster, these forms were not completed by management, but by clerks in the office. The

DUT document provided to the union referred to dates from 12 September 2022 through 21 October 2022 and provides no dates prior to the start time change.

According to the postmaster's testimony, the information he provided was "all he could find." It was undisputed that the information provided did not satisfy the union's RFI. It was also undisputed that the postmaster did not supply the union with an explanation why the remaining information requested was not available, nor did he supply the union with a written statement indicating that the information did not exist. These undisputed facts are inconsistent with the terms of the settlement agreements the postmaster signed in April of 2022 regarding information requests, and by extension Articles 17 and 31.

Therefore, regarding Issue Statement #2, management clearly violated Articles 15, 17 and 31 by failing to comply with its agreement to provide requested information in the future and properly respond to the union's information requests based on the terms of that valid agreement.

Regarding Issue Statement #1, I agree with most every other arbitrator cited by both the union and agency regarding management's right to change starting times. Absent a restriction in a *Local Memorandum of Understanding*, I agree that *Article 3 … gives the Postal Service a wide berth to manage its operations. Obviously, they must also be in compliance to the other Articles of the CBA. Briefly, it's their railroad and they can run it as they choose fit.*[1]

The union argued that the order to change the starting times was a blanket directive that came from higher management. This claim was based on a 10 June 2022 email contained in the case file from the Manager of Post Office Operation (MPOO) for the Illinois 2 District that read in part: *there is a plan to change all carriers start times to 8:30am. Please speak with your local stewards about this possibility happening in your unit.* While the text of this email created an understandable suspicion, there was no demonstration of fact that linked the starting time change to the MPOO's email, therefore this argument is rejected.

The union argued that starting letter carriers at 08:30 would subject them to working in the dark during the winter months, exposing them to additional dangers, thus modifying their "conditions of employment." Without a doubt when letter carriers are required to work outside in the dark, they

[1] Arbitrator Casciano - B19N-4B-C-23179960 – Marshfield MA – 28 September 2023

are subjected to additional dangers that are not present in daylight. To argue otherwise is a display of dishonesty or ignorance – perhaps both. However, working in the dark is not necessarily a "condition of employment" in this case. Conditions of employment are the rules, requirements, and policies an employer and employee agree to abide by during the employee's service to the company. They spell out the rights and obligations of each party. Conditions of employment are also known as terms of employment. I believe the union is confusing the conditions of an employee's working environment with the conditions of their employment.

The union at hearing next argued that management failed to "bargain in good faith" concerning the change in starting times, asserting this was the agency's obligation. While I can understand why it might be helpful to have had more transparency than was provided in this instance, I do not find this union argument persuasive in the least and agree with Arbitrator August in her finding in a similar case when she opined, [a] *review … established that Carriers were reporting too early and there was a need for change; this discretion is available to Management in their exclusive rights under Article 3. Additionally, while it would improve labor relations in any office to do so, there is no requirement to negotiate with the Union regarding the anticipated changes in reporting times.*[2] As such, I do not find merit in this union argument.

Handbook M-39, *Management of Delivery Services*, by way of Article 19 is the basis for the union's main argument. The relevant portion is in Section 122.1 *Establishing Schedules*, and the subsection 122.11, which states:

> *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.*

[2] Arbitrator August - C16N-4C-C 19003021 – Youngstown OH – 22 August 2021

The union argued only one element of this subsection is relevant to this dispute and that is element (*b*), that schedules should be fixed to coincide with the receipt of mail and that at least 80% of the carriers' daily mail to be cased should be on or at their cases when they report to work. The union attempted to demonstrate that 80% of the mail was at the carriers' cases by use of a questionnaire that asked if 80% of the mail was at their case when they arrived at 08:00 (Question #4). Universally, the answer to this question was "yes," but I am not convinced this is factually accurate, nor am I convinced that it is not. Two letter carrier witnesses were called and testified that shortly after arriving for duty they were told that "all the mail is up," meaning that all the mail for the day was distributed and ready to be cased or was ready for delivery. That seems to establish the union's position based on these carriers' personal observations, but it does not establish fact. This testimony was helpful, but not definitive in establishing a prima facie case against management's actions.

In my opinion, the information the union requested could have produced the answer to the question at hand, but the union was denied that information or even an explanation as to why it was unavailable, as was this arbitrator. The language in M-39, Section 122.11 indicates management must [c]***onsider*** *the following factors in establishing schedules.*

At this point, what is management's obligation when implementing the scheduling provisions of Handbook M-39, Section 122.1? The obligation clearly states that management must "consider" the six elements listed in Section 122.11, but what does that mean, to "consider"? Several distinguished arbitrators have very divergent views. For instance, Arbitrator Lawrence Roberts[3] found that "consider" serves more as a guideline, when he wrote:

> *But also, it's very clear the language of the M-39, Section 122 is not absolute. This entire Section is prefaced with the language ordering the Employer to only "Consider the following factors in establishing schedules." There is no language found in this entire Section that requires the Employer to do any of the following, lines a through g, instead, only to consider those specific points when determining Carrier schedules. It is my considered opinion that language provides a* ***recommendation rather than a mandate****.*
> [emphasis added]

Alternatively, Arbitrator Carlton Snow[4], opined in a **Regional** decision that:

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[3] Arbitrator Roberts - Cl6N-4C-C 18465190 – Orchard Park NY – 07 May 2019
[4] Arbitrator Snow – F98N-4F-C 02062648 – Rialto CA – 22 January 2003

> *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.* [emphasis added]

In my view, "consider" in the context of Section 122.11 is a guideline, but a guideline that requires more than a passing thought to say, "I considered it." It is a guideline that requires the decision maker to be able to demonstrate the facts that their consideration was based upon, if challenged. Without the ability to explain the consideration process with facts, then that section of the handbook is meaningless. In this instance, the union did challenge the postmaster's consideration process when it presented the RFI to the postmaster. Had the RFI been fulfilled it may well have shown that due consideration had been given and the starting time change was correct and necessary. Unfortunately, that ship sailed when the postmaster failed to provide the facts relied upon to support this decision to change the starting times in the Tri-City office.

As an aside, the union identified Arbitrator Carlton Snow as a National arbitrator and then cited one of his Regional awards, I can only assume, to attempt to add weight to the Regional award. While the late Mr. Snow was a well-known and highly respected National Arbitrator, he also served on several Regional arbitration panels. As such, notwithstanding his immense stature, he was a Regional arbitrator when he issued the union's referenced case and I'm sure even he would have blushed to be referred to as a National arbitrator when an advocate was referring to a particular Regional award he had issued.

At hearing, the postmaster testified that the change in starting time was based on his "observations" that mail was arriving late on the delivery trucks, and that the late arrival times caused the distribution of mail to the carriers to be pushed back causing letter carriers to "wait" for mail. If this was the case and could be demonstrated with sufficient facts to support his "observations," then the change in start time may well have been the correct decision to ensure the efficiency of the operation and reduce wasteful practices. However, as already noted, this information was lacking from the case file or testimony at hearing.

As stated earlier, a finding of a violation of Issue Statement #2 likely has a direct relationship to Issue Statement #1. As a contract case, the union bears the burden to prove its allegation. In this case, that burden is to prove that management violated *the National Agreement when they*

changed the carrier starting times for city letter carriers from 8:00 am to 8:30 am in the Tri-City Post Office.

However, when the postmaster failed to provide the requested information the union sought, he denied the parties the ability to see what considerations were made and how they supported his decision to change the letter carriers' starting times. In doing so, the postmaster took the voluntary action of shifting the burden of proof away from the union and placed it squarely upon the agency to demonstrate it had acted properly when that consideration process was challenged.

I am not convinced the start time change in this dispute was "wrong," and that is not to say that it was "correct" either. What I am convinced of, however, is that based on the limited testimony from the postmaster and the scant amount of supporting data he produced, that was in the case file, he did not prove that he gave due consideration to the obligations required in Handbook M-39, Section 122.11 b. As such, I find that management did violate Issue Statement #1.

Regarding remedy, the union asks that the letter carriers at the Tri-City office be returned to their original 08:00 starting time, that they be paid out-of-schedule pay for the entire period they have been changed to 08:30, and that the union receive compensation for management's failure to comply with its April 2022 grievance settlements regarding the information requests.

1.) The starting time for letter carriers in the Tri-City office will be returned to 08:00 beginning with the next Pay Period after the signing of this award. This remedy is granted.

2.) Regarding the request for out-of-schedule pay, the notice to change starting time was certainly well before the Wednesday prior to the schedule coming out for the week beginning 02 July 2022, therefore, proper advance notice was given regarding the weekly schedule requirements consistent with the provision found in Article 8. The notice also stated that the change was "until further notice." The union argued this phrase indicates that the change in starting time must be interpreted as being "temporary" otherwise it would have said the change was "permanent." The use of the phrase "until further notice" could have certainly been more precise and not the subject of unintended interpretations. However, if "further notice" is never given, then "further notice" is permanent. The postmaster testified that it was his intention that the starting time change be permanent.

Absent a definitive proof by the union that the change was intended to be temporary, I cannot agree with the union that the ambiguous phrase must be interpreted as "temporary." The request for out of schedule pay is denied.

3.) The union requests a compensatory award because the postmaster failed to comply with the April 2022 grievance settlements that required him to provide requested information in the future, and/or provide a written explanation for his inability to do so. In this case, the postmaster's failure to comply has been the basis for sustaining this grievance. In addition, the union did not provide any demonstration how a compensatory award would achieve, what I assume would be, the goal of compliance in the future. I am not opposed to a compensatory award and believe it is within an arbitrator's prerogative to issue one, but any request for a compensatory award must be substantiated with proof of demonstrable harm and how the requested compensation equals that demonstrable harm and achieves compliance. The request for a compensatory award is denied.

I retain jurisdiction of 60 days from issuance.