

NATIONAL ARBITRATION PANEL

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In the Matter of the Arbitration)
between)
)
UNITED STATES POSTAL SERVICE) USPS Case No.: Q18R-4Q-C 20298144
)
and)
)
NATIONAL RURAL LETTER) Class Action
CARRIERS ASSOCIATION) (COVID-19 Compensation Relief)
)
_____)

BEFORE: Margo R. Newman Arbitrator

APPEARANCES:

For the U.S. Postal Service: Erin Lynch, Syed Bokhari,
Lauren Weaver & Michelle Windmueller
Counsel

For the Union: Michael Gan, Mark Gisler, &
Jean- Marc Favreau
Counsel

Place of Hearing: Videoconference hearing
Dates of Hearing: March 16 & 17, 2022 and February 6, 2023
Briefs Received: May 12, 2023
Date of Award: June 27, 2023
Relevant Contract Provisions: Articles 9.2.A.1.t, 9.2.C.3.b, 15.4.D & 15.5.C
Contract Year: 2018-2021
Type of Grievance: Compensation issues

Award Summary:

The Postal Service violated Article 15.4.D by failing to timely submit its written position statement. Its attempt to add new arguments at the arbitration hearing is rejected, but its ability to defend its actions on the bases presented to the Union during the grievance procedure is upheld.

The remedy requested in the Union's grievance is denied. The Postal Service's refusal to pay overtime to regular rural carriers who, on average, consistently worked over their evaluations during the period of the pandemic due to the increase in parcel volume does not violate either Article 9.2.A.1.t or Article 9.2.C.3.b.

In accordance with Article 15.5.A, the Union is directed to pay 75% of the arbitrator's fees, and the Postal Service is directed to pay 25% of such fees.

A hearing was held by videoconference before the undersigned on March 16 & 17, 2022 and February 6, 2023, where the parties had the opportunity to examine and cross-examine witnesses, present documentary evidence, and make arguments in support of their respective positions. The hearing was transcribed. The parties filed post-hearing briefs which were received by the arbitrator on May 12, 2023. The parties stipulated that the arbitrator can frame the issues, hear and decide the merits of the grievance, and retain jurisdiction to deal with issues arising that concern the interpretation of the award and/or implementation of any remedial order.

ISSUES:

The parties state the issues in this case as follow:

The Union presents the following two issues:

1. Whether the Postal Service violated Article 15.4.D of the National Agreement by refusing to provide the Union with a timely statement in writing of its understanding of the issues involved and the facts giving rise to such issues. If so, what shall the remedy be?
2. Whether rural letter carriers who exceeded their route evaluations are entitled to additional compensation pursuant to Articles 9.2.A.1.t and/or 9.2.C.3.b of the National Agreement in light of the Postal Service's failure and/or refusal to provide suitable relief or appropriate compensation due to the unusual conditions caused by the COVID-19

pandemic, including significant increases in parcel volume and rural letter carriers working in excess of the evaluated time for their routes. If so, what shall the remedy be?

The Postal Service presents the following two issues:

1. Whether the Postal Service violated Article 15.4.D of the National Agreement by allegedly refusing to provide the NRLCA with a timely position statement, and should it be precluded from presenting a defense as a result of such action?
2. Whether Article 9.2.A.1.t and 9.2.C.3.b of the National Agreement required the Postal Service to compensate regular rural carriers at the overtime rate throughout the COVID-19 pandemic for all hours worked in excess of their route evaluation times, less any hours for which they already received overtime compensation?

In accord with the parties' stipulation, I frame the issues as follows:

1. Did the Postal Service violate Article 15.4.D of the National Agreement by failing to provide the Union with a timely statement in writing of its understanding of the issues involved and the facts giving rise to such issues? If so, what is the appropriate remedy?
2. Are rural letter carriers who exceeded their route evaluations entitled to additional compensation pursuant to Articles 9.2.A.1.t and/or 9.2.C.3.b of the National Agreement due to the unusual conditions caused by the COVID-19 pandemic, including significant increases in parcel volume and rural letter carriers working in excess of the evaluated time for their routes? If so, what is the appropriate remedy?

RELEVANT AGREEMENT PROVISIONS:

The following language of the 2018-2021 National Agreement is relevant to the instant dispute.

ARTICLE 9 - COMPENSATION, SALARIES, AND WAGES

* * * * *

Section 2. Compensation, Allowance, and Fees

A. Compensation Pursuant to the Fair Labor Standards Act (FLSA)

1. FLSA Section 7(b)(2)

It is desired by the parties that certain rural letter carriers shall be employed on an annual basis at a guaranteed annual wage and that such rural carriers shall not be required to actually work more than 2,240 hours during the guarantee period of fifty-two (52) consecutive week as specified below, pursuant to Section 7(b)(2) of the Fair Labor Standards Act, as amended. Therefore the parties agree as follows:

t. When permanent or longstanding route conditions, beyond the control of the rural carrier, cause, or are expected to cause, the rural carrier to exceed the evaluated hours of the route and to exceed the hours of the annual guarantee for the route, the Employer shall provide suitable relief or shall provide appropriate compensation for the actual hours worked in excess of the annual guarantee. Under such conditions, rural carriers shall not be expected to use leave in addition to that normally required to meet the route evaluation or guarantee requirements specified in the agreement.

* * * * *

C. Evaluated Compensation

3. Mail Counts

b. Whenever a carrier represents that certain unusual conditions or special services were not reflected in the latest evaluation, the evaluated time may be adjusted by an appropriate allowance as determined by the Employer. Such additional

allowance may be authorized only when the carrier's actual work time exceeds the current evaluated time for the route.

**ARTICLE 15 - GRIEVANCE AND ARBITRATION
PROCEDURE**

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Section 4. Grievance Procedure - General

D. National Level Grievance

It is agreed that in the event of a dispute between the Union and the Employer as to the interpretation of this Agreement, such dispute may be initiated as a grievance at the Step 4 level by the President of the Union. Such a grievance shall be initiated in writing and must specify in detail the facts giving rise to the dispute, the precise interpretive issues to be decided and the contention of the Union. Thereafter the parties shall meet at Step 4 within thirty (30) days in an effort to define the precise issues involved, develop all necessary facts, and reach agreement. Should they fail to agree, then, within fifteen (15) days of such meeting, each party shall provide the other with a statement in writing of its understanding of the issues involved, and the facts giving rise to such issues. In the event the parties have failed to reach agreement within sixty (60) days of the initiation of the grievance at Step 4, the Union then may appeal it to arbitration, within thirty (30) days thereafter.

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Section 5. Arbitration

C. National Arbitration

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Prior to the scheduled hearing, each party to the dispute may separately submit to the arbitrator who has been

assigned the case, and to the other party to the dispute, a statement setting forth the following:

- a. The facts relevant to the grievance;
- b. The issue in the case; and
- c. The position(s) or contention(s) of the party submitting the statement.

RELEVANT FACTS/BACKGROUND:

The substantive issue in this case involves the impact of the increase in parcels during the COVID-19 pandemic on the unique evaluated compensation system for rural carriers set forth in Article 9.2.A&C of the National Agreement. Article 9.2.A.1 explains that, under Fair Labor Standards Act (FLSA) Section 7(b)(2), regular rural carriers are employed on an annual basis at a guaranteed annual salary, and are not permitted to actually work more than 2240 hours during the 52 consecutive week guarantee period. They receive overtime compensation for all hours actually worked over 12 hours/day, 56 hours/week, and 2080 hours/52 consecutive weeks (guarantee period), as well as the three week negotiated period prior to Christmas each year (Article 9.2.K). Any overtime paid for such work is not counted in calculating the annual wage guarantee. Evaluated route overtime pay is already included in the calculation of the guaranteed annual salary for a particular route, which a rural carrier receives regardless of whether s/he works under or over the evaluated hours for the route in any given week or pay period. The evaluated compensation system is incentive based, and presumes normal fluctuations in mail.

Arbitrator Dana Eischen explained the manner of pay for rural carriers in *USPS and NRLCA (2002 Mail Count)*, Case Nos. Q95R-4Q-C 02101253 & 02101267 (2006) at pp. 22-24:

The evaluated pay system established by USPS and NRLCA is unique in the Postal Service, in that rural carriers are not paid for

an eight-hour day. Rather, each rural carrier is paid a particular annual salary at a point on a sliding scale of "Evaluated Hours" arrived at through mathematical conversion from the "Standard Hours" (total hours and minutes per week) s/he expends casing and delivering the mail, as recorded by postal managers during a National Mail Count ("NMC") of the particular rural route to which s/he is assigned. Thus, the rural carrier evaluated pay system takes into account the myriad differences and idiosyncracies [sic.] among rural routes and between post offices providing rural mail delivery, e.g., mail volume, number of boxes, logistics, demography, geography, etc.

* * * * *

It should also be noted that once an evaluated salary is established for the route, a rural carrier is paid that same salary every pay period until the route is again evaluated, regardless of whether the daily, weekly or monthly workload for that particular route is above or below the standard hours measured during the governing NMC. In short, irrespective of whether rural route casing and delivery takes less time or more time on any given day to day, week to week, or month to month, the rural carrier is paid on the basis of the annual salary set by the results of the most recent NMC of that particular route.

* * * * *

The National Mail Count ("NMC") is a real-time process of Postal Service managers and supervisors physically counting, timing, measuring, and recording some 32 different "elements" of rural route job functions performed by the rural carrier during a representative two to four week period. Some of the job elements are measured by a simple whole number count of how many times an action is performed, others are measured by the actual amount of time expended performing the action, others are measured by size or dimension of "mail piece" objects and some are assigned a previously negotiated time value for each occurrence. At the conclusion of the rural mail count period, the data for each route are assembled, various formulae are applied and the route value for pay purposes is determined by calculations utilizing the standard allowances and actual time credits. Thus, each of the 32 mail count elements is converted into seconds, minutes, and hours from which the "Standard Hours" for an individual route are converted to "Evaluated Hours"; using formulae negotiated

between the Postal Service and the NRLCA. This process eventually produces the salary for each rural route, in accordance with the graduated salary schedule ("Table of Evaluated Hours for Rural Routes") set forth in Article 9.2.C.6 of the National Agreement.

The Evaluated Compensation System (ECS) was replaced by an engineered Rural Route Evaluated Compensation System (RRECS) as a result of an interest arbitration award issued in 2012. RRECS is a dynamic system with a new set of standards or allowances that were developed by a panel during an ECS standards project study that had been ongoing for years. The new system was anticipated to give a better representation of elements involved in the work of rural carriers as it was designed to automatically take into account the type of unusual conditions and spikes in volumes that were annually calculated during the NMC.

Although the last NMC was conducted in February and March, 2018, due to the projected implementation of RRECS in early 2020, the parties mutually agreed to hold off on conducting another mail count. In February, 2020 the rollout of RRECS in Memphis, Tennessee began. On March 11, 2020 the World Health Organization (WHO) declared a worldwide pandemic. On March 13, 2020, President Donald Trump declared COVID-19 a National Emergency. Due to the COVID-19 pandemic, the Postal Service stopped working on the implementation of RRECS in order to focus on safety and logistics as the USPS was identified as an essential service. RRECS was not implemented until May 6, 2023. The instant grievance encompasses the time period between the onset of the pandemic in March, 2020 and the implementation of RRECS on May 6, 2023.

At the beginning of the pandemic, the Union began hearing anecdotal concerns from rural carriers regarding the large increase in package volume at the same time the news and other media reported on drastic changes to online shopping habits because of

lockdowns and fears of going into stores. Changes to the types and amounts of mail were noted quickly, as was concern for increase in workload for letter carriers.

Michael Milligan, Director of Strategic Business and Financial Planning, manages a group that tracks USPS volume and revenue to forecast USPS income and expenses. Milligan prepared a presentation for this arbitration in March of 2022, containing data for USPS Mail Volume from fiscal year (FY) 2017 through FY 2021. The data differentiates mail as small and flat letters, postcards, flats, magazines, and packages that have three dimensions - height, width and depth. The data is based on actual, observed numbers of items as opposed to estimates and covers some trends from before COVID as well as the impact of COVID on total mail and package volume. While mail volume is simply a count of how many pieces or items are received, it does not reflect workload differences that go into each product. In analyzing overall workload, the USPS uses a measurement called weighted volume. The USPS uses the weighted volume to take into account that each piece of mail requires a different amount of work and a different cost for the Postal Service and its employees. Weighted mail volume has much more of an impact on delivery and mail handling.

The data indicates that the overall trend shows a decrease in letter/marketing mail and an increase in package volume as people purchased more and more online. The pie charts created by Milligan show a 50 percent increase in share of packages (from 4% to 6%) as a measure of contribution to the system Postal Service-wide, not rural carrier specific. Milligan suggested that, although he is not an expert in the rural carrier evaluation system, if letter mail volume stayed the same and packages increased, the workload would be higher for the USPS. The charts presented showed that in FY 2017-2019, shipping and packages constituted 4% of the total volume (measured in millions of pieces), while first class mail was 39%, and marketing mail was 53%. In both

FY 2020 and 2021, the package volume increased to 6%, while marketing mail decreased to 49 and 51% respectively, and first class mail measured 41 and 39% respectively. The charts also reveal an increase in the volume of domestic shipping and packages from 6,149 million pieces in FY 2019 to 7,579 in FY 2021. The lowest post-pandemic package volume is higher than the highest pre-pandemic volume, excluding the Christmas overtime period. While the average number of regular carriers with work hours recorded to a route remained around 64,000 from FY 2019-2021¹, the percentage exceeding their annual guarantee and route evaluation went from .03% to .23%.

Without the implementation of RRECS, the evaluated route hours used in the pay scale for rural carriers throughout the pandemic was based on the 2018 NMC. Package delivery for rural carriers was estimated at about 13% of the overall time on a weekly evaluation. Under the ECS, rural carriers received a maximum of 48 seconds credit for delivering packages versus a standard of one minute for every 28 letters (or about three seconds per letter). The more precise engineered standards under RRECS establish a maximum time of two minutes and fifty seconds per parcel - over two minutes more than the standard used in the NMC.

Postal Service officials were having daily conversations about the pandemic and necessary responses. Discussions were also taking place with its various unions about providing personal protective equipment (PPE), modifications to the work environment to comply with COVID guidelines, staffing shortages, sick leave and dependent care leave, illness and death, resulting in a lack of sufficient manpower. Postal Service Director of NRLCA Contract Administration, Cathy Perron, and NRLCA Director of Labor Relations, David Heather, and President Ronnie Stutts, began having calls and

¹ At the time of the 2018 NMC, the number of routes was recorded as 67,734. Commencing on Pay Period (PP) 6, week 1 of 2020 (2/29/20), and continuing through PP 26, week 2 of 2021 (12/11/21), the number of routes is listed as around 80,000. There was no direct evidence explaining this change.

virtual meetings at least once or twice a week, as well as more frequent email communication, regarding various issues involving rural mail service during the pandemic. The Union communicated frequent reports from the field of the toll the staffing shortages and increased packages were having on rural carrier workload. A suggestion of conducting a new mail count to properly capture the change in volume was discussed in an April 9, 2020 telephone call, and numerous times thereafter. The Union continued to express its concerns about the effect of the increase in package volume on rural carriers' workload and evaluated route times.

Three Memoranda of Understanding (MOU) were signed between the NRLCA and USPS to address the staffing shortages and other COVID-related concerns. One MOU was signed on March 26, 2020 regarding Temporary Expanded Scheduling of Assistant Rural Carriers (ARCs), who are hired to provide weekend and holiday service, and were being permitted to volunteer to work on routes during the week. Another MOU was signed on April 8, 2020, permitting regular rural carriers to volunteer to work on Sundays and provide assistance on other rural routes at the overtime rate of pay. The third MOU was signed on April 15, 2020 regarding Temporary Workplace Changes to Promote Social Distancing due to COVID-19, including staggering start times.

In an April 28, 2020 telecom meeting, updates were provided by the Postal Service including package volume increases and first class mail and marketing mail decreases. Package volume was up 50% over the same time the year prior and package increases were at 70-75% of peak volume. Increases in Amazon and UPS drops were up, indicating that rural carriers were responsible for the final step of delivery of packages from those companies as well. Data was conveyed showing letter mail volume was down 30% over the same pay period of the prior year and marketing mail volume was down 44-50%. Shortly thereafter, there was another discussion about a possible September 2020 mail

count and suggestions of standards to address the increase in packages for rural carriers. USPS expressed its belief that increased workload over evaluation was a more location specific issue and not Service-wide. After the call on May 7, the Union submitted a Request for Information (RFI) seeking information on whether carriers were working over their evaluation times on a wide-spread basis due to the recent increase in package volumes brought on by the pandemic. An additional RFI was submitted the next week to get more specific information.

On May 20, 2020, the Union sent a proposed Draft MOU to the Postal Service regarding assistance for rural carriers with increased packages. The Union's proposed MOU called for managers to make every effort to utilize auxiliary assistance to ensure that regular rural carrier's actual weekly work hours on their assigned route do not exceed the weekly paid evaluated hours of the route. It provides that if a carrier's actual work hours exceed his/her evaluated hours during the week, s/he would receive overtime compensation in a manner similar to what occurs in the Christmastime exception period set out in Article 9.2.K. The Christmas period had been the only exception to the evaluated system for decades. During this three-week period every year, if the rural carriers happen to work more hours than their evaluation (or over 40 hours/week), they would be compensated for the additional hours, and all hours over 40 per week would be paid at the overtime rate. The Christmastime allowance was negotiated in anticipation of the usual increase in packages during that time period.

Perron explained that the Postal Service was working to provide auxiliary assistance as available, but with the staffing shortages being experienced due to COVID, there were insufficient resources to provide what was needed. She testified that there were discussions concerning the Union's proposed MOU, but the Postal Service felt that there was no reason to pay overtime. The Union filed the instant Step 4 grievance on June

18, 2020, and the parties met to discuss it on July 17 and 31, 2020. The Union sent its position statement on August 6, 2020, explaining why it believed that the situation fell within the parameters of Articles 9.2.A.1.t and 9.2.C.3.b, and setting forth a request for relief similar to that contained in its proposed MOU.² On at least 10 occasions subsequent to this time, the Union requested the Postal Service to submit its written denial so that it could understand its position, and despite assurances from Perron that they were working on it, the Union had not received anything in writing at the time its Board authorized it to appeal the grievance to arbitration, which occurred on February 17, 2021. Heather explained that this is the first case the Union has had to appeal to arbitration without a written denial or position statement from the Postal Service.

Heather testified that the two provisions the Union relies upon to support its grievance are safety valves for the evaluated compensation system. He described what occurred - the exponential increase in parcels caused by the pandemic coupled with no mail count since early 2018 - as a “perfect storm,” and an unprecedented situation designed to be encompassed within the cited provisions. In their meetings, Heather stated the Union’s belief that the changes brought about by the pandemic are “permanent or longstanding route conditions” beyond the control of the rural carrier, and that Article 9.2.A.1.t requires the Postal Service to provide suitable relief or appropriate compensation. He took the position that what occurred was an “unusual condition” not reflected in the latest evaluation, falling within the parameters of Article 9.2.C.3.b, and necessitating an appropriate allowance to further compensate affected rural carriers.

Perron testified that the Union’s grievance is based on provisions never relied upon, or interpreted nationally, and that she vocalized the Postal Service’s position that

² The Union’s grievance specifically requests compensation according to Article 9.2.K. The remedial request also includes not (1) requiring rural carriers to use leave in addition to what is normally required; (2) precluding rural carriers from working relief days; (3) precluding rural carriers from selecting the high option; and (4) adjusting routes due to excess work hours.

“longstanding route conditions” mentioned in Article 9.2.A.1.t refers to the physical characteristics of a route changing. She stated that “suitable relief” means auxiliary assistance and route adjustment, and that paying “appropriate compensation” refers to FLSA situations set out in the Agreement. Perron explained that Article 9.2.C.3.b is discretionary, permitting the Postal Service to adjust a route by an allowance if it determines there is a need. She testified that she made clear to Heather during their discussions that neither provision contemplates the payment of overtime for exceeding evaluated hours.

Perron admitted that the pandemic itself was an unusual condition, acknowledged that the Union’s grievance was not frivolous, and explained that the Postal Service had no ill intent by not giving a written denial, but was only trying to continue talking with the hope of reaching a resolution. Heather made clear that what the Union was seeking from the start was sufficient auxiliary assistance or route adjustments, and another NMC in September 2020, to more accurately reflect the work performed and required on each route. He noted that the Union’s remedy, including monetary overtime payments, has evolved over time with updated data provided by the Postal Service. Heather explained that the Union was only seeking monetary compensation (at the overtime rate) for those specific rural carriers who exceeded their evaluated hours on a regular basis during the noted three year time period, and that it appeared that there were fewer than 6000 individuals who fell within that category, 2/3 of whom averaged less than 2 unpaid hours per week.³

Between the appeal of the grievance to arbitration on February 17, 2021, and the commencement of the hearing before me on March 16, 2022, there were four separate

³ The Union used the information received from the Postal Service over time to create a spreadsheet of all rural carriers and their work hours in relation to their evaluated hours. That document was submitted as an exhibit to explain which rural carriers would be covered by the Union’s requested monetary remedy.

arbitration hearing dates scheduled - July 8, 2021, September 9, 2021, October 7, 2021 and January 27, 2022 - that were cancelled either by mutual agreement or request of the USPS or the arbitrator. It was not until February 18, 2022 that the Postal Service sent the Union a written statement of its understanding of the facts and issues of the case. That document was not placed into the record. By letter dated February 24, 2022, the Union objected to the correspondence as untimely filed under Article 15.4.D, indicating that it would object to the admission of the letter or its contents at the arbitration hearing. By letter dated March 8, 2022, the Postal Service sent to me its written statement of position concerning the underlying issues in this case. At the arbitration hearing, the Union objected to the receipt of this document, arguing that the Postal Service waived its right to defend against the grievance by its untimely submission.

PARTIES' POSITIONS:

The Union initially argues that the Postal Service waived its right to assert its position by failing to respond to the grievance. It notes that the general policy of Article 15, that grievances are to be resolved at the lowest level insuring all facts and issues are identified and considered, expressly requires good faith observance of these principles. The Union points out that Article 15.4.D mandates that each party shall provide the other with a written statement of the issues and facts within 15 days of the Step 4 meeting, if they fail to resolve the case at that time. It contends that timelines can only be extended by mutual agreement, which did not exist in this case, as evidenced by its 10 separate requests for a denial and the fact that it had to file its appeal without one. The Union argues that failure to meet these contractual timelines constitutes a waiver of the Postal Service's position in the grievance procedure, relying on USPS Case Nos. H8N-5L-C 10418 (Mittenthal, 1981) and H8N-5B-C 17682 (Aaron, 1983). It posits that the

arbitrator must provide a remedy to uphold the process of full disclosure within the grievance procedure agreed to by the parties, which is not a mere technicality.

With respect to the merits, the Union argues that the increase in parcels during the COVID-19 pandemic warranted auxiliary assistance or additional compensation under Article 9. It maintains that Articles 9.2.A.1.t and 9.2.C.3.b are safety valves created by the parties in recognition of times when unexpected, uncontrollable events will warrant adjusting the evaluation set by the prior mail count. The Union claims that the pandemic-related parcel increase falls within these parameters.

The Union alleges that the “suitable relief or appropriate compensation” for long-standing route conditions contained in Article 9.2.A.1.t encompasses circumstances affecting rural carrier’s evaluated working hours through no fault of the carrier, and is not limited to the physical characteristics of the route, but can include exponential increases in volume or a pandemic. It submits that other examples relied upon by the Postal Service are covered by different provisions of the Agreement, such as Temporary Route Deviations under Articles 9.2.B.4 and 9.2.C.13, and Route Reassessment under Article 30.1.E. The Union believes that the pandemic met the requirements of a longstanding condition beyond the control of the carrier, that caused him/her to exceed the evaluated hours. It notes that the rural carrier cannot be forced to use leave, etc. to deal with this type of longstanding route condition. The Union argues that “suitable relief” could have been auxiliary assistance, which it had continually asked for, but that, at this point in time, it is too late for that type of remedy, and that compensation is now required.

The Union submits that the increase in parcels caused by the pandemic was an “unusual condition” not reflected in the latest evaluation, requiring an adjustment by an appropriate allowance under Article 9.2.C.3.b, which was one of the available options open to the Postal Service, but not chosen by them. It insists that the Postal Service also

could have conducted another mail count in September, 2020 and/or 2021, which would have taken into account the effect of at least a year and a half of pandemic-related significant parcel volume increases, which created significant additional work causing many rural carriers to exceed their evaluated hours. The Union points out that the pandemic was longstanding, covering over a three year period between March, 2020 and April, 2023, and that the increase in work was beyond the control of the rural carriers, a situation falling squarely within the the coverage of Article 9.2.C.3.b.

The Union argues that the Postal Service violated both of the cited provisions by not providing suitable relief or adjusting route evaluations, despite the Union's continual efforts to get it to take action. It contends that the monetary remedy requested is reasonable, and encompasses all rural carriers who worked over their evaluated hours from February 29, 2020 through the implementation of RRECS, and provides for overtime pay for average weekly hours worked over the evaluated hours, less overtime already received, plus interest. The Union also requests that the Postal Service make whole all employees required to use leave, precluded from working relief day hours, or selecting/maintaining the high option. It insists that such remedy is consistent with Articles 9.2.A.1.t and 9.2.C.3.b, and is necessitated by the Postal Service's failure to take action despite repeated opportunities to do so, and the Union working with it to alleviate issues. The Union contends that the remedy is narrowly tailored to reach only those rural carriers who regularly worked over their evaluations on a long term basis, and amounts to less than one-half of 1% of the total hours paid to rural carriers.

The Postal Service contends that the arbitrator must consider its defense notwithstanding the Union's allegation of untimeliness. It states that there is nothing in Article 15.4.D that precludes this, noting that failure to meet the 15 day timeline does not entitle the Union to a summary award sustaining the grievance on its merits, citing USPS

Case Nos. H0C-NA-C 21 (Das, 2002); Q00V-4Q-C 06231177 (Goldberg, 2015). The Postal Service reasons that there was no surprise or prejudice to the Union concerning its understanding of the Postal Service's positions, which were fully discussed between the parties during their meetings. It maintains that it followed the same "gentleman's agreement" that has been historical practice between the parties in Step 4 grievances - that timelines are not followed and that there are open-ended and continuous discussions in an attempt to resolve the issue - noting that a denial was not issued since there were ongoing settlement negotiations. The Postal Service notes that the Union itself did not adhere to the timelines in moving the case to arbitration, and that it granted the Union's request for priority scheduling of the case as an exception to Article 15.5.C, which also permits the filing of position statements prior to the scheduled hearing.

Additionally, the Postal Service claims that the Union waived its timeliness argument. It points out that the grievance was filed on June 18, 2020, but the Union did not raise any timeliness objection until February 24, 2022, a year after filing its appeal to arbitration (which itself did not raise timeliness), and three weeks before the scheduled hearing. The Postal Service argues that the Union's failure to raise its timeliness objection earlier constitutes a waiver, relying on USPS Case Nos. H8T-5C-C 11160 (Aaron, 1982) and Q87M-4Q-C 99008684 (Das, 2013).

As to the merits, the Postal Service contends that nothing in the National Agreement supports the Union's grievance. It asserts that Article 9.2.A.1.t does not provide a basis for its proposed remedy, since the Union failed to prove that increased parcel volume during the pandemic was a "permanent or longstanding route condition," which refers to the physical characteristics of a route, such as a destroyed bridge. The Postal Service also maintains that the Union did not satisfy its burden of proving that increased parcel volumes during the pandemic caused rural carriers to exceed their

evaluations or annual guarantee, a required causation element of Article 9.2.A.1.t. It claims that the agreed exhibits prove that the average percentage of rural carriers exceeding their evaluated hours, and the average number of hours by which they exceeded them, remained consistent before and during the pandemic. The Postal Service notes that the Union did not show that any increase in hours worked was the result of an increase in parcel volume.

Additionally, the Postal Service insists that the Union's proposed remedy is not properly considered "suitable relief" or "appropriate compensation" under Article 9.2.A.1.t. It notes that it agreed to expand the use of ARCs to provide auxiliary assistance, and that suitable relief is typically a route or territorial adjustment. The Postal Service argues that the measurement of appropriate compensation provides overtime for the hours which the rural carrier exceeds his/her annual guarantee of 2080 hours, not the hours worked in excess of the evaluated route, which is what the Union seeks in this case.

The Postal Service argues that Article 9.2.C.3.b does not provide a basis for the Union's remedy, since the language "may be adjusted" gives it discretion to adjust the route by an appropriate allowance as determined solely by the Postal Service, and does not obligate it to make any adjustment. It also points out that Article 9.2.C.3.b does not provide for overtime compensation as a remedy, which would only apply for exceeding the annual guarantee under the ECS and FLSA Section 7(b)(2). The Postal Service posits that the only remedy in this provision is making a route adjustment, not overtime compensation. Finally, the Postal Service asserts that the Union cannot use arbitration to achieve a remedy demand the Postal Service did not agree to in the proposed MOU, which is inconsistent with the ECS and National Agreement. It requests that the grievance be denied.

DISCUSSION AND FINDINGS:

As noted above, there are two separate issues raised in this case. The first is a procedural issue involving the interpretation of Article 15.4.D, and the effect of the Postal Service's failure to meet the time limits for submitting its written position statement containing the facts and issues being relied upon. The second issue involves an interpretation of Articles 9.2.A.1.t and 9.2.C.3.b, in the context of changed circumstances resulting from the COVID-19 pandemic. I will address each issue in turn.

The pertinent part of Article 15.4.D, National Level grievance, states:

.....the parties shall meet at Step 4 within thirty (30) days in an effort to define the precise issues involved, develop all necessary facts, and reach agreement. Should they fail to agree, then, within fifteen (15) days of such meeting, each party shall provide the other with a statement in writing of its understanding of the issues involved, and the facts giving rise to such issues. In the event the parties have failed to reach agreement within sixty (60) days of the initiation of the grievance at Step 4, the Union then may appeal it to arbitration, within thirty (30) days thereafter.

The grievance was filed on June 18, 2020, and the parties first met to discuss it on July 17, 2020. They met again on July 31, and the Union filed its position statement on August 6, 2020. From that time forward, including virtual meetings and email correspondence, the Union requested a written denial or position statement from the Postal Service on 10 separate occasions prior to filing its appeal to arbitration on February 17, 2021. Four prior arbitration hearing dates were scheduled on July 8, September 9, October 17, 2021, and January 27, 2022, and all were cancelled. It appears that the Postal Service sent the Union a letter dated February 18, 2022 setting forth its position, a document not found in the record, and the Union responded, objecting to the lateness of this statement on February 24, 2022. The only written position statement in

the record that was filed by the Postal Service with the arbitrator is dated March 8, 2022, 8 days before the commencement of this hearing on March 16, 2022.

The Union's argument is that, since the Postal Service did not comply with the time limits for submitting its position statement contained in Article 15.4.D, it is foreclosed from relying on the March 8, 2022 statement, or the contents therein, in defending this case. There is no doubt that the Postal Service did not meet the contractual 15 day time limit from the date of the Step 4 meeting, even if the parties can be considered to have continued to meet at Step 4 numerous times after July 31, 2020. The Union's repeated requests for a denial and/or written position statement reveals that it did not mutually agree to an extension of this time period. In fact, the Union was forced to appeal the case to arbitration without the benefit of the Postal Service's written statement, a situation described as unprecedented. Thus, a technical violation of Article 15.4.D has occurred in this case.

Article 15.4.B states that the failure of the Union to meet its prescribed time limits in the underlying steps of the grievance procedure, including arbitration, shall be considered as a waiver of the grievance. Section 15.4.C states that the failure of the Employer to render a timely decision in any of the steps shall be deemed to move the grievance to the next step in the procedure. Thus, although a violation of the Agreement normally requires a remedy, as the Union argues, the remedy it requests is a waiver of the right of the Postal Service to defend the grievance in its entirety, which is not provided for in the agreed language of the parties. Nowhere does Article 15 provide that the absence of a Postal Service response or written position statement results in a waiver of its ability to present evidence at an arbitration hearing.⁴ See, e.g. *Das* award.

⁴ I note that the Postal Service's untimely grievance response sent to the Union on February 18, 2022, and to which the Union objected, was not included in the record. Article 15.5.C permits the Postal Service to submit its position statement to the arbitrator prior the the hearing, which it did on March 8, 2022.

The cases relied upon by the Union do support the proposition that either party is precluded from introducing new evidence or arguments in arbitration that were not previously discussed between the parties or brought forward in the grievance procedure. See, e.g. *Aaron & Mittenthal* awards. Thus, if the Postal Service's late filed position statement, or its attempted arguments at the hearing can be considered new, e.g. not brought forward in the grievance procedure, then it is precluded from relying on those arguments.

The record reveals that, during the discussions with the Union, the Postal Service argued that what occurred with the pandemic was not a longstanding route condition as contemplated by Article 9.2.A.1.t, which refers to the physical characteristics of a route changing, and that any route adjustment under Article 9.2.C.3.b for an unusual condition or special service not reflected in the latest evaluation is discretionary. The Postal Service made clear to the Union its belief that neither provision supported the payment of overtime compensation for work performed over the route evaluation. These arguments constitute the substantive position of the Postal Service brought forth in the grievance procedure, and cannot be considered new evidence or argument. The Union was not surprised by these arguments, and was prepared to meet and defend them. See, e.g. *Goldberg* award.

However, the Postal Service also attempted to argue, both at the hearing and in its post-hearing brief, that the Union's appeal to arbitration in this case was untimely under Article 15.4.D, and therefore was procedurally defective. This argument was not raised at any time during the grievance procedure or in the Postal Service's March 8, 2022 written statement of facts and issues submitted to me. Thus, I consider the Postal Service's procedural objection to be untimely raised and I am precluded from its consideration in

this case. See, a.g. *Aaron* award. This is also true of any reference to a past practice of the parties with respect to enforcing timelines in national arbitrations.

The second issue involves an interpretation of Articles 9.2.A.1.t and 9.2.C.3.b to see if they support the Union's grievance and remedy request. The underlying premise of the grievance is that the increase in parcel volume due to the COVID-19 pandemic, coupled with the absence of an annual mail count after 2018, led to many more rural carriers regularly working in excess of their evaluated route hours without additional compensation. It asserts that such a "perfect storm" - which occurred through no fault of the carrier, could not have been anticipated, and lasted for about a 3 year period - constitutes a "permanent or longstanding route condition" under Article 9.2.A.1.t as well as an "unusual condition or special service not reflected in the latest evaluation" under Article 9.2.C.3.b. On the other hand, the Postal Service states that "route conditions" under Article 9.2.A.1.t refers to certain physical characteristics of a route, and that fluctuations in mail volume do not constitute route conditions. It also contends that increased parcel volume does not constitute a "special service" or an "unusual condition" contemplated by Article 9.2.C.3.b, which would only permit route specific adjustments, not a service-wide remedy.

Neither of these provisions has been interpreted on a national level. There can be no question that the COVID-19 pandemic was an unusual condition, which was neither reflected in the latest evaluation, nor of short duration. A three year period of a substantial increase in the number of parcels caused by the pandemic, when coupled with the absence of a NMC reflecting the increase, can certainly be considered a "longstanding route condition beyond the control of the rural carrier" which is expected to cause the rural carrier to exceed the evaluated hours of the route. Article 9.2.A.1.t does not, by its terms, limit its coverage to only physical route conditions.

However, it does specifically state that the longstanding route condition causes, or is expected to cause, the rural carrier to exceed the evaluated hours of the route “and to exceed the hours of the annual guarantee for the route.” The remedy requested in this case is focused on those rural carriers who exceeded their evaluated hours on a regular basis, but does not include those hours worked in excess of their annual guarantee of 2080, since it is agreed that hours worked in excess of 2080 are required to be paid at the overtime rate under the FLSA. The Union’s remedy request in this case seeks overtime pay for those rural carriers who exceeded their evaluated hours, but does not include hours worked over the annual guarantee, which have already been compensated at the overtime rate. The language of Article 9.2.A.1.t directs the Employer to provide suitable relief or “appropriate compensation for the actual hours worked in excess of the annual guarantee.” Overtime compensation for the hours actually worked in excess of the evaluated hours of the route, but not in excess of the annual guarantee, is not a remedy contemplated by the language of Article 9.2.A.1.t.

I also conclude that the situation presented in this case constitutes an “unusual condition... not reflected in the latest evaluation,” and thus falls within the language of Article 9.2.C.3.b. As noted by the Postal Service, its obligation under that provision is discretionary, and involves an adjustment to the evaluated time of a route by an appropriate allowance. Under Article 9.2.C.3.b, any additional allowance determined by the Postal Service to be appropriate does apply to the situation where a rural carrier’s actual work time exceeds the current evaluated time for the route. This is what is being sought by the Union herein in the form of overtime compensation. However, while the Postal Service could have adjusted evaluated time by determining an appropriate allowance for a particular route, it was within its rights not to do so. Unlike the language of Article 9.2.A.1.t, the Employer’s obligation under Article 9.2.C.3.b is not mandatory, and is solely at the discretion of the Postal Service. That provision does not support the

Union's requested remedy of overtime compensation for the average actual hours worked by specific rural carriers over their evaluations.

The parties specifically negotiated Article 9.2.K, the Christmas Allowances and Procedures provision, as an exception to the ECS, to ensure that the additional work anticipated to occur due to the pre-Christmas period increase in parcels resulted in additional compensation to the rural carriers. The fact that Article 9.2.K exists to provide this monetary protection supports the conclusion that additional monetary compensation was discretionary, and could not have been mandated solely by reliance on either Article 9.2.A.1.t or Article 9.2.C.3.b. While these provisions could provide a basis for the granting of additional compensation and/or allowances, the agreed-upon language does not require the Postal Service to take such action in situations where a rural carrier works over his/her evaluation, but less than 12 hours/day, 56 hours/week or 2080 hours/52 consecutive week period.

As noted by the Postal Service, the Union cannot use arbitration to achieve what it could not get through negotiation of its proposed MOU. Article 15.5.A makes clear that decisions of an arbitrator are limited to the terms and provisions of the Agreement which cannot be altered, amended or modified by the arbitrator.

Therefore, although I agree with the Union, that the perfect storm created by the increase in package volume and the absence of a NMC since 2018 could possibly fall within the parameters of Articles 9.2.A.1.t and 9.2.C.3.b, I am unable to conclude that those provisions support the requested remedy of overtime compensation for those rural carriers whose average actual work hours exceeded their route evaluations on a consistent

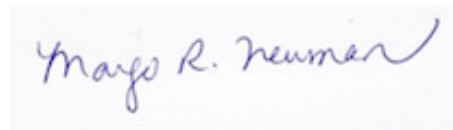
basis during the pandemic period, but who worked less than the annual guarantee.⁵ While the Postal Service was free to make appropriate route adjustments or allowances, its failure to do so in the circumstances of this case does not violate the cited provisions of the Agreement.⁶

AWARD:

The Postal Service violated Article 15.4.D by failing to timely submit its written position statement. Its attempt to add new arguments at the arbitration hearing is rejected, but its ability to defend its actions on the bases presented to the Union during the grievance procedure is upheld.

The remedy requested in the Union's grievance is denied. The Postal Service's refusal to pay overtime to regular rural carriers who, on average, consistently worked over their evaluations during the period of the pandemic due to the increase in parcel volume does not violate either Article 9.2.A.1.t or Article 9.2.C.3.b.

In accordance with Article 15.5.A, the Union is directed to pay 75% of the arbitrator's fees, and the Postal Service is directed to pay 25% of the such fees.



Margo R. Newman, Arbitrator

⁵ The information placed into the record focused on the entitlement to overtime compensation, and did not address whether any of the rural carriers the Union identified as prospective remedy recipients had been subject to the additional conditions identified in the Union's grievance, e.g. use of leave, relief day work, selection of high option, etc.

⁶ Based upon these findings, I need not address the Postal Service's questioning of the adequacy of the Union's proof of causation or a link between the parcel increase and the hours worked by rural carriers over their route evaluations.