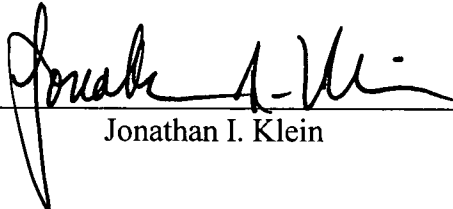


AWARD SUMMARY

The issue presented is answered in the affirmative. Management is directed to cease and desist from failing to schedule known vacancies in advance with known replacements in violation §126.3 of the M-39 Handbook. Management shall cease and desist from using "pivot" or "OTDL" on the Form 3997, Unit Daily Report, in place of or in lieu of known vacancies. This directive does not apply to unscheduled absences. No monetary award is warranted.


Jonathan I. Klein

STATEMENT OF ISSUE¹

The parties stipulated that the issue presented was set forth by the Step B team in its decision to impose the grievance on November 18, 2005:

Was there a violation of Article 19 of the National Agreement, Handbook M-39 Management of Delivery Services, when management failed to schedule vacancies in advance? And if so, what is the appropriate remedy?

STATEMENT OF FACTS

This grievance was filed August 15, 2005, alleging that during the period of August 6 through August 12, 2005, management violated Section 126.3 of the Handbook M-39,

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1. The parties agreed to make this grievance a representative case for approximately 22 pending grievances. (Joint Ex. 10).

Management of Delivery Services, by failing to schedule known vacancies. Instead, management filled the vacancies by pivoting, or resorting to the OTDL. In opposition, management asserted that Section 126.3 is purely instructional, "suggestive for the daily office procedures, for management, on a day by day basis," and "that pivoting by carriers with undertime in the office and the OTDL carriers scheduled on any give day satisfies the definition of a scheduled replacement." (Joint Ex. 2 at 15). The grievance proceeded through the grievance procedure to impasse by the Step B team on November 18, 2005, and was subsequently appealed to arbitration.

As part of the twelve joint exhibits agreed upon by the parties at hearing, there were a series of Step B settlements (Jt. Ex. 11), a grievance settlement dated September 23, 1988 (Jt. Ex. 6), and a grievance resulting in a pre-arbitration settlement (Jt. Ex. 5; Jt. Ex. 6, p. 2). The Union presented testimony from Albert Moran, a retired letter carrier with thirty-five years of service. Moran was a former vice-president of NALC Branch 385, who handled grievances at Steps 1-3, worked as a Union advocate and participated in negotiations of the Local Memorandum of Understanding ("LMOU"). Moran identified the grievance settlement he signed on September 23, 1988 (Jt. Ex. 6), which arose in the context of problems with auxillary routes open on a day-to-day basis. The Union wanted the PTFs filling those auxillary routes scheduled in advance. The written resolution provided that "auxillary routes are known vacancies and will be scheduled accordingly."

Two years later, another grievance arose claiming the prior settlement of September 23, 1988, was being violated. James Corvino, management's Step 2 designee at the time, asserted at the arbitration hearing that it was "cruel" not to let a PTF know, in advance, of the route they would be assigned to if the route was to be filled. However, he insisted there was no intent to preclude management attempts to capture undertime available from regular, full-time carriers on low volume days. The 1988 settlement was an attempt to alleviate the placement of PTFs "on call" when the known vacancies existed. The pre-arbitration grievance settlement provides that management will abide by §126.3 of the M-39 Handbook. (Jt. 6, p. 2).

At hearing the Postal Service objected to consideration of the Union's recitation to provisions of Article 30 of the current and past LMOUs involving the posting of vacancies. This language appears under the subheading "seniority," which since the 1990 LMOU applies to all regular work force letter carrier craft employees as a guide to filling assignments. Management's objection to the LMOU language was overruled.²

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2. Contrary to the Postal Service's admonition that the National Level award of Arbitrator Carlton Snow in Case No. Q94C-4Q-C 98117564 (2003) prohibits consideration of the LMOU in this case, Snow elaborates that at least on the National Level, a "decision needs to be made on a case-by-case basis as to whether or not the bargain of the parties is being evaded and whether or not considering a particular argument will encourage arbitration by ambush." *Id.* at 16-17. Just as Arbitrator Snow remained unpersuaded that the APWU was unduly surprised by the Postal Service's affirmative defenses, this arbitrator is unconvinced that express language in the LMOU on filling assignments should be considered a "surprise" to management. Indeed, it was management that first mentioned the LMOU in its Formal Step A response, albeit other sections of the LMOU, and the Union's Step B member raised other sections of the same agreement. (Jt. Ex. 2 at 3, 4 and 15).

Looking back to the 1985 LMOU, the parties agreed that all known vacant duty assignments of five days or more would be posted for bid, and the senior applicant would receive the assignment. (Union Ex. 4). As a result of the Union's proposal of new language for the LMOU's Article 30, Item 22, B(2), the parties agreed the 1990 LMOU should contain the following language:

Full time reserve letter carriers (leave regulars) and any unassigned full time letter carriers may exercise their preference of daily duty assignments within their bid section by seniority. Known vacant duty assignments will be canvassed the day prior to the actual vacancy. Those regulars exercising their preference shall assume the daily schedule of the duty assignment.

This language of the LMOU contains the first reference to canvassing vacant duty assignments the day prior to the actual vacancy. Identical language can be found in the current 2001-2006 LMOU. (Union Exs. 5 and 6). The scheduling of known vacancies was demonstrated to be a source of friction between the parties which would flare up on occasion. It was Diana L. Kady, a letter carrier with twenty-two years of service, who filed the grievance resulting in the September 23, 1988, grievance settlement. Kady testified she did so because management would not schedule vacancies in advance pursuant to §126.3 of the Handbook M-39. (Jt. Ex. 6). Later in 1992, Kady again filed a similar grievance when the vacant routes remained unscheduled.

Similarly, Ida Rose Smith, currently a T-6 working relief on five different routes, described her twenty-one years as a letter carrier, including working at the Austintown branch. When Smith worked as a leave regular, she could bid on hold downs, and if those were not available she would be able to select the route she wanted to deliver the night before her working

the next day, and she was always scheduled for the vacancies. She would leave a note for the manager if she was changing routes and bumping another leave regular, and PTFs scheduled in advance would be bumped. Her supervisor, Mike Bachinger, would make out the schedule the day before and insert the changes requested. She was always scheduled in advance, and not once as a leave regular was Smith not scheduled where there was a known vacancy.

Smith's testimony was corroborated by Michael A. Sharp, a city letter carrier who worked as a 204B supervisor in Austintown during March and April 2000. When Sharp first worked as a PTF the schedule was always posted a day early, and when he was not working a hold down, he would check the schedule a day in advance. Working as a 204B in Austintown, Sharp made out the schedule a day in advance, including PTFs, casuals and leave regulars. He described creating the schedule in this manner as his duty under the M-39, §126.3. He would not leave a route vacant unless there was nobody available to fill it. In that situation the route would be pivoted. Smith's own supervisor at that time was Mike Bachinger, and Bachinger preferred the schedules be completed one week in advance, rather than a day in advance.

Thomas E. Donaldson, a letter carrier in Austintown with twenty-two years of service, worked both as a supervisor and 204 B during his tenure in the Postal Service. Donaldson testified that as a PTF, the schedule was known since it was posted the night before at the time clock. As a leave regular in Austintown, he would work a hold down, but if no hold downs were available he would be placed on a posted schedule in advance. During his stint as a supervisor, Donaldson stated his job description was the M-39, and he posted the work schedule at the time

clock the night before in accordance with §126.3. His manager at the time would reinforce the principles of §126.3, and the manager would want the schedule completed at least one week in advance.

Thomas Bica, a twenty-seven year letter carrier and steward at the Poland Branch of the Youngstown, Ohio post office, conducted the Formal Step A concerning the instant grievance. He opined that the routes were improperly left vacant and his belief that the issue had already been addressed. It was Bica's opinion that there had been no scheduling issue until the POOM instructed managers to "leave routes vacant" in order for them to be pivoted. Bica reviewed a number of Step B resolves with his counterpart at Formal Step A, Michael Bachinger. It remains the Union's position that those resolves do not address the issue emanating from the M-39, §126.3 – scheduling known vacancies. (Jt. Ex. 11). He also expressed the Union's view that the award of Arbitrator Linda DiLeone Klein in Case No. C98N-4C 02102152 (2005) did not resolve the issue in that Arbitrator Klein concluded she was without authority to address §126.3.

The final witness for the Union was the current president of NALC Local 385, John Dyce, who provided additions and corrections after reviewing the response of Mr. Bachinger at Formal A. Dyce criticized the position of management that the M-39 is merely instructive, and not mandatory in the same way that management views handbooks and manuals when bringing enforcement or disciplinary action against letter carriers. The J-CAM process has set aside the notion expressed in a 1978 National Level arbitration award by Arbitrator Sylvester Garrett that

manuals are merely suggestive in nature. Further, unlike the facts of the Garrett Award, the Union here has cited a specific manual section as applicable and controlling.

Contrary to any suggestions otherwise, the Union is not trying to insist that the Postal Service must call in letter carriers on their non-scheduled days, but it can use PTFs, unassigned regulars, and if needed the OTDL carriers to fill vacancies. Further, management has the right to pivot carriers under certain circumstances. Dyce pointed to portions of an Austintown schedule as evidence that it is possible to schedule in advance and management can still utilize pivoting to capture undertime. (Jt. Ex. 12) On cross-examination, Dyce agreed it was his position that at least the day before a known vacancy will occur that each such vacancy must have an employee's name associated with the vacancy. In his opinion, the contract requires management to schedule known vacancies in advance. He acknowledged that if management had five known vacancies and was unable to fill the fifth vacancy, it could do so from the OTDL in order to avoid an eight hour guarantee by calling out a letter carrier on his or her non-scheduled day.³

Not surprisingly, management's witnesses took a different approach to the issue presented. James Corvino, currently a postmaster, verified that he consented to the settlements in Joint Exhibits 5 and 6 to permit PTFs to know in advance if they might be scheduled, even though that schedule might change. He maintained, however, that an auxiliary route may not be

3. The parties also entered into the following stipulation. "If present to testify, letter carriers John Fire, Brian Paloci, Rich Panning and Henry Gomez would testify that between 1992 and 2000, when they were either leave regulars or PTFs in the offices in which they worked, they were scheduled in advance for known vacancies." (Joint Ex. 3).

scheduled in order for local management to divide the schedule and pivot if it turned into a light mail day. Further, only after the settlement set forth in Joint Exhibit 6 did the Union claim that it wanted a person scheduled for every known vacancy. If management must fill a vacant position pivoting would be eliminated and it could not reduce the applicable guarantee. For example, management would be required to bring out a PTF to work on an 8 hour assignment when the regular carriers might have sufficient spare time off their assigned routes to work the assignment.

On cross-examination, Corvino was posed the example of a light duty letter carrier who could case for two hours, but not carry his route. He opined that if mail volume was light, he might have the other regular letter carriers absorb the remaining six hours of the light duty carrier's route. He agreed, however, that if management knew it would have a PTF for six hours, then the PTF would be told in advance of the vacancy. Further, while a four hour guarantee for PTFs exists in Youngstown, Corvino also agreed he could pivot two hours of the route. There is simply no hard and fast rule.

He asserted that M-39, §126.3 does not apply to auxillary routes, but only for regular routes and scheduling is done in advance. Since nobody is assigned to auxillary routes in advance, there is no need to schedule such routes since management is not replacing anyone. Another consideration is that certain seasons have lighter mail volume than others. For example, the summer during prime time when there are a number of letter carries off – perhaps two routes are open every day and supervision plans on pivoting at least one of them. There is no need to schedule a PTF or casual or to write in names on the routes which are to be pivoted.

The lack of auxillary routes in Austintown was confirmed by manager Michael Bachinger who was assigned to manage the Austintown branch at the time the grievance arose. Bachinger stated there were no auxillary routes in Austintown today or at the time of the grievance. He had reviewed the M-39, §126.3 and most of the Step B decisions contained in Joint Ex. 11 during the grievance process, and he voiced the opinion that the issue had been settled in management's favor. The Postal Service complied with §126.3 of the M-39, but in Bachinger's opinion that provision is merely instructional in nature, although admittedly enforceable through the grievance procedure. He agreed that the issue of overtime was not referenced in the issue statement on the Form 8190 during the grievance procedure.

Bachinger acknowledged that the daily schedule for Austintown on August 8, 2005, reveals a number of overburdened routes, and that auxillary assistance had been used on such routes. (Postal Exhibit 1). He also admitted that when he supervised carriers directly he completed the next week's daily schedule by the preceding Saturday, and documented any known sick leave, annual leave or special military leave with adjustments constantly being made to the schedule. He admitted that in the case of a T-6 who was on annual leave on August 8, 2005, an OTDL carrier could have been scheduled in advance. If the OTDL came in at the normal time to work ten hours, but the mail volume was low, Bachinger admitted the supervisor could have made adjustments.

OPINION AND ANALYSIS

Res Judicata

A threshold issue raised by the Postal Service is a claim that the grievance is barred based on the principle of *res judicata*. In support of its position, management cites to a series of Step B decisions, the decision of Arbitrator Linda DiLeone Klein arising out of Youngstown, Ohio, Case No. C98N-4C-C 02102152 (October 3, 2005), and a decision of this arbitrator from the same location identifying factors that would afford another arbitration award persuasive effect when addressing the merits of a subsequent grievance. Clearly, the identical parties and location are present. What is critical for this *res judicata* analysis is whether the issue is the same, whether the first claim was granted or denied, and if the earlier decision was predicated on a reasoned approach addressing the contract language at issue before this arbitrator.

As the arbitrator stated at the evidentiary hearing, it is important to afford proper deference to the decision of a Step B team. The parties themselves have clearly articulated that “[a] Step B decision establishes precedent only in the installation from which the grievance arose.” (Jt. Ex. 8; J-CAM Nov. 2005, Page 15-8). The same J-CAM section mandates that the written Step B decision must state the reasons for the decision in detail.

Joint Exhibit 11 contains eight (8) Step B decisions from the Austintown installation, and in each of those decisions the Step B team held that based on the documentation provided no contractual violation had occurred. It is interesting to note that in each Step B decision, the issue was phrased as: “Did Management violate Section 126.3 of M-39 Handbook and Branch 385

resolves on this issue? And if so, what is the appropriate remedy.” Four of the Step B decisions were rendered on September 16, 2005, and four on October 11, 2005. What is remarkable, however, is that none of those decisions refer to Section 126.3 of the M-39 Handbook in the body of the Step B team’s explanations. The first portion of the Step B decisions consistently hold that the Union cannot force management to work an ODL carrier eight hours on his/her non-scheduled day, rather than use ODL carries who are not on their non-scheduled day except when required to equalize overtime for the quarter. While reference may be made by the Step B team to a known vacant assignment, no reference is made to Section 126.3. The Step B team cited to Article 3 - Management Rights, the daily operations for delivery service managers, and general language on overtime assignments and management’s right to determine whether to give overtime work to a PTF, casual or full-time employee. In at least three of the Step B decisions it is noted the Union contends that management pivoted known vacant routes during one week. However, there is no evidence as to when and why the routes became vacant, and most significant is the lack of any discussion on the application of Section 126.3 to the facts of those cases. These Step B decisions represent what the parties were able to agree upon at that level of the grievance procedure, but they are not binding precedent within the installation on the issue presented here.

The question of whether to bring a letter carrier in on his or her non-scheduled day, or to employ pivoting to cover unscheduled vacancies may be related to the issue before this arbitrator, but it remains a separate and distinct question. This case centers on the creation of the work

schedule by preparing the Form 3997 in advance as required by §126.3 of the M-39. In an effort to short circuit the arbitrator's analysis, the management advocate asserted the controlling nature of the award by Arbitrator Linda DiLeone Klein. To fully understand the impact (or lack thereof) of that award on the stated issue, it is necessary to quote extensively from her decision at 34-37:

As it regards Issue #1 relating to scheduling known vacancies, the Union sought compliance with a prior settlement in its Case No. 385-90-88; the Union also sought compliance with Section 126.3 of the M-39 Handbook.

Union Exhibit 2 contains the September 1988 Step 2 Settlement stating that "auxiliary routes are known vacancies and will be scheduled accordingly". The Union viewed this as a requirement to abide by Section 126.3 of the M-39 pertaining to completion of Form 3997, the daily unit record. This provision refers to preparing the form in advance since scheduled absences and scheduled replacements are known; then, unscheduled absences and the unscheduled replacements may be added. Although the reference in that settlement is to auxiliary routes, it was established that there were no such routes in the current matter.

Additionally, the Union filed a grievance in 1990 alleging Management's failure to comply with said settlement; as a corrective measure, the Union sought compliance with the 1988 settlement. In 1992, in a pre-arbitration settlement, the parties agreed that "Management will abide by Part 126.3 of Handbook M-39". According to the Union, there was compliance with this agreement until the circumstances giving rise to the current cases occurred. The Union claimed that Part 126.3 requires the scheduling of known vacancies whether the routes are auxiliary or full time. The Union recognizes that Management has options other than the use of overtime when covering vacancies; however, per Section 126.3, the scheduling must be "made in advance."

The Postal Service referred to the Step 3 appeal of Grievance No. 385-90-88 and insisted that it was about "not putting PTFs on call" while known vacancies existed; it was not about pivoting. The Postal Service also contended that Section 126.3 relates to completing a form; it does not prohibit pivoting, curtailing mail or scheduling undertime.

Attached to Union Exhibit #2 is a Step 4 Settlement in Case No. E1N-4F-C 20559, which states as follows:

Available full-time craft duty assignments of anticipated duration of 5 days or more will be made available as hold-down assignments. However, management may pivot the route of the "hold-down" on a day-to-day basis without incurring any liability. (Underlining in text).

When all of the evidence pertaining to "scheduling known vacancies" is viewed in its entirety, the Arbitrator finds that Management is not prohibited from "pivoting" and Management is not required to cover known vacancies with overtime; as stated by Arbitrator Jensen in 1973, calling in carriers on their non-scheduled days is "solely a matter of judgment".

The Arbitrator finds further that Management has the right to maintain the efficiency of operations and to determine the methods, means and personnel by which such operations are to be conducted; the exercise of these rights is subject to and limited by the provisions of the National Agreement.

Additionally, the Arbitrator recognizes that some meaning must be given to the cited settlement. The Arbitrator also recognizes the Union's concerns about scheduling.

However, a Regional Level Arbitrator lacks the authority to "interpret" the language of the National Agreement and accompanying manuals, such as the M-39 at Section 126.3. In this Arbitrator's opinion, Section 126.3 may reasonably be interpreted as explaining how to complete Form 3997. Although the Union views the language as requiring all vacancies which are known in advance to be scheduled in advance, it is also reasonable to conclude that the Postal Service would not relinquish its right to schedule, its right to capture undertime, or its right to level or balance carrier work loads for purposes of efficiency.

Furthermore, the grievance of C. Young alleged a contract violation by not scheduling said employee, who is on the OTDL, on a known vacancy. Clearly, there is no guarantee of overtime for those on the overtime list and Management has other options for meeting delivery commitments.

Absent sufficient evidence of a clear violation of the cited settlement and absent a National Level interpretation of the meaning and intent of Section 126.3 of the M-39, this Arbitrator cannot sustain the Union's position here.

The Postal Service contends the Union is simply seeking a backdoor approach to having a regular level arbitrator render an "interpretation" of a handbook provision, which is precluded by the Step B decisions and Arbitrator Klein's award. Similarly, the inference the Union is attempting to draw from the handbooks and manuals is not contractually permissible. Case No. NB-N-3908 (Garrett, Arb.) (1978). In the Garrett Award, the narrow issue concerned pre-sequenced flat mail to be handled as a third bundle for purposes of a dismount delivery. Arbitrator Garrett, while stating that handbook provisions were not drafted to represent the results of collective bargaining and referring to those provisions as "guides" for employees in the performance of their duties, continues by noting that nothing in the M-39 or M-41 handbooks addressed the situation in that case. The decision concludes with the following statement by Arbitrator Garrett.

Thus the critical fact here is that the Union does not point to any specific Handbook provision which clearly (or by reasonable implication) could have been violated by the instruction given to Grievant Oefinger in the present case. The required conclusion, under the present evidence, is that the Handbooks simply were not intended to cover this narrowly limited type of situation at all. *Id.* at 13.

A careful review of the cited arbitration awards and Step B decisions does not serve to preclude addressing the merits of the instant grievance. Here, unlike in the Garrett Award, the Union has pointed to a specific handbook provision which "clearly (or by reasonable implication)

could have been violated" -- M-39, §126.3. The Step B decisions represent a method by which the parties mutually agreed to resolve the stated issues, but they simply do not address the application of §126.3 and cannot be considered of precedential value on the issue presented here. Finally, the award of Arbitrator Linda DiLeone Klein declines to address the issue deeming it interpretative in nature. This arbitrator views application of the M-39, §126.3 to the facts of this case as non-interpretive, and reaches the conclusion that resolution of this issue is no different than what arbitrators at the regular level do day-in and day-out.

Merits

The arbitrator finds §126.3 of the M-39 to be clear and unambiguous. It requires that the Unit Daily Record, Form 3997, be prepared "several days in advance." As part of that preparation, scheduled absences and scheduled replacements are to be placed on the schedule. Management submits that the requirement of a "scheduled replacement" is satisfied by simply stating "pivot" or "OTDL." The arbitrator respectfully differs, however, and that perspective is supported by an examination of the parties own example of a Form 3997 placed into the M-39 as Exhibit 126.3. (Joint Ex. 4). In the parties agreed example, the Form 3997 shows unscheduled, regularly assigned letter carriers by name, and then lists the utility and PTF carriers by individual name.

When this fact is taken into consideration with the grievance settlements and the overwhelming testimony of scheduling known vacancies in advance (Testimony of Diana Kady;

Testimony of Ida Rose Smith; Testimony of Michael A. Sharp; Testimony of Thomas E. Donaldson; Testimony of John Dyce; Stipulations of letter carriers John Fire, Brian Paloci, Rich Panning and Henry Gomez), as well as the bargaining history over the LMOU, the evidence proves that scheduling known vacancies in advance with individual letter carrier names was performed in Austintown, albeit with periods of non-compliance, for a period extending over seventeen years.

It is also abundantly clear that compliance with §126.3 should not require management to call in letter carriers on their non-scheduled days. There are casuals, PTFs, unassigned regulars and eventually the OTDL for carriers working their scheduled day from which to draw employees to meet service needs. Adjustments to carrier workload by curtailment and the capture of undertime by pivoting is clearly permissible under certain circumstances, and further allows management the flexibility to meet daily delivery needs. The choice of the most economical method of meeting delivery service requirements is well within management's rights, but those methods must be employed within the confines of the National Agreement and the handbooks and manuals invoked through Article 19. The parties require that known vacancies be scheduled in advance. It is this arbitrator's considered opinion that mechanisms to deal with the unanticipated, *unscheduled vacancy* such as pivoting or the use of carriers on the OTDL, are not intended to be used in preparing a schedule containing known scheduled replacements for known scheduled absences.

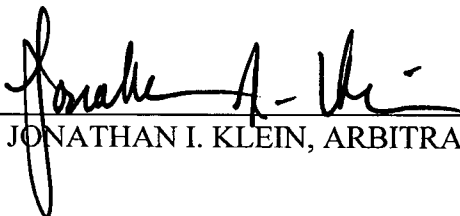
One final word of caution. The parties have created a complicated situation of their own making in the world of work schedules, but that may be the “nature of the beast.” If the handbooks and manuals were not complicated enough, the LMOU grants to leave regulars and unassigned full-time letter carriers preference rights within their bid section based on seniority for known vacant duty assignments canvassed the day prior to the actual vacancy. A regular letter carrier exercising his or her preference shall assume the daily schedule of the duty assignment. (Union Ex.5, Article 30). In any event, the contractual mechanism for scheduling is the parties’ prerogative, notwithstanding the potential for additional complications in last minute adjustments to the daily schedule.⁴

In sum, when management in this case scheduled known vacancies in advance using the phrase “pivot” or “OTDL,” it violated §126.3 of Handbook M-39. There is no other way to read the handbook language – it is clear. As for the proper remedy, there is no factual foundation to award a monetary remedy as requested by the Union’s Step B team member. There has been no showing of any specific monetary losses suffered by any of the members of the class. It is proper, however, in light of the long and storied history of scheduling issues within the installation, that a cease and desist order issue.

4. A lack of proper, advanced scheduling would appear to make the exercise of seniority by leave regulars and unassigned full-time carriers to their preferred daily duty assignments a virtual nullity. The same could be said as to the act of canvassing a day prior to the actual vacancy under Article 30 of the LMOU.

AWARD

The issue presented is answered in the affirmative. Management is directed to cease and desist from failing to schedule known vacancies in advance with known replacements in violation §126.3 of the M-39 Handbook. Management shall cease and desist from using "pivot" or "OTDL" on the Form 3997, Unit Daily Report, in place of or in lieu of known vacancies. This directive does not apply to unscheduled absences. No monetary award is warranted.



JONATHAN I. KLEIN, ARBITRATOR

Date of Issuance: May 25, 2006

