

NATIONAL ARBITRATION
BEFORE IMPARTIAL ARBITRATOR STEPHEN B. GOLDBERG

In the Matter of Arbitration)

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between)

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UNITED STATES POSTAL SERVICE)

Case No. Q10C-4Q-C 12320729

)

Article 12.5.B.2

and)

)

AMERICAN POSTAL WORKERS)

UNION, AFL-CIO)

BEFORE: Stephen B. Goldberg, Arbitrator

APPEARANCES:

United States Postal Service: Brian H. Reimer, Attorney; Rickey Dean, Labor Relations Specialist

American Postal Workers Union, AFL-CIO: Anton G. Hajjar, Attorney (O'Donnell, Schwartz & Anderson, P.C.)


Place of Hearing:	American Postal Workers Union, AFL-CIO, 1300 L Street, N.W., Washington, D.C.
Date of Hearing:	March 5, 2013
Date of Award:	June 17, 2013
Relevant Contract Provisions:	Article 12.5.B.2 ; MOU Re Postal Support Employees ; Article 37.3.A.1
Contract Year:	2010-2015
Type of Grievance:	Contract Interpretation

Summary of Award

The second sentence of Article 12.5.B.2 of the 2010 Agreement provides:

Management shall identify duty assignments within the appropriate radius held by PSEs which shall be made available for the reassignment of excess career employees.

The issue presented by this case is whether the obligations imposed on the Postal Service by the quoted language include that of identifying and separating those Postal Support Employees (PSEs) within the appropriate radius of an excessing event who do not hold a posted duty assignment, but are regularly working hours which, if combined, would yield sufficient hours for a regular duty assignment. The Union asserts that Article 12.5.B.2 imposes this obligation, but I conclude otherwise. The Union's position is not supported by the language of Article 12.5.B.2, and the evidence of bargaining history, on which the Union relies heavily, is insufficiently persuasive, when considered in light of other evidence of the meaning to be attributed to Article 12.5.B.2 – the JCIM comments on that Article, and the language of Article 37.3.A.1 - to warrant the conclusion that Article 12.5.B.2 imposes the obligation for which the Union contends. The sole obligation imposed on the Postal Service by the quoted language of Article 12.5.B.2 is that of identifying and separating those PSEs within the appropriate radius who are holding posted duty assignments, whether they have opted into those duty assignments or have been assigned to them by Postal Service management.



Stephen B. Goldberg, Arbitrator

Discussion

A core principle in effecting reassignments, set out in Article 12.4.A of the 2010 Agreement, is that dislocation and inconvenience to employees in the regular work force will be kept to a minimum, consistent with the needs of the Postal Service. In implementing that principle, the parties have, over the years, imposed various limitations on the Postal Service's ability to excess employees in the regular work force. Among those limitations bearing, albeit indirectly, on this case is that imposed by Article 12.5.C.5.a. (2) in the 1990 Agreement, which provided, in relevant part:

- a. Reassignments within installation. When, for any reason,
- b. an installation must reduce the number of employees more rapidly than is possible by normal attrition, that installation:

(2) Shall, to the extent possible, minimize the impact on regular workforce employees by separation of all casuals.¹

In 2001, Arbitrator Carlton Snow, faced with a dispute about the interpretation of the phrase "to the extent possible" in Article 12.5.C.5.a (2), held that the Postal Service was required to separate casuals from an installation undergoing excessing (a "losing installation") if doing so "would yield sufficient hours for a regular workforce clerk, that is, eight hours within nine or ten hours, five days per week".²

¹ Essentially the same protection for employees in the regular workforce is contained in Article 12.4.D of the 2010 Agreement.

² Case No. HOC-NA-C 12 (Snow 2001)(page 19). With the advent of non-traditional full-time duty assignments (NTFT) in the 2010 Agreement, there is greater flexibility concerning what constitutes sufficient days and hours for a regular workforce clerk. Memorandum of Understanding Re Non-Traditional Full-Time (NTFT) Duty Assignments.

In the negotiations leading to the 2010 Agreement, the Union was faced with the consolidation and closing of mail processing installations as a result of decreasing mail volume, leading to increased excessing. In its continuing effort to minimize the effects of such excessing, the Union succeeded in securing limitations on the frequency with which excessing may occur (Article 12.5.B.1); a 50-mile limitation on the distance within which excessed employees may be involuntarily assigned (MOU on Minimizing Excessing); requirements of notification of awarded duty assignments (60 or 30 days prior to the reporting date, depending on the radius of the excessing event) (Article 12.5.B.4); and the requirement, set out in Article 12.5.B.2, that:

Management shall identify duty assignments within the appropriate radius held by PSEs which shall be made available for the reassignment of excess career employees.

It is the latter requirement that is at issue here.

The precise issue presented is whether the requirements imposed on the Postal Service by Article 12.5.B.2 “within the appropriate radius” are essentially the same as those which Arbitrator Snow found were imposed on the Postal Service in the losing installation by the former Article 12.5.C.5.a (2). Must the Postal Service separate PSEs within the appropriate radius who are not holding regular duty assignments if doing so would yield sufficient hours for a regular workforce clerk? The Union asserts that the Postal Service must do so - that it must go beyond separating PSEs from posted duty assignments and also identify and combine those hours regularly worked by PSEs within the appropriate radius if doing so would, in the words of Arbitrator Snow, “yield sufficient hours for a regular workforce clerk”. Thus, from the Union perspective, the term “duty assignments”, as used in Article 12.5.B.2, includes both posted duty assignments and *de facto* duty assignments – those which result when one or more PSEs are “performing a set of duties and responsibilities within [a] recognized position regularly scheduled during specific hours of duty” (Article 37.1.B).

The Postal Service disagrees both with the Union's definition of "duty assignment", as used in Article 12.5.B.2, and with the Union's view of the Postal Service's obligations under that Article. From the Postal Service perspective, a duty assignment as defined by Article 37.1.B, and as used in Article 12.5.B.2, is limited to those duty assignments defined and posted by the Service. Furthermore, the Postal Service's obligation under Article 12.5.B.2 is solely to identify posted duty assignments held by PSEs within the appropriate radius, and to separate PSEs holding those duty assignments in order to make them available to career employees. The Postal Service is not, it asserts, obliged by Article 12.5.B.2 to identify and combine hours worked by PSEs that do not constitute posted duty assignments, even if doing so would yield sufficient hours for a regular workforce clerk.

Initially, there is nothing in the text of Article 12.5.B.2 which refers to combining hours worked by PSEs in order to create duty assignments for career employees. To the contrary, Article 12.5.B. 2 refers solely to identifying duty assignments held by PSEs and making those assignments available for career employees.

The Union asserts, however, that the bargaining history of Article 12.5.B.2 demonstrates that the parties to the 2010 negotiations intended to impose on the Postal Service the obligation to combine PSE hours in the appropriate radius if doing so would create duty assignments for excess employees. In support of this argument, the Union relies on the testimony of APWU Director of Industrial Relations Mike Morris, who, together with John Dockins, at the time USPS Manager of Contract Administration –APWU, was primarily responsible for negotiating Article 12.5.B.2.³ Mr. Morris testified:

Now, it's very important what we were seeking here, and I made this very clear to John Dockins. ... Our intent was to take the obligation that the Postal Service had to cobble together, to use that term, to create a duty assignment to the extent that one

³ Mr. Dockins, who has retired from the Postal Service, did not testify. Postal Service counsel stated that he was unavailable to do so.

could be created in a losing installation and to expand that obligation . . . to include the 50-mile withholding radius. . .⁴

We already knew what it meant to – minimizing PSEs/casuals to the extent possible means. Arbitrator Snow told us what that means. We took that concept and expanded it from just the installation to the entire withholding radius . . .

What I told John is that the intent was to -- to apply the same obligations that the Postal Service had in the installation as it related to PSEs, to expand that obligation to the -- to the withholding area in order to minimize the excess -- the excessing event so that under the previous agreement you had no obligation whatsoever to minimize casual hours outside the losing installation. Under this new contract, casuals being supplanted by PSEs, we intended to expand that to the withholding area. What had applied before only to the installation would now apply to the entire withholding area, and that -- to me that's very clear what the language says on its face.⁵

Mr. Morris' testimony concerning his negotiations with Mr. Dockins is as significant for what it omits as it is for what it contains. As to the latter, Mr. Morris makes it clear that he told Mr. Dockins that the Union's intent in proposing the disputed language was to apply the same obligation that Arbitrator Snow had imposed on the Postal Service in the losing facility – to separate PSEs if doing so

⁴ Inasmuch as a typical excessing and withholding radius is 50 miles from the losing installation (MOU on Minimizing Excessing; Article 12.5.B.2), the Article 12.5.B.2 "appropriate radius" will also typically be 50 miles from the losing installation.

⁵ Patrick Devine, who was a USPS Labor Relations Specialist/Team Leader at the time of the 2010 negotiations, testified that at Mr. Dockins' direction, he had a brief discussion with Mr. Morris concerning the language of Article 12.5.B.2, and at that time there was no reference to "cobbling together" (combining) PSE work to create duty assignments for excessed employees. According to Mr. Devine, he did have a discussion in 2006 with Jim McCarthy, APWU Clerk Craft Director at the time, about whether casual hours should be cobbled together to create career employee duty assignments. "We didn't agree then, so we certainly didn't agree during Mike and I's brief discussion. . ."

would, by combining their hours, yield sufficient hours for a regular duty assignment – throughout the area affected by an excessing event. Mr. Morris did not testify, however, that Mr. Dockins said he agreed with or accepted the Union’s interpretation of what the disputed language would accomplish. Putting the most favorable interpretation possible on Mr. Morris’ testimony, which I fully credit, Mr. Dockins said nothing in response to Mr. Morris’ remarks, leading Mr. Morris to believe that Mr. Dockins accepted Mr. Morris’ interpretation of the disputed language. Under some circumstances, as that provision in the Restatement of Contracts cited by the Union indicates, that would be sufficient to warrant the conclusion that the Union’s interpretation of the disputed language should prevail.⁶

That provision does not, however, stand alone as a guide to the appropriate interpretation to be given to disputed contract language. When there exist other indicators as to the meaning the parties intended to place upon contract language, they too must be taken into account.

One of the key indicators as to the parties’ shared view of the meaning of Article 12.5.B.2 can be found in their comments on that Article in the Joint Contract Interpretation Manual (JCIM). According to the Postal Service (Brief, pp. 10-12):

Mirroring the distinction in the National Agreement, but with even more clarity, the parties’ Joint Contract

⁶ See Restatement (Second) of Contracts § 201 (“Whose Meaning Prevails”):

(2) Where the parties have attached different meanings to a promise or agreement or a term thereof, it is interpreted in accordance with the meaning attached by one of them if at the time the agreement was made

(a) that party did not know of any different meaning attached by the other, and the other knew the meaning attached by the first party; or

(b) that party had no reason to know of any different meaning attached by the other, and the other had reason to know the meaning attached by the first party.

Interpretation Manual ("JCIM") specifies actions the Postal Service must take to minimize the effects of excessing on impacted employees.

The JCIM specifies that where hours worked by multiple PSEs within the losing installation can be combined to provide enough work for a regular employee, [the Postal Service] must [do] so:

MINIMIZING IMPACT

In order to minimize the impact on employees (FTR, PTR, PTF), all Postal Support Employees (PSEs) working in the affected craft and installation will be separated to the extent possible prior to making involuntary reassignments. When the excessing event is at a Level 20 or below post office, to the extent possible, part-time flexible employee hours will be reduced. There is an obligation to separate PSEs if doing so would yield sufficient hours for a regular duty assignment, either NTFT or traditional: that is, eight hours within nine or ten hours, five days during a service week.

Thus, within the losing installation, the Postal Service has agreed that it will, in effect, cobble together workhours performed by PSEs to minimize the need for excessing in the first place.

Noticeably absent from the JCIM, however, is any obligation for management to do the same outside the installation (i.e., within the 40 or 50 mile radius of assigning). Rather, the JCIM only requires the Postal Service to identify (not create) duty assignments:

In addition, management shall identify duty assignments within the appropriate radius held by Postal Support Employees (PSEs) which shall be made available for the reassignment of excessed

career employees. In addition to those residual duty assignments into which PSEs have opted to occupy, the parties shall identify the existence of any other duty assignments within the withholding area occupied by PSEs in order to minimize the impact of excessing on full-time career employees (FTR, PTR, PTF) in the regular work force.⁷

The Postal Service argument, based on the JCIM, has considerable force. The parties drew a clear distinction between the Postal Service's obligation in the losing installation – to separate PSEs if doing so would yield sufficient hours for a regular duty assignment – and its obligation within the appropriate radius – to identify duty assignments held by PSEs and to make those duty assignments available for the reassignment of excessed career employees. The Union's argument that the parties agreed to impose the same obligation on the Postal Service of combining PSE hours to create regular duty assignments throughout the withholding area that the Snow Award had created in the losing facility thus appears to be contradicted by the JCIM.

The Union's analysis of the JCIM leads to a different conclusion. According to the Union, Section 3.F of the MOU re Postal Support Employees provides that PSEs can only occupy duty assignments into which they have opted.⁸ Accordingly, the reference in the second paragraph of the JCIM to "other duty assignments" in addition to those which PSEs have opted to occupy can only be to those hours worked by PSEs which do not constitute a posted duty assignment. It is those

⁷ All underlining in the above quotation is contained in the Postal Service's brief, not the JCIM.

⁸ Opting

A PSE may only occupy full time (traditional or nontraditional) duty assignments in accordance with these rules. This does not prohibit PSEs from working assignments that do not constitute a duty assignment.

In the Clerk and Motor Vehicle Crafts, where practicable, PSEs will be allowed to opt on a seniority basis for fulltime (traditional and nontraditional vacant, residual assignments in the installation for which they are qualified and which are not assigned to career employees. Such opting does not create any work hour or assignment guarantees. . .

hours, the Union asserts, which the Postal Service must identify and combine to the extent that doing so will create a full-time duty assignment for a career employee.

The Postal Service contends, however, that PSEs may, consistent with the Agreement, occupy duty assignments other than those they have opted into. In support of this contention, the Postal Service relies upon the testimony of Patrick Devine, who testified that he was involved in the drafting of the explanatory Questions and Answers concerning Article 12. According to Mr. Devine, a group consisting of him, Postal Service labor representative Angie Ferguson, and Union representatives Mike Morris and Lyle Krueth, discussed Question 45 and its Answer, the latter of which contains the same language as the last sentence in the second paragraph of the JCIM on Minimizing Impact.⁹ Mr. Devine was asked, “And what situations, if any, were discussed about when a PSE could be in a position who has not opted for it?” He responded:

The only . . . one I remember from the discussions was if someone was ‘working’ a duty assignment but had not officially opted, had not signed the paperwork or anything like that, that was the example.

Similarly, Mr. Morris admitted on cross-examination that the Postal Service has the contractual authority to assign a residual vacancy to one or more PSEs, even if they have not opted to fill that vacancy.¹⁰ It is this type of duty assignment, the Postal Service asserts, that was contemplated by the last

⁹ Q. 45 – Article 12.5.B.2 is amended to include the need to identify duty assignments currently held by PSEs which shall be made available for reassignment of excess career employees. Which duty assignments does this include?
ANSWER: In addition to those residual duty assignments into which PSEs have opted to occupy, the parties shall identify the existence of any other duty assignments occupied by PSEs in order to minimize the impact of excessing on full-time career employees in the regular work force.

¹⁰ Mr. Morris sought to qualify this admission by stating that, “The duty assignment wouldn’t be held by the PSE. The MOU is very clear that the only way a PSE can hold a duty assignment is through opting and to be performing the work that’s in that duty assignment, but they would be in no way holding it . . . occupying it might be a better word.” The MOU Re Postal Support Employees, Section 3.F, which Mr. Morris referred to, however, provides that a PSE who opts for a duty assignment “occupies”, rather than “holds” that duty assignment. The Minimizing Impact portion of the JCIM refers to PSEs “occupying” both duty assignments they have opted for and other duty assignments. Solely the text of Article 12.5.B.2 refers to duty assignments “held” by PSEs. The two terms thus appear to have been interchangeable in the contemplation of the negotiators.

sentence of the second paragraph of the JCIM. I find this argument persuasive and reject the Union's contention that the MOU re Postal Support Employees leads to the conclusion that its interpretation of Article 12.5.B.2 is correct.

The Union next relies, in support of its interpretation of Article 12.5.B.2, on new language added to Article 37.3.A.1 in the 2010 Agreement. That language, set out in bold below, provides:

- A. Newly established and vacant Clerk Craft duty assignments shall be posted as follows:
 - 1. All newly established Clerk Craft duty assignments shall be posted to craft employees eligible to bid within 28 days. All vacant duty assignments, except those positions excluded by the provisions of Article 1, Section 2, shall be
 - 2. posted within 28 days unless such vacant duty assignments are reverted. **Every effort will be made to create desirable duty assignments from all available work hours for career employees to bid.**

The Union argues, in reliance on the boldface sentence (Brief, pp. 3-4):

The rule of interpretation to be employed here is that a contract must be interpreted as a whole and different related parts of a contract should be interpreted together. This rule supports the argument that when the parties used the word "identify" in Article 12.5.B.2, it was synonymous with "create" in the new Article 37.3.A.1. The force of this conclusion is even stronger because these changes were negotiated together.

The flaw in the Union's argument, however, is that it treats "create" in Article 37.3.A.1 as synonymous with "identify" in Article 12.5.B.2. In fact, they are not at all synonymous. The Merriam-Webster Online Dictionary (<http://www.merriam-webster.com>) defines "identify", as to "establish the

identity of”, and defines “create” as “to make or bring into existence something new”. It also lists 25 synonyms of “create”, none of which is “identify”.

Under these circumstances, in which the key words used in Article 12.5.B.2 and Article 37.3.A.1 have such different meanings, the most likely interpretation is that the parties intended those different meanings – that the obligation on the Postal Service in Article 37.3.A.1 is to create duty assignments, while in Article 12.5.B.2 the obligation is not to create duty assignments, as the Union would have it, but solely to identify existing duty assignments.

The Union’s next argument (Brief, pp. 2-3) is that:

Under Article 12, **before** the language change in this article, management was **already** required to withhold residual duty assignments (including those to which PSEs may have “opted”) as “landing spots” for excessed regular employees. . . If the Postal Service is correct in its view of the meaning of the negotiated language, **the APWU would have achieved nothing** under the new language, contrary to the rule of contract interpretation that all parts of a contract are to be given effect and no part is to be deemed surplusage or meaningless. (Emphasis in brief.)

To be sure, the conclusion that the disputed language does not oblige the Postal Service to cobble together PSE work hours across the affected area in order to create duty assignments for career employees means that the Union will have achieved considerably less than it claims the new language entitles it to, but that does not mean that it achieved nothing. The first sentence of Article 12.5.B.2 requires only that the Postal Service “give full consideration” to withholding positions for career employees, while the new language makes it plain that the Postal Service is required to make available PSE positions for reassignment to career employees. Similarly, the new language applies, pursuant to the JCIM (as interpreted in this Decision), both to duty assignments which PSEs have opted to occupy and those to which they have been assigned by management.

Finally, the Union responds to the Arbitrator's statement at the hearing that in a contract interpretation matter, he takes into consideration not only contract language and bargaining history, but also "whose argument makes more sense". According to the Union (Brief, p. 5), the Postal Service's position fails the "more sense" test:

The Postal Service's . . . claim is that to do what the Union says it must is so burdensome that it cannot be presumed that the Postal Service agreed to do it. The factual record, principally NBA Bob Bloomer's un rebutted testimony, however, entirely refutes this claim. The Postal Service can – and has – used its personnel computer system to identify PSE hours and assignments easily with a click of a mouse. . .

Assuming, as the Union asserts, that it is not difficult for the Postal Service to identify PSE hours and assignments, a minimum knowledge of human resources management suggests that no matter how easy it may be to identify PSE hours, it is considerably more difficult to combine hours worked by PSEs in different facilities to create efficient duty assignments, and more difficult still to do so in a manner with which the Union will agree. This is not to say that the Postal Service could not have agreed to the Union's proposal to combine PSE hours across the affected area, but rather that in determining what the Postal Service did agree to, it is not difficult to find a reason "that makes sense" as to why it might have resisted the Union's proposal.

Ultimately, the Union's case rests on Mr. Morris' testimony, which, the Union asserts, proves, in the absence of contrary testimony by Mr. Dockins, that Mr. Dockins agreed to expand beyond the losing installation to the entire area affected by an excessing event the Postal Service's obligation to combine PSE hours if doing so would create duty assignments for career employees. If there were no evidence other than Mr. Morris' testimony bearing on the question of whether Mr. Dockins, on behalf of the Postal Service, agreed to the Union's

demand, the Union might well prevail. There is, however, substantial evidence to the contrary.

If the Postal Service had agreed to expand the obligation to combine PSE hours beyond the losing installation to the entire area affected by an excessing event, nothing would have been easier than to have so stated in the JCIM. The parties did not, however, do so. Instead, the JCIM first sets out the Postal Service's obligation in the losing installation to be that of "separate[ing] PSEs if doing so would yield sufficient hours for a regular duty assignment". Next, instead of stating that the same obligation applies, by virtue of Article 12.5.B.2, to the entire area affected by the excessing, the JCIM provides, in relevant part:

[M]anagement shall identify duty assignments within the appropriate radius held by Postal Support Employees (PSEs) which shall be made available for the reassignment of excessed career employees.

It is clear beyond dispute that the latter is not a copy of the former and contains no indication that it is intended to be such.¹¹

The failure of Article 12.5.B.2 to set out the asserted Postal Service obligation to combine PSE hours in the entire area affected by an excessing event when doing so would create duty assignments for career employees stands in stark contrast to Article 37.3.A.1, in which, dealing with a similar, albeit unrelated issue, the Agreement provides that:

Every effort will be made to create desirable duty assignments from all available work hours for career employees to bid.

¹¹ The Union's argument that that portion of the JCIM not quoted above requires a contrary conclusion is treated at pp. 10-12, *supra*, and will not be repeated here.

This language demonstrates that the negotiators of the 2010 Agreement knew how to impose on the Postal Service the obligation to combine PSE hours when doing so would yield duty assignments for career employees. They did so for bidding purposes in Article 37.3.A.1. They also did so in the excessing situation for PSEs in the losing installation. They did not do so, however, in either the text of Article 12.5.B.2 or in the interpretation of Article 12.5.B.2 set out in the JCIM, beyond the losing installation into the entire area affected by an excessing event.¹²

¹² There were two issues discussed at the hearing and in the briefs which I am not deciding and on which I express no opinion:

- Can a “duty assignment”, as that term is used in Article 12.5.B.2, exist if that assignment has not been posted for bid by the Postal Service? I need not – and do not – decide that question because even if, as the Union asserts, a “duty assignment” is work that is being regularly scheduled and performed, whether it has been posted or not, the fact remains that, as I have concluded, the Postal Service is obliged by Article 12.5.B.2 to identify and separate only those PSEs who are holding posted duty assignments.
- Does the new language in Article 37.3.A.1 overrule the Award of Arbitrator Linda Byars in Cases Q94C-4Q-C 96096822 and Q94C-4Q-C 96096823? Article 37.3.A.1 was referred to in the instant Decision solely as an aid to the interpretation of Article 12.5.B.2, and I have no need to consider the impact of Article 37.3.A.1 on the issues considered by Arbitrator Byars.