

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. Q11VC-4Q-C 12180389

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and)

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AMERICAN POSTAL WORKERS)

UNION, AFL-CIO)

BEFORE: Stephen B. Goldberg, Arbitrator

APPEARANCES:

United States Postal Service: Neftali Pluguez, Manager, Contract Administration; Jacqueline Adona, 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: April 16, 2013

Date of Award: July 25, 2013

Relevant Contract Provisions: MOU Re Postal Support Employees, Section 1.g.

Contract Year: 2010-2015

Type of Grievance: Contract Interpretation

Summary of Award

Section 1.g. of the MOU Re Postal Support Employees, after setting out the hourly rates for PSEs, contains the following sentence:

Should it be necessary for recruitment or retention of PSEs, the Postal Service may pay higher hourly rates, with the concurrence of the Union.

It is the position of the Postal Service that this sentence should be interpreted to preclude the Union from conditioning its concurrence on issues other than those related to the amount of the hourly rate proposed by the Postal Service.

The Union's position is that it is free to insist on whatever demands it wishes as a condition to its concurrence.

Based upon the language and bargaining history of the sentence in dispute, I conclude that the Union may condition its concurrence on a Postal Service proposal to increase PSE wage rates solely upon matters reasonably related to the Postal Service's proposal, including, but not limited to, the amount of the proposed increase.



Stephen B. Goldberg, Arbitrator

I. Summary of Relevant Evidence

On November 7, 2011, the first meeting to discuss PSE salary exception requests subsequent the negotiation of the 2010 Agreement took place at the office of APWU President Cliff Guffey. At this meeting, in addition to Mr. Guffey, were Patrick Devine, USPS Manager of Contract Administration, and APWU officers Phil Tabbita, Manager of Negotiation Support and Special Projects, and Bob Pritchard, MVS Division Director. According to Mr. Guffey, he called this meeting because he had been advised by Mr. Pritchard that the Postal Service had been advertising for PSE applicants at pay rates in excess of those provided for in the MOU Re Postal Support Employees (hereafter PSE MOU). According to Mr. Devine, he had contacted Mr. Guffey to arrange the meeting because he had PSE salary packages that he wanted to discuss with Mr. Guffey.

Mr. Devine further testified that he “lugged” with him to the November 7 meeting 117 requests for PSE salary rate exceptions. He also brought with him supporting information for each request. He told Mr. Guffey that he had brought information packages for the different locations at which rate exceptions were sought, at which point, according to Mr. Devine, “Cliff put his hand up and said what we want is the desirable duty assignments in the NTFT MOU for the motor vehicle.”¹

Mr. Devine testified that he responded by saying, “I don’t think I can get that for you. So we’re not going to talk about these wage rates?”, to which Mr. Guffey said, “No, you know what we want”. At that point, Mr. Tabbita and Mr. Pritchard left, but, according to Mr. Devine, he then met alone with Mr. Guffey, and said:

¹ Paragraph 19 of the NTFT MOU provides that Article 37.3.A.1 of the Agreement, which deals with newly established and vacant Clerk Craft duty assignments, would be modified to provide that “Every effort will made to create desirable duty assignments from all available work hours for career employees to bid.” According to Mr. Devine, Mr. Guffey wanted a similar provision for the motor vehicle craft.

I think you should . . . at least take a look at what these people have put together to show that we're having trouble hiring those people, and he says no. And I said, it's not my business to tell you this, but what I don't understand is how is it that we are supposed to give you back these jobs if we can't hire the PSEs to do that. . . . You're going to be filing a grievance against us for failing to fill these 600 jobs if we can't get the PSEs to put into those jobs."²

Mr. Guffey again said, "I've told you what we want", Mr. Devine said "I don't think that I can get that for you", and at that point, according to Mr. Devine, their meeting ended.

Mr. Guffey's testimony concerning what took place at the November 7 meeting differed from that of Mr. Devine. According to Mr. Guffey, he had assumed that he and Mr. Devine would discuss the locations at which the Postal Service sought salary rate exceptions, and he had prepared a series of questions to determine if the Postal Service was abiding by the Agreement at those locations.³ Mr. Devine, however, did not want to discuss individual locations and

² Paragraph 2 of the Jobs MOU provides that "The Motor Vehicle Craft will assume service on a minimum of 600 PVS routes currently contracted to HCR upon the expiration of each supplier contract." According to Mr. Devine, the Postal Service's agreement to return 600 motor vehicle jobs to the APWU bargaining unit was based on the Postal Service's ability to fill up to 75% of those jobs with PSEs. He testified:

So the point that I was making to Mr. Guffey on November 7 was how were we going to . . . comply with the requirement to return that work if we made that calculation based on the PSE wage rate and then we can't even hire PSEs because we . . . can't find PSEs at regular rates.

³ Among those questions, according to Mr. Guffey, were:

An example is, was there retreat rights? Does anyone have retreat rights back there? So, hey, don't hire this PSE at a higher level. You've got a person who has a right to come back there. Checkmark, you know. Are they overstaffed with PSEs? Checkmark. Is what they're bringing the person in to do, is it a residual vacancy? Have they posted it? In other words, maybe it's only a 35-hour job, but maybe one of the full-time people wants to bid that and then they can hire the PSE for the full-time – you know, why are they hiring this PSE?

did not show the Union any documents. He wanted to talk about the Union giving the Postal Service carte blanche to make any exceptions to the PSE salary schedule it wanted at any location it chose. When Mr. Devine made clear that was what he wanted to discuss, according to Mr. Guffey, "that's when we came back and said, well, if you're . . . going to change the contract, let's discuss it".

Mr. Guffey was then asked if, as Mr. Devine testified, the Union sought at the November 7 meeting to obtain desirable duty assignments for the motor vehicle craft. He responded:

Once . . . they didn't want to discuss site by site . . . I may have come back and said if you're wanting that blanket authority, then we can talk about other things and one of them would be that. I'm sure I talked about that if it came up in that context.

Mr. Guffey agreed with Mr. Devine that their meeting was brief, about 15 minutes.

Phillip Tabbita, who was present at the November 7 meeting, basically corroborated Mr. Guffey's description of that meeting. Mr. Tabbita also testified that it was he who drafted the sentence in the PSE MOU that is the subject of the instant grievance, and that his proposed language was accepted by the Postal Service without change. According to Mr. Tabbita, the Union's reason for proposing that sentence was its concern that the rates in the PSE pay structure, would, in some localities be too low to attract applicants, particularly in the motor vehicle craft. There was also a Union concern about PSE wages being too high. He testified:

So that was very much on my mind as we started designing the pay structure and the numbers got down as low as they did, that there was going to have to be an escape clause . . . We wanted to have a [PSE] rate low enough that we would be competitive in terms of keeping work in-house and gaining work back. We also

didn't want rates so low that you couldn't hire people and then we're in the same situation where, you know, one alternative that the Postal Service has when they can't hire is they contract.

So this was, in essence, an attempt to make sure that we would have rates sufficient to attract people and retain people at competitive rates, but at the same time not so high that they would make us uncompetitive. . . So there's the balancing act that's going on here, and that's what we want to look at any time we had a specific proposal is where we come out on that.

Mr. Tabbita also testified to other Union concerns that led it to propose that PSE wage rates could be above those set out in the PSE MOU only if the Union concurred. One of those was the risk that the Postal Service might propose PSE wage rates that were greater than the entry rate for career employees. The result of that might be that PSEs would be discouraged from becoming career employees if the opportunity arose:

Now . . . the benefits of total compensation would be better, but that doesn't put food on your table or pay your rent, you actually have your disposable income going down substantially.

According to Mr. Tabbita, it was his understanding, as the drafter of the language providing that the Postal Service could pay higher rates "with the concurrence of the Union", that:

[W]e could say no for a lot of reasons. We don't like the fact that the Postal Service is going to say well, people hired earlier won't get the rate⁴ . . . or that . . . new

⁴ This is a reference to a January 10, 2013, e-mail from Patrick Devine to Denver Postal Service managers authorizing the hiring of 22 PSEs at rates above those in the PSE MOU, stating that these rates apply only to new hires, concerning which Mr. Guffey testified:

Look, you will never get concurrence from us on any situation where you think you can hire an individual at a different rate. . . We have a rate nationwide. You want to talk about changing those rates for the district, area or location, but don't tell us you're

career hires are going to have to eat a pay cut if they come from their PSE rates.

If the Postal Service is unwilling to make those accommodations, I think we probably would or could say no, that you've got to do something here, you're just not going to get a deal with us. But I don't think we could be totally arbitrary or capricious or certainly discriminatory in the way that we made those decisions. It wouldn't be in our – it wouldn't be in our interest or the Postal Service's interest to do so.

On December 2, 2011, Mr. Guffey sent the following letter to Doug Tulino, USPS Vice President Labor Relations:

Dear Mr. Tulino:

Under our 2010 National Agreement, the parties have agreed on compensation rates for PSEs who might be hired as motor vehicle operators. The parties also agreed that, if the negotiated rates are insufficient to attract the needed number of drivers in a particular area, the parties will negotiate concerning an alternative rate that would be sufficient. In the absence of agreement on an alternative rate, the Postal Service's options are to hire drivers at the existing agreed-upon rate or to hire career drivers at the career rate.

According, to Mr. Guffey, at the time he sent this letter, he thought the dispute about the conditions under which PSE salary exceptions would be granted could be resolved if responsible APWU and USPS officials were to sit down and talk about it. That was the purpose of his letter, "but none of that ever happened".

going to change the rates for an individual. That's not what the Union is. And we will never agree to special rates for an individual.

It is undisputed that subsequent to the November 7, 2011, meeting, the Postal Service, through February 1, 2013, approved the hiring of a substantial number of PSEs at salary rates in excess of those provided for in the PSE MOU, doing so without APWU concurrence. In a February 5, 2013, e-mail from Neftali Pluguez, USPS Labor Relations Specialist, to Lyle Krueth, APWU Assistant Director, Clerk Division, Mr. Pluguez wrote:

To clarify, the Postal Service's position is that we initially tried to get concurrence for the PSE rates but the APWU tried to negotiate for each exception, so the Postal Service did move forward with them.

On May 30, 2012, the USPS, in accordance with Article 15.2, referred this dispute for National Arbitration.

II. DISCUSSION

A. Meeting of November 7, 2011

Based upon all the evidence, I credit the testimony of Mr. Devine that he went to the November 7 meeting with the intention of discussing individual requests for salary rate exceptions at specific locations. I further credit Mr. Devine's testimony that Mr. Guffey refused to discuss individual requests for salary rate exceptions unless the Postal Service would grant the Union's demand for desirable duty assignments in the NTFT MOU for the motor vehicle craft.

B. The Interpretive Issue

In the absence of an agreed-upon statement of the interpretive issue for decision, the Arbitrator states that issue to be:

In discussions with the Postal Service concerning whether the Union will concur in a Postal Service request to pay hourly PSE wage rates higher than those

set out in the PSE MOU, is the Union limited to discussing the wage rate proposed by the Postal Service and any alternative wage rate proposed by the Union?

The Postal Service's position on the above-stated issue is not entirely clear. At one point its brief (p. 3), it states:

Evidence demonstrates discussions between the parties concerning specific PSE salary exceptions should be limited to the hourly rate proposed by the Postal Service or, at most, other matters directly related to the request for an exception.

The "evidence" referred to in the foregoing appears to be a reference to counsel's statements at the hearing, in response to the Arbitrator's questions, that under the Postal Service's interpretation of the disputed language, the Union would be free to insist, as a condition to concurring with a proposed PSE wage exception for newly-hired employees, that the same wage exception be granted to current PSEs in the same region and pay grade. The Union would also be free, counsel stated, to oppose a proposed wage exception on the grounds that it would put PSEs above the entry level for career employees.

Subsequently, however, the Postal Service, in the concluding section of its brief, stated (p. 14):

The Postal Service asks that [the Arbitrator] order the parties to limit the discussions for concurrence as used in the PSE MOU Section 1.g. to issues related to the monetary amount of the exception to the hourly rate proposed by the Postal Service.

In light of the Postal Service's requested order, I shall proceed on the assumption that its position regarding the proper interpretation of the disputed sentence is that set out above – that the Union may condition its concurrence solely on to issues related to the monetary amount of the exception to the hourly rate proposed by the Postal Service.

The Union's position is that it has an absolute right to decline to concur with a proposed exception to the PSE wage rates and is free to propose whatever demands it wishes as a condition to its concurrence.

The first place to look in any dispute about contract interpretation is to the language of the contract provision in question. The sentence in dispute here provides:

Should it be necessary for recruitment or retention of PSEs, the Postal Service may pay higher hourly rates, with the concurrence of the Union.

Standing on its own, this language places no limit on the conditions upon which the Union must grant its concurrence. It does not state that the Union's decision with respect to concurrence must be based solely on "issues related to the monetary amount of the exception to the hourly rate proposed by the Postal Service", or that "Union concurrence is limited to proposing alternate rates". The language in question thus supports the Union's position that there are no contractual limitations on the conditions it may insist upon as conditions to its concurrence with a Postal Service request for a PSE wage exception.

Turning next to the bargaining history, Phillip Tabitta, the sole witness on this aspect of the case, testified that the sentence at issue was a Union proposal, drafted by him and accepted by the Postal Service without change. Its purpose was to discourage the contracting out of bargaining unit work by enabling the Postal Service to pay more than the standard PSE rates where necessary to do so to hire PSEs. The Union's fear was that if the Postal Service were unable to keep its costs down by hiring PSEs, even at rates higher than those in the PSE MOU, overall costs would increase to the point at which the Postal Service would be motivated to contract out the work in question.⁵

⁵ The sentence in the PSE MOU which follows the sentence in dispute provides. "Whenever contracting or insourcing is under consideration, the Union may propose different hourly rates for competitive purposes", was also proposed by the Union. It sought to discourage contracting out from the opposite angle of the disputed sentence - by authorizing the Union to propose lower hourly rates for career employees. Thus, the Postal Service could propose higher PSE rates subject to a Union veto, and the Union could propose lower career employee rates subject to a Postal Service veto.

The Union was also concerned that if the PSE rates proposed by the Postal Service were too high, that too would increase Postal Service costs to the point at which contracting out would appear attractive. Finally, the Union was concerned that if PSE wage rates exceeded those of entry level career employees, PSEs would be discouraged from becoming career employees. For all these reasons, the Union drafted the provision that the Postal Service could propose higher PSE wage rates, but that they could not pay higher rates without Union concurrence. According to Mr. Tabitta:

[W]e could say no for a lot of reasons. We don't like the fact that the Postal Service is going to say well, people hired earlier won't get the rate . . . or that . . . new career hires are going to have to eat a pay cut if they come from their PSE rates.

If the Postal Service is unwilling to make those accommodations, I think we probably would or could say no, that you've got to do something here, you're just not going to get a deal with us. But I don't think we could be totally arbitrary or capricious or certainly discriminatory in the way that we made those decisions. It wouldn't be in our – it wouldn't be in our interest or the Postal Service's interest to do so.

The Postal Service asserts that, despite the language of the disputed sentence and the absence of support for its position in the bargaining history, the mutual understanding of the parties at the time the disputed sentence was negotiated was that the only issue which the Union could raise in discussing concurrence was the amount of the proposed wage rate. It finds support for this in Mr. Guffey's December 2, 2011, letter to Mr. Tulino, in which Mr. Guffey stated:

Under our 2010 National Agreement, the parties have agreed on compensation rates for PSEs who might be hired as motor vehicle operators. The parties also agreed that, if the negotiated rates are insufficient to attract the needed number of drivers in a particular

area, the parties will negotiate concerning an alternative rate that would be sufficient.

According to the Postal Service, this letter demonstrates Mr. Guffey's recognition of the parties' mutual understanding that negotiations about requested exceptions to PSE wage rates would focus on wage rates. The Postal Service finds further support for Mr. Guffey's understanding to this effect in his testimony that:

[W]e recognized that problem . . . that they could not hire people at these rates, and so we came into agreement that we would negotiate the rates.

There can be little doubt that the parties' expectation in agreeing to the sentence in dispute was that the typical discussion of a Postal Service request for an exception to the PSE wage rates would focus on the proposed rate and alternative wage rates. The question, however, is whether the parties agreed to limit discussions to that single issue. As has already been pointed out, nothing in the language of the disputed sentence supports the conclusion that they did. Nor is there anything in the record that shows that the parties discussed or even considered that question. The key question, then, is what interpretive conclusion is to be drawn from the language of the disputed sentence and the limited evidence of bargaining history.

In considering that question, it is important to remember that the sentence in question was proposed by the Union to serve Union goals – primarily that of discouraging contracting out – by providing the Postal Service, under some circumstances, with the authority to pay PSE wage rates in excess of those set out in the PSE MOU. There is no reason to suppose that the Union would knowingly have required itself to concur in such increased wage rates if it viewed other Union goals as more important, under the circumstances of a particular request, than discouraging contracting out.

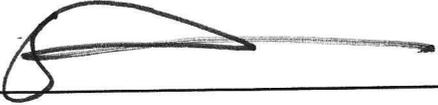
On the other hand, there is equally no reason to suppose that either the Union or the Postal Service contemplated that the Union would be free to condition its concurrence in increased PSE wage rates on Postal Service acceptance of Union demands having no connection with PSE wage rates. Even Mr. Tabitta did not go to that extreme, instead testifying:

[W]e could say no for a lot of reasons. We don't like the fact that the Postal Service is going to say well, people hired earlier won't get the rate . . . or that . . . new career hires are going to have to eat a pay cut if they come from their PSE rates.

Mr. Tabitta's testimony sets out a persuasive view of what the parties could have anticipated under a Union-proposed and Union-drafted provision that granted the Union power to concur – or not – in a Postal Service proposal to increase PSE wage rates above those set out in the PSE MOU. Since the disputed language was proposed by the Union to serve Union interests, Union concurrence was not likely to have been viewed by the Union as limited to the narrow question of the amount of the proposed PSE wage increase, but could logically include other matters related to the Postal Service's proposal. Similarly, because the core issue dealt with by the disputed sentence is PSE wage rates, it is wholly unlikely that the Postal Service would have agreed to give the Union a blank check to condition its concurrence on grounds wholly unrelated to the PSE wage rates under consideration. Accordingly, I conclude that the Union may condition its concurrence on a Postal Service proposal to increase PSE wage rates solely upon matters reasonably related to the Postal Service's proposal, including, but not limited to, the amount of the proposed increase.

III. AWARD

The matter is remanded to the parties for discussion of the appropriate remedy, if any. If they are unable to reach agreement within 30 days, either party may request further proceedings before the Arbitrator.



Stephen B. Goldberg, Arbitrator

July 25, 2013