

C#10181

A-C

REGULAR ARBITRATION

USPS - NALC

SOUTHERN REGION

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In the Matter of Arbitration	)	Case	#S7N-3S-C-66347
Between	)	GTS	#0011931
United States Postal Service	)	Ileana Estevez, Grievant	
Ft. Lauderdale, Florida	)	Case	#S7N-3S-C-66351
and	)	GTS	#0011959, Class Action
Branch 2550	)	Case	#S7N-3S-C-66353
National Association of	)	GTS	#0011958, Class Action
Letter Carriers, AFL-CIO	)	Record Closed:	March 16, 1990

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Before Irvin Sobel, Arbitrator of Record

Appearances:

For the United States Postal Service (Service, Union, Management)

Jerry Foster

Labor Relations Assistant,

Ft. Lauderdale, Florida.

For the National Association of Letter Carriers (NALC, Union)

Marty Ireland

President, Local 2550,

Ft. Lauderdale, Florida.

Preliminary Statement:

The hearing of the enumerated issues was held pursuant to procedures of Modified Article 15 of the National Agreement (LMRA). On June 30, September 7, and September 12, 1989 respectively the Union filed grievances on behalf of PTF Ileana Estevez and two Class Action Grievances, alleging the Service violated the LMRA in each of the respective cases. The parties unable to resolve the issues assigned them to final and binding arbitration. The hearings were conducted by the above cited arbitrator on March 16, 1990 at the Main Post Office in Ft. Lauderdale, Florida. At the hearing the parties were accorded full opportunity to present witnesses for direct and cross-examination and introduce such other evidence and argumentation each party deemed pertinent to the resolution of the grievances under consideration. The hearing files were closed as of March 16, 1990.

The arbitrator would like to thank the parties for their patience in waiting for this abnormally delayed decision. Their understanding of the reason for the delay namely my wife's protracted illness, hospitalization and ultimate death is comforting. Their continued expressions of sympathy and concern is deeply appreciated.

Case #S7N-3S-C-66347, Ileana Estevez, Grievant

The parties mutually stipulated the following issue for resolution.

Did the Employer violate the National Agreement when it denied Grievant's bid on Temporary Vacant Duty Assignment, Route 22-1. If so, what is the appropriate remedy.

Facts in Case:

On June 21, 1989, Supervisor Whitehead denied the grievant's June 16 bid for a temporary vacant router's position (22-1).

The Union essentially contended that the grievant a Part Time Flexible Carrier (PTF) on Light Duty due to pregnancy was improperly denied the temporary router's assignment she was entitled to under the National Agreement (N/A). It argued that the Employer's stated reason for denying the bid, namely grievant's light duty restrictions, was without foundation. In its letter of corrections and additions the Union put the matter thusly:

Grievant's restrictions did not prevent her from performing a router's functions. Employees may sit to do casing and grievant could sit for eight hours. Moreover another router (Debra Nelson) was allowed to perform the router functions and her restrictions were more severe than that of the grievant.

Accordingly the Union requested the grievant shall be awarded the temporary vacant router position (22-1). It also requested that the grievant shall be paid all lost wages including overtime from June 24, 1989 to October 30.

Jerry Foster in his Step 2 (Modified Grievance Procedure) denial argued:

"A review of grievant's file show that she is on light duty and her restrictions do not allow her to perform the functions of the position for the time required (Ex. Grievant restricted to 2 hours or less standing.)"

Relevant Contract Provisions:

41. - Positioning

- C-1 The senior bidder meeting the qualification standards established for that position shall be designated the "successful bidder".

C-2 Within ten days after the closing date of the posting the Employer shall put a notice indicating the successful bidder, seniority date, and number.

## Section 2 - Seniority

### B - Definitions

2. Part Time regular carriers are considered to be a separate category and seniority for assignments and other purposes shall be restricted to this category.

4. Part Time Flexible letter carriers may exercise their preferences by use of the seniority in scheduling and for available full time craft assignments of anticipated duration of five (5) days or more in the delivery unit to which they are assigned.

### Article 13.4B:

The full time regular or part time flexible employees must be able to meet the qualifications of the position to which the employee is reassigned in a permanent basis. On a temporary reassignment qualifications can be modified provided excessive hours are not used in the operation.

### Position of the Parties:

The essence of each party's position is reflected in their already cited statements. However some arguments were modified while others were stated in altered, if not new form, during the hearing. Accordingly, a brief summary of each party's position is warranted at this junction.

### The Union's Position:

The Union contended that the grievant's rights under the National Agreement entitled her to bid for the assignment of temporary Router and as the only bidder that bid should have been honored. In denying her bid Supervisor Whitehead cited "restrictions" which were clearly inapplicable to the router position, since Debra Nelson whose

restrictions, including that of being required to sit the entire eight hours, were far more stringent than the grievant's. The grievant's restrictions allowed her to stand for two hours. That time was more than sufficient to allow her to reach the top rungs of the router's case. After the grievant's rejection the Employer neither filled nor even reposted the vacancy; instead, it frequently filled it with casual employees.

The Employer's Position:

The Employer contended that Ms. Estevez's restrictions precluded her performance as a router for a full eight hour day. She was not treated disparately from Ms. Nelson who, not only was a full time regular but also was much taller than the grievant thus enabling her to reach the top rungs from her sitting position. Equally significant was the fact that the grievant's pregnancy would not permit her to work beyond October 30 while it was known at the time of posting that the incumbent of the position Carrier Culpepper, who was on OWCP, would not be able to return to duty for an extended period well beyond the end of October date the grievant was due to take leave. In fact, as of this date, Culpepper has not yet returned to his position.

Opinion and Award:

Introduction:

Three basic questions must be answered before the instant grievance can be resolved. Those are: (1) Was the grievant entitled to bid for and be awarded the temporary router's position; (2) If so, did her restrictions prevent her from being awarded the position; (3)

Was the grievant treated disparately; and (4) Did the limited amount of time the grievant had, before she was scheduled to temporarily leave the Service, preclude her of being awarded the temporary assignment as router.

The National Agreement, Article 41 - Section B (2 and 4), clearly states that Part Time Flexible Carriers may exercise their preference by use of their seniority for available full time craft assignments of anticipated duration of five (5) days or more in the delivery unit to which they are assigned. Ms. Estevez was thus clearly eligible to bid for Router Position #22-01 (Temporary) and thus as the only bidder for that assignment she was entitled to have her bid accepted if she were able to meet the physical requirements of the position.

Management, in the person of Ben Whitehead, contended that the physical limitations, imposed upon her following the acceptance on April 20 of her request for a Light Duty Assignment made it physically impossible for her to perform the Router's function. Specifically the Employer argued that the grievant's lack of height not only precluded her reaching the top rungs of the Router's case but also given her restriction to two hours standing per day, she could not be expected to be able to complete all of her assignments.

The Union contended that this argument was a subterfuge designed to keep the router position open and thus able to be filled in a more flexible and less costly mode by either casuals or other available PTF carriers. It cited the case of Carrier Debra Nelson, whose request for a Light Duty Assignment for the same reason as the grievant's namely, pregnancy was granted on June 16, 1989. Ms. Nelson, who was assigned to a Router's position was on virtually full restrictions

including being required to sit the full eight hours. Although the Employer contended that Ms. Nelson was a full time regular and Ms. Estevez a PTF that distinction is of no validity once the latter was the only bidder for the temporary Router's Position (22-1).

The only issue was Ms. Estevez's ability to perform the job within her physical limitations. It is not clear from Ms. Nelson's restrictions that the requisite entirely of the casing she had to perform could be performed in a sitting position. Even if Ms. Estevez were shorter than Ms. Nelson, a matter asserted by Management, the effect of that unstated height difference was never determined specifically. Thus despite Ms. Nelson's indeterminate height advantage it is hard to conceive that as contended by Management she could easily have reached the top cases.

On the other hand Estevez could still reach the upper cubicles of the Router's case by standing and the entirely of the standing required would certainly not aggregate two hours daily. Thus the Union was able to affirmatively maintain its burden, namely that the grievant's work restrictions, did not preclude her from performing Router Assignment 22-01.

The position was a Temporary Vacancy and the fact that Ms. Estevez was scheduled to go on leave towards the end of October before the position's incumbent was scheduled to return, thus, did not invalidate her assuming that assignment. The vacancy was still a temporary one and was ostensibly still the permanent assignment of Mr. Culpepper.

For the above reasons, even though the Employer could argue that its actions were motivated by efficiency considerations, including the

limited duration of Estevez's time, the grievant's bid was improperly rejected. She was fully able within her restrictions to perform the eight hours per day temporary Router's assignment and thus the official basis in which the Employer denied her bid was invalid. For this reason her grievance will be sustained and she will be awarded the differences between the number of hours she actually worked between June 24 and October 29, and the amount she would have worked had she been employed on the eight (8) hours per day, forty hours per week schedule compatible with the bid position denied her.

Calculations would indicate that the number of hours improperly denied Ms. Estevez approximated fifty-four (54) hours. These are the hours the grievant would have worked between pay period 14 and the end of pay period 22 had she properly been scheduled in accordance with the bid which was denied her.

Award:

The grievance of Ms. Ileana Estevez is hereby sustained. The grievant will be awarded back pay for fifty-four (54) hours at her prevailing hourly rate as of June 24, 1989.

Case #S7N-3S-C-66351 - Class Action

Facts in Case:

On August 24, 1989 the Union introduced a Class Action grievance contending that bargaining unit Position 14-3 was improperly awarded to Isabel Carrion. The Union argued Ms. Carrion was a 204-B and therefore "not eligible to bid on Carrier Advertisement 89-6 (Reserve

Letter Carrier) 14-3". It requested that "RLC 14-3" be reposted for bid.

Jerry Foster's denial of the grievance at Step 2 of the Modified Grievance Procedure unequivocally stated the Employer's position. He argued:

First of all the grievance is not timely; Carrier I. Carrion was announced as the successful bidder for position of RLC 14-3 per results of Carrier Ad 89-6 which was dated July 26, 1989. The grievance was not filed at Step 1 until August 24, 1989 (well past the 14 day limit provided in Article 15, Section 2 of N/A). Secondly the Union provided no documentation whatsoever to show that I. Carrion was acting as a 204-B at the time she bid the position.

#### Relevant Contract Provisions

##### Article 41 - Section 1A-2

2. Letter carriers temporarily detailed to a supervisory position (204B) may not bid on vacant letter carrier craft duty assignments while so detailed. However, nothing contained herein shall be construed to preclude such temporarily detailed employees from voluntarily terminating a 204B detail and returning to their craft position. Upon return to the craft position, such employees may exercise their right to bid on vacant letter carrier craft assignments.

The duty assignment of a full-time carrier detailed to a supervisory position, including a supervisory training program in excess of 4 months shall be declared vacant and shall be posted for bid in accordance with this Article. Upon return to the craft the carrier will become an unassigned regular. A letter carrier temporarily detailed to a supervisory position will not be returned to the craft solely to circumvent the provisions of Section 1.A.2.

Form 1723. Notice of Assignment, shall be used in detailing letter carriers to temporary supervisor positions (204b). The Employer will provide the Union at the local level with a copy of Form(s) 1723 showing the beginning and ending of all such details.

## Article 15 - Section 2

The Union also may initiate a grievance at Step 1 within 14 days, 14 days first became aware of (or recognizably should have become aware of) the facts giving rise to the grievance. A Step 1 Union grievance may involve a complaint affecting more than one employee in the office.

### Arbitrability:

The Employer citing Article 15.2 contended that the Union's filing of its Class Action grievance was untimely and thus the grievance itself should be denied as inarbitrable. The grievance was filed on August 24, 1989 while the "Results of Carrier Advertisement" which declared that Ms. Carrion was the successful senior bidder for RLC 14-3 was dated July 26, 1989.

The Union however contended that almost immediately after the July 26 notification of "Results" it had protested the designation of Ms. Carrion as the senior bidder to Dan Lynaugh, Manager City Operations, who was the signatory of the bid sheet.

The NALC requested that Lynaugh rescind his designation of Ms. Carrion as the successful bidder and the position be reposted for bidding in the next Carrier Advertisement. Ms. Lynaugh neither rendered a decision nor responded to it's request and thus, the first time the Union was made aware that its claim for a reposting had been rejected was August 14th when the position in contention was not posted on Carrier Advertisement 89-7 (Also signed by the aforecited Lynaugh).

For the above reason, namely the Union's intervention shortly after the July 26 announcement of successful bidders and Mr. Lynaugh's failure to notify the Union that the position would not be reposted,

the date in which it can be proven that the Union became "aware of the facts giving rise to the grievance" was August 14, 1989. To rule otherwise, namely in favor of the July 26, 1989 date would unduly formalize the grievance procedure and negate the kind of informal decision making which frequently settles issues before grievances are instituted.

The grievance, therefore, was timely filed. The issue in contention will be decided on its substantive merits.

Opinion and Award:

The status of the 204-B has been a source of conflicting interests especially for the individual who is both a member of the bargaining unit and yet temporarily removed from it. The person in that ambivalent status whose ultimate fate as a Supervisor is still conjectural would necessarily desire not to have incurred any impairment of rights within the bargaining unit if that temporary and provisional status does not lead to a Supervisor's position. The Employer of course prefers to be able to recruit from the carrier ranks those it considers as having the greatest potential for a management role and thus it would like to assure those who may aspire to such positions that if the move were to prove unsuccessful that no loss of opportunity within the carrier ranks will be suffered. On the other hand the Union would like to protect members of its organization by assuring that desirable assignments for carriers are not usurped by individuals, who while still officially part of the bargaining unit, have commitments and basic loyalties to their management roles.

The result of these conflicting interests is a carefully crafted and worded contractual provision. The nature of the service requirement as a 204-B, during the 4 month training period is not spelled out; in fact, the language of the LMRA does not even specify that the service as a 204-B be continuous. As a matter of fact many 204-B's do not have continuous assignments as Supervisors during the four month period specified. When there is a need for their services, they perform as 204-B's, generally as reliefs for other Supervisors, otherwise they return to their bargaining unit status. It is not unusual to have a carrier function in both capacities, not only within a given week, but also within the same day.

According to the mandated Form 1723's on July 11, 1989 the date in which Ms. Carrion exercised her bid option she was performing carrier duties. Her assignment as a 204-B terminated on July 8 and did not resume until July 17. In short, there was a one week hiatus between 204-B assignments during which Carrier Carrion exercised her bid option. She also was not functioning as a 204-B on the day she was notified she was the senior successful bidder for RLC 14-3 but was in that status the week before (July 17 - 22) and the week after (July 29 - August 4). In short, although Ms. Carrion seemingly met the minimal formal requirements for submitting a bid the issue remains whether her bid was in conformity with the entirety of 41.2 especially that part thereof which states that, "A letter carrier temporary to a Supervising position will not be returned to the craft solely to circumvent the provisions of Section 1.A.2.

The Form 1723's show that Ms. Carrion initiated training as a 204-B on March 25, 1989. That assignment terminated on April 1, 1989

and she did not receive another 204-B assignment until April 18, 1989. From the date of the completion of that assignment on April 1, after the aforementioned two week hiatus in April, her assignments as a 204-B with the exception of the two July weeks already alluded to were virtually continuous [April 22-24, April 29-May 5, May 6-19, May 20-June 2, June 3-16, June 17-30 (annual leave), July 1-22, July 29-August 4].

Given the above litany drawn for the Service's own records it is clear that over the four month period, with the exception of the two week period in April between the her training and her first assignment and the weeks in which Ms. Carrion made her bid and had it designated as the successful one she served almost continuously as a 204-B. Moreover, it is equally clear that when she returned to her craft status in July it was by Employer designation and not by, as stipulated in 41.2 a "voluntary termination", of her 204-B status.

For all the above reasons, the Class Action grievance will be sustained.

Award:

The Class Action grievance is sustained. The designation on July 26, 1989 of Ms. Isabel Carrion as the successful bidder for RLC 14-3 is hereby rescinded and the position is hereby declared vacant. Position RLC 14-3 will hereby be reposted as expeditiously as possible.

Case #S7N-3S-C-66353

Facts in Case:

On September 7, 1989 after a First Step Modified 15 denial by Management Representative Tom Cohen the Union filed a Class Action grievance on behalf of the Carriers of Tamarac Station. The Union contended:

204-B R. Freise was allowed to submit and was awarded a bid on RT 2118 (Job Slot 2678979) Tamarac on Carrier Ad 89-7. Paragraph 40 on PG 3 states: A person must not be on a temporary detail to 204-B during the times and dates of Bidding. Bid Sheet Dates August 14 - August 25.

It requested:

Awarded bid to 204-B, R. Freise be made null and void. 204-B Freise be returned to former position. RT 2118 be awarded to the next senior carrier in accordance with the National Agreement. Also any carrier who placed bid on RT 2118 be given a bonus of \$10 a day for as long as Ms. Freise remains in this bid illegally and violates the other carriers' rights to be awarded the bid.

Jerry Foster in denying the grievance stated Investigation of the matter showed that R. Freise was not on a 204-B status when he bid for the carrier assignment in question. He was a 204-B on August 14, 15, 16 but was returned to his regular carrier status August 17, 1989 to August 21, 1989. He submitted the bid during the period August 20, 1989. R. Freise was not returned to the craft assignment solely to circumvent the provisions of Article 14, Section 1 A-2 of the National Agreement. There is no evidence of a contractual violation.

Opinion and Award:

Arbitrator's Discussion:

Because of the grievant similarities both in major detail and argumentation between the above case and that related to the job bid of Ms. I. Carrion the parties, other than introducing the grievance

file, and the Form 1723's made no specific arguments regarding the above issue. In short the parties agreed that the issues were sufficiently similar in both Class Action Grievances to enable the arbitrator to render his decision on the basis of his conclusions drawn from the grievance files.

Opinion and Award:

Although the parties conceded that the issues on both cases were identical this Arbitrator while sustaining the Union's grievance in the Carrion case would like to make a few observations which differentiate the two fact situations.

The two cases are not sufficiently identical to warrant a simple reiteration of the decision in the Carrion case. For instance Mr. Freise's Form 1723's submitted by the Union to support its contentions fail to reveal that degree of continuity as a 204-B requisite to validating the Union's contentions. The Union submitted Assignment Orders (1723's) solely from July 1 to September during which Mr. Freise was utilized only sporadically in Supervisory positions. He was utilized as a 204-B from July 5-14, July 20-21, August 14-16, August 21-25, and August 28-31. In general, he not only was utilized less than 50 percent of the time as a 204-B but he also received a substantial number of relatively short term assignments covering either absences of other Supervisors or vacant positions.

The Union did not show either de-facto or de-jure that Freise, under terms of 41.1 A-2, was precluded from bidding for RT 2118. He was not on a 204-B assignment on August 17 when he submitted the bid. In short the Union did not sustain the burden of proof that the

Employer returned Mr. Freise to the craft to circumvent the provisions of Section 1.A.2.

Award:

The Class Action grievance of Branch 2550 is denied. Mr. Freise's successful bid for Route 2118 is hereby affirmed.

Tallahassee, Florida  
July 23, 1990

This is a certified true copy of Arbitration Award

  
Irvin Sobel, Arbitrator