

C#04739A-E

AWARD IN ARBITRATION

RECEIVED

UNITED STATES POSTAL)	APR 2 1985
SERVICE,)	
Employer,)	JIM EDGEOMON, NBA
-and-)	National Association Letter Carriers
NATIONAL ASSOCIATION OF)	W1N-5D-C 2510
LETTER CARRIERS,)	2527
Union.)	2810
)	3544
)	3545

The above captioned matters was duly processed through the parties' grievance procedure, being unresolved, appealed to and heard before the undersigned in regular arbitration on March 19, 1985, at 715 Northwest Hoyt Street, Portland, Oregon.

Making appearances on the record were:

Robert G. Funge - USPS representative

Robert Weaver - NALC representative

At the outset of the proceedings the parties stipulated the matters was properly before me for arbitral determination and the issues for resolution to be:

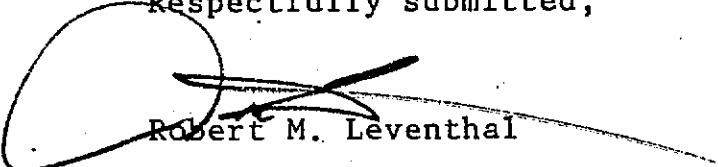
1. Did the United States Postal Service violate the national agreement in denying the Grievant bidding rights for vacant duty assignments of five days or more?
2. If so, to what remedy is the Grievant entitled?

At the conclusion of the evidentiary portion of the proceedings the parties elected to make oral argument on the record whereupon this matter was duly taken under consideration.

Having carefully reviewed the entire record in this case it is my award that:

1. The Postal Service did violate the national agreement in denying the Grievant bidding rights for vacant duty assignments of five days or more.
2. The remedy is as set forth in the appended opinion.

Respectfully submitted,



Robert M. Leventhal

Submitted this 28th day of March, 1985
Culver City, California

BACKGROUND

The fact picture as to what occurred was not in substantive dispute and the parties were able to stipulate as to most of the relevant facts.

These events occurred in 1982 at the Oregon City Station. At the time the events occurred there were 12 regular plus one auxiliary routes. In order to staff those routes the Employer had on its roles 15 full-time carriers, 12 assigned to designated routes, three designated as utility, but two of those were T-6 working the relief while one was designated the "reserve."

The reserve carrier, as a full-time employee, was entitled to a guarantee of eight hours per day and 40 per week and was to all particular intents, equal to the other regular carriers excepting his lack of a regular assignment which subjected him to certain mandatory assignments such as arose in the instant cases.

Additionally, the Employer had a complement of three part-time flex employees which included Mr. Herring, herein-after called the Grievant.

Pursuant to the agreement and procedures when assignments of five or more days became available, such were posted allowing either the reserve or the PTF to "opt" to work such assignments. If any individual so opted and was allowed to work, that employee would assume that schedule as to hours and days off.

On each of the occasions at issue the Employer posted the assignment, the Grievant was the only or senior employee to opt to work the assignments. There was no dispute that "but for" the Employer's decision after the opt period was closed and the Grievant assigned the work, to then mandatorily assign the reserve, the Grievant would have been assigned to work each of the assignments in question.

Further, there was no dispute enough work existed within the Post Office for each of the periods in question to provide the reserve eight hours work per day or 40 per week if the Grievant had been allowed to work the assignments. The Parties were in dispute as to if some of those hours would have been "out of schedule" and even if so, if that was in fact relevant.

There was also agreement that if the Employer was found to have violated the contract this matter would be remanded back to the parties to review records in order to determine if the Grievant had not worked eight hours in any given day or 40 in any given week that he would have worked but for the Employer's actions and then if so, he would be entitled to pay for each such hour at his then applicable rate.

POSITION OF THE PARTIES

The Union

In defense of its position the instant grievances should be granted the Union's major arguments may be summarized as follows:

1. Article 41 of the national agreement guarantees the designated individual the right to opt assignment by seniority. The Grievant was the senior employee and the Employer cannot arbitrarily deny him his rights.
2. The regional instruction does not mandate that opts must be ignored in favor of a reserve if such is required to avoid out of schedule overtime payment.
3. The Employer may, on any given day due to operational requirements, bump a PTF off an opted assignment, but such must be done on demonstrated operational needs on a day to day basis.
4. Assuming arguendo the Employer may disregard a PTF's opt and mandatorily assign a reserve, when such is done the Employer has an affirmative obligation to advise the effected employee (or the Union) as to the express reasons why, such requirement cannot be fulfilled by generalities such as "scheduling problems" or "efficient operation of the system."
5. Each of the weeks in question were for a week of annual leave. The fact another employee was going on leave was known to the Employer well in advance, there were no representations as to any special problems known in advance or anticipated

for any of the weeks in question and review of the record clearly demonstrates that regular route work was available to be assigned the reserve had he not been manditorily assigned and such assignments would not have required out of schedule pay.

6. The Employer's fourth step answer in Case H1N-5F-C 9164 went to a situation where the Postal Service assigned a reserve to the auxiliary route, which is the Union's position in the instant case.

The Employer

In defense of its position the instant grievances should be denied, the Employer's major arguments may be summarized as follows:

1. No violation of any provision of the national agreement or regional instruction has occurred in that pursuant thereto the Employer has the obligation to provide 8 and 40 to the reserve. The PTF employees are only to be used to fill the "gaps."
2. The collective bargaining agreement and regional instructions mandate that to the extent possible the reserve, is a full-time employee to be assigned a full-time schedule. When the reserve did not opt the positions in question, to assign him to the auxiliary route or some parts of other

jobs, which are historically performed by the PTF employees, would not only violate the manner in which such employees are supposed to assigned, but cause gaps resulting in no work performed for periods of time or to adjust the reserves working hours thereby causing out of schedule pay.

3. The regional instruction is explicit directing that management is not to use a reserve as a PTF and in scheduling to "keep in mind" out of schedule overtime. In the instant case the reserve was assigned a schedule that coincided with the other carriers, had the Grievant been allowed to work the opt, that would have necessitated working the reserve different hours to insure he would have his eight hours work each day.
4. The Union is partially correct in that reviewing the assignments after each of the periods in question there may have been route assignments, but the Employer must schedule in advance and exercised its best judgment at that time. To hold management to knowledge after the fact is inappropriate, particularly where, pursuant to the collective bargaining agreement, the Employer has discretion in its scheduling decisions.

ANALYSIS

As with any case of contract interpretation the touchstone is the contract which sets forth in pertinent part:

ARTICLE 7 EMPLOYEE CLASSIFICATIONS

1. Full-Time. Employees in this category shall be hired pursuant to such procedures as the Employer may establish and shall be assigned to regular schedules consisting of five (5) eight (8) hour days in a service week.
2. Part-Time. Employees in this category shall be hired pursuant to such procedures as the Employer may establish and shall be assigned to regular schedules of less than forty (40) hours in a service week, or shall be available to work flexible hours as assigned by the Employer during the course of a service week.

ARTICLE 8 HOURS OF WORK

Section 8. Guarantees

C. The Employer will guarantee all employees at least four (4) hours work or pay on any day they are requested or scheduled to work in a post office or facility with 200 or more man years of employment per year. All employees at other postoffices and facilities will be guaranteed two (2) hours work or pay when requested or scheduled to work.

Article 41 LETTER CARRIER CRAFT

Section 2. Seniority

B. Definitions

3. Full-time reserve letter carriers, and any unassigned full-time letter carriers whose duty assignment has been eliminated in the particular delivery unit, may exercise their preference by use of their seniority for available craft duty assignments of anticipated duration of five (5) days or more in the delivery unit within their bid assignment areas, except where the local past practice provides for a shorter period.

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

The designation of reserve was new and designed to replace prior descriptions such as "leave replacements," "leave regulars," "floaters" or "unassigned regulars."

In order to assist in implementing the 1978 through 1981 contract a western regional instruction letter was issued. The regional instruction was (and apparently still is) intended as a guide to assist in properly administering the contract. Clearly that document cannot supercede the contract, but it does demonstrate management's understanding of its rights and obligations thereunder.

I found the following paragraphs of the regional instructions pertinent:

Intent of Reserves

1. The intent of the name "Reserve Letter Carrier" is to provide a common nomenclature for those full-time positions currently in the field which have been known by various names such as "leave replacements", "leave regulars", "floaters", and "unassigned regulars" as referenced in the old Agreement. (The term unassigned regular under the new Agreement (1978 to 1981) is to be used only when the employees are excess to the needs of the delivery unit; it is obvious they do not hold a bid assignment.)

4. Opting vs. Not Opting and Being Assigned

If a reserve carrier opts and is successful for an assignment of five days or more he assumes the hours and days off of the opted assignment and overtime is not paid for if such hours and/or days off are outside of this posted job bid.

However, if the employee does not opt and we assign him to the five-day or more duty assignment and he works hours and days off outside of his posted job bid he is to be paid overtime for such hours or days off.

5. Reserves Not to be Used as Flexies

All full-time carriers including reserves and unassigned regulars, whether or not in a bid assignment, must have regular hours of work and days off. They are not to be used as flexies are used.

6. Question of Flexibility

With the establishment of reserve carrier some may think flexibility in scheduling has diminished, and in offices which have used full-time carriers, as they use flexies, such is true. However, our responsibilities are very clear in this area.

All full-time carriers must have regular hours of work and days off. Much of the believed loss of flexibility can be overcome by administering as follows:

7. Scheduling of Starting Times

Recognize that the reserve letter carrier is the principal replacement for scheduled absences, but may also fill unscheduled absences.

10. Part-Time Flexies Opting

- a. If a reserve carrier or an unassigned full-time carrier does not opt to take an available assignment of five or more days and there is sufficient work to keep them busy (eight hours/day and forty hours/week) then part-time flexies can opt for the assignment by exercising their seniority. If the part-time flexible(s) fails to opt for the assignment, he/she is then to be assigned to the duties.
- b. If it can be shown that there will be insufficient work for the full-time unassigned regular or reserve carrier

and he/she does not opt for an available assignment, he/she can be directed to the assignment before having part-time flexibles opt for the assignment.

From the above I feel the contractual scheme is clear, the reserves have an explicit role (in this regard the prior titles were more descriptive) which is to work as a regular carrier enjoying all the rights and privileges thereof including a scheduled work week. The Employer has agreed that to the extent possible the employees holding the reserve position are to be worked as "regulars" and in light of the advanced schedule and guarantees, such individuals are not to be used as "flexies."

These rights also carry some obligations and from the regional instruction such appears to be that if a regular assignment is open and a reserve does not wish to work that assignment, he is subject to such assignment if that is necessary in order to preserve or maintain the intent of the reserve position.

However, pursuant to the contract while the Employer has maintained the right to direct the work force and included therein the right to schedule employees in the most efficient manner, where employees enjoy specific rights, such must be honored even if they are not the most efficient way to schedule the work force.

The contract grants few rights to employees hired as part-time flexs as each right so accorded in some manner reduces the Employer's flexibility. Clearly, the two hour

minimum guarantee in effect at this office could cause individuals to be paid for work not performed.

However, where the contract does confer a right on the part-time flex, such is to be accorded the same weight as the rights of regular employees, unless such right is expressly subordinated.

In the instant case the Employer, in its western regional instruction has identified its position re subordination of the part-time flex rights in Paragraph 10 B.

As I read Paragraph 10 B two tests must be met, first, it can be shown that there will be insufficient work.

I concur with Union counsel this language does place an affirmative burden on the Employer, but I do not accept the reverse position that the Union (or a Grievant) can rebut the Employer's position by demonstrating that eight hours, not necessarily consecutive, of any type of carrier work be it the utility route, special deliveries, collections, etc. are present demonstrates the Employer cannot meet its burden to show insufficient work.

If the western regional instruction is to be given credence, the purpose is not to use the reserves as a flexie and the Union argument that any work during the hours of an operation represents an "available assignment" is then inconsistent with the underlying theory of the reserve position and the clear instruction that employees so classified are not to be used a flexies.

In the instant case, one of the usual problems that arise with the passage of time (these events occurred in 1982) occurred, if there were any special or "extraordinary" circumstances present when management had to make its decision not to honor the senior employee who opted for the posted assignments, such was not testified to.

In its grievance answers to the five separate grievances filed in this dispute, management set forth as a basis for its actions:

1. There are no other full-time positions already scheduled or available that coincided with the reserve carrier's tour, 7:00 a.m. to 3:30 p.m.
2. The usual use of a PTF is to case and carry the auxiliary route (Number 13) until approximately 2:30 p.m., then take lunch, a break etc., then start early collections at 4:00 p.m., then perform other duties such as closing, pick-up and late collections until 6:00 p.m.
3. Scheduling the reserve at 9:30 would incur out of schedule payment and then have to "make work" after the five hours on the auxiliary route as after he delivered that route, it would be too early for specials or collection runs.
4. It is the "general practice" to assign the reserve to five day vacancies even though part-time flexs may opt, when there are not other full time

positions or assignments available for that reserve carrier within his scheduled tour.

5. Not obligated to "make work" to accommodate a reserve while a part-time flex is utilized on a full-time assignment.

Based upon the Employer's answer, there were no "special circumstances" and it can only be concluded the Employer knew of the assignment some weeks in advance (they were occasioned by annual leave requests) and it knew what its assignments were and projected work load.

Clearly the unexpected could occur at any time, a regular carrier becoming ill or injured, some unexpected heavy volume of mail, etc.

However, in my opinion the Employer may not use the possibility of contingencies as a basis to deny the part-time flex their rights under Article 41.4 of the national agreement.

I feel it significant the Union did not dispute that if events occurred on a day to day basis, that would cause substantial scheduling problems if the successful part-time flex was allowed to work the opted schedule, the part-time flex could be taken off or bumped from that assignment.

While I concur with the Employer that hindsight is not always a proper test of a parties responsibility to schedule, review of the documents submitted shows that for most, if not all of the days in each of the assignment

periods, one or more part-time flexs were assigned to carry regular routes. The contingency events would not reduce such assignments, but would in all probability increase them as other regular carriers might become ill, injured or require some type of emergency leave. I recognize that a carrier scheduled to be off may report earlier than expected, but such would be a very rare occurrence in relation to the alternative events.

Therefore, I find the Employer's position flawed for two major reasons. First, while this may appear to be "technical," by the Employer's own regional instruction, Paragraph 10 B expressly sets forth that if the reserve does not opt, he can be directed to the assignment before having the part-time flexs opt.

The above requirement presumes the Employer has made an advanced assessment and believes, if challenged, it can show there will be insufficient work, it may then direct the reserve to the assignment, but that must be done before the part-time flexs are allowed to opt.

In the instant case all relevant facts were known, yet the Employer did not determine first if the reserve wanted the assignment and then if not to exercise its right (subject to challenge regarding the amount of work) to assign, but rather posted, allowed the sign-up procedure to occur, determined the Grievant was the successful "opter," awarded the opt, then, based upon no change of facts elected to deny the opt and manditorily assigned the reserve.

The second major point on which I disagree with the Employer also emerges from the regional instruction, that document, as referenced above, requires an affirmative showing by (the Employer) there will be insufficient work.

The Employer's grievance answer recounted the Employer's usual or standard "expectations" and it's usual schedule of certain work. There were no special circumstances or other considerations pointed out and the only differentiation between these weeks and the many other weeks where five day assignments became available due to annual leave, appeared to be that for these weeks only one regular was away while perhaps for other weeks two regulars were away and therefore the reserve was assigned to one of those routes and the part-time flex opt could be honored.

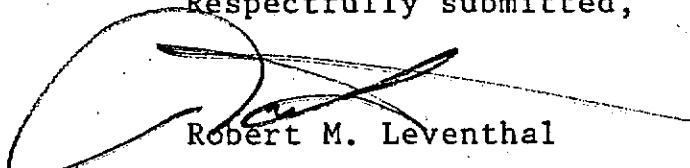
While I understand the Employer's theory, I feel compelled to point out that if there were two assignments and two part-time flexs opted, denying one of those opts by manditorily assigning the reserve would create the same fact picture as in the instant case.

Therefore, the Employer, in full knowledge of its usual work load and the schedules did not assign the reserve when he failed to opt, allowed the part-time flexs to opt, awarded the senior part-time flex the schedule, then without any justification denied the Grievant and manditorilly assigned the reserve. Further, there was work (not to use the reserve as a part-time flex) and that work could have

been identified in advance, such work appeared to fall within the reserve's schedule.

For all the above reasons, the Employer violated the contract and pursuant to the parties' agreement this matter is remanded for review of the records. If the Grievant, did not work hours in any of the periods in question that he would have worked had he been allowed to work the opts he was awarded, he is entitled to be paid for any such hours at his then applicable rate.

Respectfully submitted,



Robert M. Leventhal

Submitted this 28th day of March, 1985
Culver City, California