

C#06986

REGULAR ARBITRATION PANEL

\* \* \* \* \*

In the Matter of the Arbitration \*

between \*

UNITED STATES POSTAL SERVICE \*

and \*

NATIONAL ASSOCIATION OF  
LETTER CARRIERS \*

\* \* \* \* \*

Local Impasse Arbitration

Post Office: BIDDEFORD, MAINE

N4N 1K I 901242

Case No: IMPASSE

TRIAL PERIOD -  
RETREAT RIGHTS

Before Thomas F. Carey, Arbitrator

Appearances:

For U.S. Postal Service:

ROBERT FONTEK

Labor Relations Program Analyst

For Union:

John Pimentel, Jr. Regional Administrative Assistant

Date of Hearing: February 23, 1987

Hearing Closed: February 28, 1987

Place of Hearing: Biddeford, Maine

Award: The Grievance of the Union is sustained, Article 22 "Local Implementation of the Agreement Relating to Seniority, Reassignment, and Posting" in the Biddeford, Maine Post Office having not been found to be "inconsistent or in conflict" with the NA shall continue to be included in the LMOU for the reasons set forth in the body of this award.

Date of Award: March 6, 1987

## BACKGROUND

This proceeding arose as the result of a claim by the United States Postal Service (the Service) that the provisions of the Local Memorandum of Understanding concerning bidding and retreat rights were inconsistent with the National Service and the National Association of Letter Carriers (the Union). The dispute being unresolved was submitted by the Service to arbitration under local impasse procedures and the undersigned was selected as Arbitrator in accordance with the procedures set by the Parties pursuant to Article XXX. After due notice, one (1) hearing was held before the Arbitrator in Biddeford, Maine at which time the Parties were afforded full opportunity to present oral and written evidence, provide oral argument, and otherwise support their respective positions. The hearing was not transcribed. The evidence so submitted and the positions and arguments set forth at the hearing and in post hearing briefs have been fully considered in preparation and and issuance of this Opinion and its accompanying Award.

## THE ISSUES

Was the provision in the L.M.O.U. in the Biddeford, Maine Post Office which set forth that "the successful bidder shall have retreat rights" appropriately negotiated at the local level and is

said provision inconsistent or in conflict with the National Agreement?

#### REMEDY

If so, what shall the remedy be?

#### LOCAL MEMORANDUM OF UNDERSTANDING PROVISIONS AT IMPASSE

##### 22. Local Implementation of the Agreement Relating to Seniority, Reassignments and Posting

F. The successful bidder shall have the retreat rights to his/her prior assignment. All successful bidders to a posted duty assignment shall work their new assignment five (5) days before their former duty assignment is posted.

#### POSITION OF THE PARTIES

##### POSTAL SERVICE

The Service contends in this impasse, as it did in West Springfield, Mass. that the above cited provisions of the LMOU are in conflict with the various provisions of the National Agreement and the language of said provisions should be declared null and void. It is argued that the provisions are inconsistent with the terms of the 1984-87 National Agreement.

The Service again submits that the heretofore allowed "trial" period on a new bid route before a carrier must decide whether or

not he/she wants the new job is inconsistent and/or in conflict with those provisions of the National Agreement. It reiterates that such language "stands in the way" of the NA which designates the senior bidder, meeting the qualification standard established for the position, as the "successful bidder" and requires placing of the successful bidder in the assignment within 15 days, except in December.

It notes that the NA of APWU provides for the ability to withdraw from a bid but that similar language is not contained in the NA of the NALC. To allow letter carriers the right to withdraw would provide them with rights not bargained for nationally. As such, the Service asserts the disputed language of the LMOU violates the seniority and posting provisions of the NA.

The Service once again maintains that once a person is posted as the successful bidder, the new job is his and all claim to the former job is relinquished. It re-emphasizes its argument that an employee can only be assigned one position at a time and the former position is vacant and such positions must be processed as per Article 41 Section 1 of the NA. The Service also cites Article 12 Section 3 of the NA and claims that such language in the LMOU would be contrary to the effort to strive to attain an efficient and stable work force. It specifically contends that such a provision does not require an individual to take all five (5) days on the new assignment prior to making up his mind.

The Service concludes that the primacy of the National Agreement should be upheld.

#### UNION

The Union argues in this case as it did in West Springfield, Mass. that Union and Management at the local level in Biddeford, Maine have properly negotiated a Local Memorandum of Understanding. That LMOU, bargained in good faith, contains a provision for a Trial Period ("Retreat Rights"). It charges that Management now seeks to unilaterally void this provision of the LMOU.

The Union reaffirms that through the give and take of negotiations the Parties reached a compromise at the local level. Management should not be able to accept concessions from the Union in exchange for a trial period and then refuse to honor the local agreement they had signed.

It is further argued by the Union that the disputed provision is not in conflict with the National Agreement. It submits that Article 41 of the NA does not preclude a local agreement concerning a Trial Period ("Related Rights") which it contends "supplements" the NA.

The Union once again stresses that Arbitrators have been consistent in ruling that the Parties have a right to negotiate on those items on which the NA is silent. It cites awards by

Arbitrators Grossman, Williams, Caraway, Mittenthal and Bernstein in support of its arguments in rebuttal.

It repeats its contention that the trial periods are a "money saving proposition" and that without a trial period the original route could be vacant for an extended period. It also proposes that a carrier satisfied with his own route tends to use "less overtime and require less training."

The Union reaffirms that the "trial period" concept is a "widespread and well recognized practice." It reports that the Local Union has never been advised of any specific problems with the trial period and that it was "merely advised...that they had been instructed by 'Higher Management' to impasse the item." It objects to any new issues being raised at arbitration.

The Union urges that the provision for a Trial Period be retained in the Local Memorandum of Understanding.

#### DISCUSSION AND OPINION

The impasse between the Parties concerning Trial Periods (Retreat Rights) in Biddeford, Maine is found to be similar in most of its essential facts and arguments to those raised by the Parties in a companion case heard in January 1987 by this same arbitrator in West Springfield, Massachusetts. In that earlier case the trial period was for three (3) days while in the current Biddeford impasse, the period specified is five (5) days. The arguments, case

and citations, and even the post hearing briefs were agreed by the Parties to be identical in both cases. That being the case the discussion and opinion in this award must of necessity mirror the earlier award.

The Postal Service again submitted several arguments in support of the impasse it declared in claiming that the provision for a "Trial Period" (Retreat Rights) in the LMOU in Biddeford, Maine is in conflict with the NA. It premises its argument on the grounds of the "primacy" of the National Agreement. The contractual right of the Postal Service to challenge a provision in a LMOU on the grounds cited has been established in prior arbitral decisions. As referenced in my earlier decision on this matter the award of National Arbitrator Mittenthal, while noting the problems of changes in longstanding local practices, nonetheless reaffirmed that right and found in his August 31, 1984 award (Case No. H1C-NA-C-25):

In arriving at these conclusions, I am not unmindful of the practical considerations raised by the APWU. No doubt local problems have occasionally been worked out through LMOU provisions which were "inconsistent or in conflict..." No doubt these arrangements have often proved mutually beneficial. No doubt a successful challenge of such LMOU provisions, in place for a long period and accepted by employees and supervision alike, will be disruptive. But the fact remains that the national parties chose through Article 30 to impose an overriding limitation on what the local parties could do. They have not modified that limitation. Hence, the Postal Service is free at the appropriate time to raise the "inconsistent or in conflict..." claim. The arbitrator has no choice but to hold the parties to the terms of their National Agreement. If this situation is to be remedied, it must be done through negotiation rather than arbitration.

The "right" to challenge provisions in a LMOU carries with it the obligation to establish sufficient grounds in the record to demonstrate the basis for the charge that such a provision is indeed inconsistent and in conflict with specific terms of the NA. Such an assertion, must show how and/or to what degree a disputed LMOU provision has such a claimed impact on the NA that it must be set aside.

Conversely as I emphasized in the West Springfield decision the rights of the Parties to establish such local provisions has been recognized by the Parties and should be recognized and sustained, unless proven to be "inconsistent or in conflict" with the NA. In their 1971-73 negotiations the Parties set forth in Article XXX. the rationale for "local implementation" as follows:

#### ARTICLE XXX. LOCAL IMPLEMENTATION

The parties recognize that it is impractical to set forth in this Agreement all detailed matters relating to local conditions of employment and further negotiations regarding local conditions will be required with respect to local installations, post offices, and facilities. Accordingly, designated agents of the Unions signatory to this Agreement and the representatives of the Employer shall negotiate such matters on a local level, and any agreement reached shall be incorporated in memoranda of understanding. No such negotiations or memoranda of understanding shall be inconsistent or in conflict with this Agreement, nor deprive any employee of any rights or benefits provided for under this Agreement.

In the 1984-87 Agreement, the Parties included the following language in Article 30 "Local Implementation":



## ARTICLE 30 LOCAL IMPLEMENTATION

A. Presently effective local memoranda of understanding not inconsistent or in conflict with the 1984 National Agreement shall remain in effect during the term of this Agreement unless changed by mutual agreement pursuant to the local implementation procedure set forth below.

B. There shall be a 30-day period of local implementation to commence April 1, 1985 on the 22 specific items enumerated below, provided that no local memorandum of understanding may be inconsistent with or vary the terms of the 1984 National Agreement.

The twenty-second item in that listing provided:

22. Local implementation of this Agreement relating to seniority, reassignments and posting.

As noted in West Springfield supra the disputed provision for a Trial Period (Retreat Rights) at least arguably can be said to fall within the broad category of "seniority, reassignments and posting" and are properly considered as permissive subjects of local negotiations.

The facts of the case are not in dispute. The disputed provision was negotiated during 1985 local negotiations within the terms of Article XXX. of the NA. That provision previously cited allows the successful bidder retreat rights to his/her prior assignment. All successful bidders shall work their new assignment five (5) days before their former duty assignment is posted.

Article 41 Section 1C "Successful Bidder," which the Service cites and relies upon, sets forth the following terms:

### C. Successful Bidder

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

2. Within ten (10) days after the closing date of the posting, the Employer shall post a notice indicating the successful bidder, seniority date and number.

3. The successful bidder must be placed in the new assignment within 15 days except in the month of December.

4. The successful bidder shall work the duty assignment as posted. Unanticipated circumstances may require a temporary change in assignment. This same rule shall apply to T/6 and utility assignments, unless the local agreement provides otherwise.

Clearly the provisions of Article 41 Section 1C deal with both "posting and seniority." Since the disputed Biddeford LMOU provision concerning "Trial Period" (Retreat Rights) also relates to posting it can be reasonably viewed as a local implementation of Article 41 Section 1C and within the ambit of Article XXX. Section 22. In terms of the actual issues of either "trial periods" in new assignments or "retreat rights" to former assignments, I repeat my finding that the National Agreement is silent on both topics.

As noted in my West Springfield award the issues of the "successful bidder," trial periods and retreat rights have been addressed in a series of arbitral awards that are properly cited and relied upon by the Union. On April 24, 1981 National Arbitrator Bernstein (C8N-4B-C-7812) found that a five (5) day trial period in a Detroit LMOU "supplemented" the NA "by eliminating the ambiguity" contained in that Agreement "with respect to whether a successful

bidder can ever withdraw his bid after it has been made." Bernstein found further that since the NA "is silent on this subject, a local provision that deals with the problem cannot logically be considered to be inconsistent or in conflict" with the NA.

Similar conclusions were drawn by Arbitrator Caraway in his August, 1986 award (S4N-3A-1-900204) involving retreat rights in a LMOU in Paris, Texas which award stated:

Study of the provisions of the applicable provisions of the National Agreement fails to convince that there is any conflict with any of the provisions. Article 41, Section 1, B 3 provides that the bid shall be posted for ten days. Within ten days after the closing date of the posting the Postal Service shall notify the successful bidder. The successful bidder has fifteen days to be placed into the new assignment. There is no language which prohibits the exercise of retreat rights or would prohibit the inclusion of a provision such as Item 22....

The intent of Item 22 is to give a carrier, who is a successful bidder on a new route, the opportunity to change his mind and return to his original route. Nothing in the National Agreement prohibits the exercise of this intent....

In a relatively recent award issued on January 2, 1987 involving a "three (3) working days" trial period with retreat rights, Arbitrator Grossman ruled:

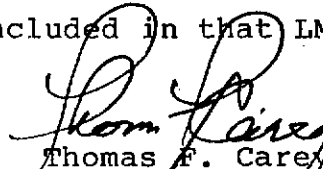
I reject the contention of the Employer that the words "Successful Bidder" in Article 41, Section 1.C or that the requirement that he/she be placed in the new assignment within a certain number of days or that he shall work the assignment as posted, preclude the augmentation of the Section by adding a trial period and retreat. In my judgment these are mutually exclusive of one another....

There are no persuasive arguments in the record before me that would establish that the Biddeford, Maine LMOU dealing with Trial Periods (Retreat Rights) is "inconsistent or in conflict" with the NA's provisions concerning "successful bidder." In both the most senior bidder is awarded the position, the bidder is placed for a period of time in the new assignment and most of the process takes place within the time constraints of the NA.

There is no showing in the case at bar of any significant problems with cost efficiency as relied upon in the Liebowitz award in July, 1986 involving a LMOU in Albany, New York. Once again assuming arguendo, that such an argument were raised, the question still remains as to whether cost and efficiency arguments alone can make a properly negotiated local Trial Period (Retreat Rights) null and void. It must be recognized that those negotiations involved "trade offs" between the local negotiators. It would be patently unequitable to void one element of such a bargained agreement without strong evidence that such a component was clearly "inconsistent or in conflict with" the NA. I would reiterate my conclusion that if there is a perceived problem with such trial period provisions in LMOUs by management, the proper time to address the matter is during the next round of local negotiations. If a local agreement has been properly negotiated and concluded that is not found to be inconsistent, it should not be set aside unilaterally during the life of that LMOU.

The grievance of the Biddeford is sustained. Article 22 "Local Implementation of this Agreement Relating to Seniority, Reassignments and Posting" is not found to be "inconsistent or in conflict" with the NA and shall continue to be included in that LMOU.

March 7, 1987

  
Thomas F. Carey  
Arbitrator