
In the Matter of the National Arbitration Between

UNITED STATES POSTAL SERVICE)
)
)
and) Case No. Q06N-4Q-C 11179786
)
NATIONAL ASSOCIATION OF LETTER)
CARRIERS, AFL-CIO)

Before: Dennis R. Nolan, Arbitrator

Appearances:

For the USPS: Katherine S. Attridge, Labor Counsel, and Noah E. Meyers, Labor Relations Specialist, USPS, Washington, DC

For the NALC: Keith E. Secular and Kate M. Swearengen, Cohen, Weiss and Simon LLP, New York, NY

Place of Hearing: Washington, D.C.

Date of Hearing: November 3, 2015

Date of Award: March 17, 2016

Relevant Contract Provision(s): Article 3; Article 41, Sections 1-3; USERRA, 38 U.S.C.A. Chapter 43

Contract Year: 2011-2016

Type of Grievance: Seniority claim

Award Summary: The Postal Service did not violate Article 41 by displacing the Grievant from his route when USERRA required it to award the route to an employee returning from military service.

Dennis R. Nolan

Dennis R. Nolan, Arbitrator

OPINION

I. Statement of the Case

The initial grievance in this case was filed in Phoenix, Arizona on August 31, 2010. Apparently in anticipation of that grievance, the NALC declared an interpretive dispute in Grievance E06N-4E-C 10329392 on April 13, 2010. It moved the case to national level arbitration as Case No. Q06N-4Q-C on September 18, 2015. The purpose of the grievance was to challenge the Postal Service's decision to allow a carrier returning from military duty to bid on an assignment that had been posted during his leave period and thereby displace the holder of that job. The arbitration hearing took place in Washington, DC on November 3, 2015. Both parties appeared and had full opportunity to testify, to examine and cross-examine witnesses, and to present all pertinent evidence. Both parties filed lengthy post-hearing briefs, the last of which arrived on February 22, 2016.

II. Statement of the Facts

This case involves the interplay between the collective bargaining agreement and a federal statute, the Uniformed Services Employment and Preemployment Rights Act of 1994, 38 U.S.C.A. Chapter 43, commonly known as USERRA. USERRA gives employees returning from military service certain employment rights that may not be included in, and may even contradict, seniority provisions of collective bargaining agreements.

The facts of the initial grievance in this case were stipulated by the parties at Step A. On July 17, 2009, Margarito Lara, a full-time regular carrier at the Phoenix Northwest Station, entered on military duty. While he was on duty, Route 1719 opened for bid. John Roland, the Grievant here, was the successful bidder and was awarded the route on October 24, 2009. In June of the following year, Lara notified his station manager that he wanted to use his USERRA rights to take Route 1719. Because Lara was senior to Roland, Management awarded him Route 1719 and made Roland an Unassigned Regular effective July 7, 2010.

The Union filed the underlying grievance claiming that Lara was not entitled to the route because he had not met the ELM requirements for job bidding while on military leave. In the alternative, it argued that even if Lara could exercise his USERRA rights on his return, the Postal Service should repost all assignments that had been posted between October 24, 2009 and Roland's removal on July 3, 2010. The object of the alternative claim was to let Roland to use his seniority to claim some other route while allowing Lara to hold Route 1719.

In its opening statement at the arbitration hearing, the Union stipulated that Lara did have a USERRA right to claim route 1719 (Tr. 11-13). Having concluded that the local's position on the original grievance was legally unsupportable, the Union artfully narrowed its claim to something more defensible. The revised Union claim was that, despite USERRA, the Postal Service violated

the Agreement — not by giving the route to Lara and thereby displacing Roland, but by making Roland an unassigned regular rather than taking some other, unspecified steps to protect Roland. The Union did not disavow the local's requested remedy of reposting routes. It simply recognized that reposting is not universally required in USERRA cases like this. Reposting, in short, is just one possible remedy for the Postal Service's contract violation.

The parties agreed to bifurcate the case so that if I were to find that the Postal Service did violate the Agreement, the matter would be remanded to the parties to discuss a possible remedy.

As is apparent from this brief summary, the parties' only dispute is over the interpretation of the Agreement. Their respective arguments on that dispute appear in Parts V and VI.

III. The Issue

Whether the Postal Service violates the National Agreement by removing a city letter carrier from his bid assignment and making him an unassigned regular in order to accommodate another employee's exercise of his rights under USERRA following military service?

IV. Pertinent Authorities

ARTICLE 3 MANAGEMENT RIGHTS

The Employer shall have the exclusive right, subject to the provisions of this Agreement and consistent with applicable laws and regulations:

- A. To direct employees of the Employer in the performance of official duties;
 - B. To hire, promote, transfer, assign, and retain employees in positions within the Postal Service and to suspend, demote, discharge, or take other disciplinary action against such employees;
- ...

ARTICLE 5 PROHIBITION OF UNILATERAL ACTION

The Employer will not take any actions affecting wages, hours and other terms and conditions of employment as defined in Section 8(d) of the National Labor Relations Act which violate the terms of this Agreement or are otherwise inconsistent with its obligations under law. . . .

ARTICLE 41 LETTER CARRIER CRAFT

Section 1. Posting

A. In the Letter Carrier Craft, vacant craft duty assignments shall be posted as follows:

1. A vacant or newly established duty assignment not under consideration for reversion shall be posted within fourteen calendar days from the day it becomes vacant or is established, unless a longer period of time is negotiated locally.

All city letter carrier craft full-time duty assignments other than letter routes, Carrier Technician assignments, parcel post routes, collection routes, combination routes, official mail messenger service, special carrier assignments and night routers, shall be known as fulltime Reserve Letter Carrier duty assignments. The term “unassigned regular” is used in those instances where a full-time letter carrier does not hold a duty assignment. . .

5. Whether or not a letter carrier route will be posted when there is a change of more than one (1) hour in starting time shall be negotiated locally.
6. When a fixed schedule non-work day is permanently changed, the new non-work day shall be posted. . . .

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 Carrier Technician assignments, unless the local agreement provides otherwise. . . .

Section 2. Seniority

A. Coverage

1. This seniority section applies to all regular work force Letter Carrier Craft employees when a guide is necessary for filling assignments and for other purposes and will be so used to the maximum extent possible. . . .

Section 3. Miscellaneous Provisions

O. The following provision without modification shall be made a part of a local agreement when requested by the local branch of the NALC during the period of local implementation; provided, however, that the local branch may on a onetime basis during the life of this Agreement elect to delete the provision from its local agreement:

“When a letter carrier route or full-time duty assignment, other than the letter carrier route(s) or full-time duty assignment(s) of the junior employee(s), is abolished at a delivery unit as a result of, but not limited to, route adjustments, highway, housing projects, all routes and full-time duty assignments at that unit held by letter carriers who are junior to the carriers) whose route(s) or full-time duty assignment(s) was abolished shall be posted for bid in accordance with the posting procedures in this Article.”

That provision may, at the local NALC Branch’s request during local implementation, be made applicable (including the right to delete it) to selected delivery units within an installation. For purposes of applying that provision, a delivery unit shall be a postal station, branch or ZIP code area. Any letter carrier in a higher level craft position who loses his/her duty assignment due solely to the implementation of that provision shall be entitled to the protected salary rate provisions (Article 9, Section) of this Agreement.

V. The Union’s Position

Although the Union conceded that the Postal Service was required by USERRA to give Roland’s route to Lara, it argues that doing so still violated the Agreement. Because it violated the Agreement, the Postal Service owes Roland some remedy. Article 41, Section 1.C.4. is clear that the successful bidder has a right to work the assignment as posted. The rest of Section 1 reinforces subsection 1.C.4. by obliging the employer to honor bid assignments.

Moreover, arbitration decisions interpreting Section 1.C.4. affirm the Grievant’s contractual right to hold and work Route 1719. In 2005, Arbitrator Kathy Eisenmenger found a violation of Article 41 when the Postal Service removed a carrier from his route because of alleged conduct issues. She emphasized that Section 1 established a contract right for the employee to hold a bid position as posted. Similarly, in 1984 Arbitrator Richard Mittenthal held that a successful bidder had a right to work that assignment for its duration.

Because the Postal Service violated Article 41, the Grievant is entitled to a remedy. The remedy does not include retention of Route 1719 because USERRA forbids that, but some other remedy is required. USERRA does not excuse a contract violation. In W.R. Grace & Co. v. Local Union 759, Int’l Union of the United Rubber, Cork, Linoleum & Plastic Workers of Am., 461 U.S. 757 (1983), the employer signed a conciliation agreement with the EEOC that conflicted with the collective bargaining agreement. An arbitrator awarded back pay to the employees affected by the

contract breach. While the Supreme Court recognized the employer's conflicting obligations, it upheld the arbitration award because, absent a judicial determination to the contrary, neither the Commission nor the Company can "alter the CBA without the Union's consent." Other court cases take the same position.

Here, as in *W.R. Grace*, the employer acted voluntarily and unilaterally and did not bargain with the Union about an accommodation. An employer who violates a collective bargaining agreement to satisfy other obligations does so at its peril, as both courts and the NLRB have held.

When faced with conflicting obligations, the Postal Service must find a way to accommodate both. When assignments permitted by the NALC contract conflicted with the APWU contract, Arbitrator Carlton Snow found in 1998 that the NALC could not obtain specific enforcement of its agreement because that would deprive the APWU of the benefit of its bargain. That finding did not relieve Management of its obligations. He remanded the case to the regional level for a determination of the remedy. He did the same in a similar case several years later. In both cases, the point was that the Postal Service had to comply with both of its agreements.

Management's arguments are unpersuasive. Article 3 grants broad management powers but only with the qualification that Management's authority is subject to the provisions of the Agreement. Nor does Management's operational justification for making a displaced carrier an unassigned regular provide an excuse. Its claim that reposting would be disruptive is premature because that is only one possible remedy, and the remedy question has been severed from this case. Even that disruption argument wouldn't prevent a monetary remedy. Nor was there any need for NALC to bargain for greater protections because the existing language entitling successful bidders to their routes is perfectly clear.

VI. The Postal Service's Position

The Postal Service argument is elegantly simple. It argues that USERRA obliged it to displace a junior employee from a bid position to accommodate an employee returning from uniformed service who would have been the senior bidder for the job but for his military service. The Union's stipulation that USERRA required the junior employee's displacement defeats its contradictory argument that displacing the junior employee violates the Agreement. Absent any provision requiring special treatment for the displaced employee, Article 3 gives Management the exclusive right to designate him an unassigned regular. If the Union desires a different result, it must bargain for it.

The Postal Service rejects the Union's cited authority. In the main cases relied on by the Union, *W.R. Grace* and the two awards by Arbitrator Snow, the employer voluntarily committed itself to conflicting obligations: an EEOC conciliation settlement and the CBA in *W.R. Grace*, two conflicting CBAs in the 1998 Snow award, and a settlement with one union leading to a conflict with the other union's CBA in the 2003 Snow award. Here, in contrast, the Postal Service was required

by USERRA to remove the junior employee. Article 5 of the Agreement mandates compliance with USERRA.

Contract provisions should be interpreted holistically, not in a vacuum. They should also be interpreted in favor of a lawful purpose.

Nothing in the Agreement prohibits Management from making the displaced carrier an unassigned regular. Because the Agreement is silent about a displaced employee's new position, Management properly used its authority under Article 3. The Union has not even articulated what else the Postal Service should have done other than bargain with the local Union. The Union needs to bargain for any further restriction on Management's authority in cases like this. It has bargained over other types of displacement and it could do the same here.

Making a displaced carrier an unassigned regular is a reasonable outcome operationally. Reposting all subsequent job openings as the local Union requested is not. Doing so would cause incredible disruption through a domino effect.

VII. Discussion

As the parties' arguments make clear, the fundamental question in this case is conceptual. The parties now agree that USERRA forbids literal application of Article 41, Section 1.C.4. Lara, in other words, had the legal right to claim Route 1719 regardless what Article 41 says. But does that prohibition on literal enforcement of Roland's seniority right to Route 1719 mean that Article 41 has no relevance at all in cases like this, or does it merely eliminate one method of enforcing Roland's Article 41 rights? To phrase it differently, does USERRA eliminate a successful bidder's Article 41 rights or does it merely prevent one way of exercising those rights?

The Postal Service argues that USERRA's superior authority over conflicting contractual provisions relieves it from all contractual liability for not following Article 41, Section 1.C.4. The Union argues that the statute and the contract are independent sources of obligations, so that while USERRA can force the Postal Service to let Lara take his requested route, it does not relieve the Postal Service from all liability for breaching Article 41. In the Union's view, it can enforce Article 41 in other ways besides blocking Lara from taking over the route.

The Union's argument about the necessity of following both of two conflicting authorities is ingenious but ultimately inapposite. In all of the main cases cited by the Union, the employer voluntarily committed itself to inconsistent obligations — to two irreconcilable provisions in different contracts, for example, or to settlement or conciliation agreements that breached a contract's seniority provisions. In all of those cases, it was appropriate for the courts or arbitrators to hold the employer liable for its own mistakes, to the point of ordering the employer to satisfy both obligations, even if one of them could be satisfied only by money.

This case is quite different. The Postal Service signed the Agreement but did not sign USERRA. USERRA, as the Union concedes, was a supervening legal authority that invalidated any application of Article 41 that would interfere with Lara's claim to Route 1719. In doing so, USERRA effectively invalidated the Grievant's seniority claim to his route. Because the Postal Service could not lawfully deny Lara his selection of Route 1719, it had to displace Roland.

In that legal context, USERRA, not the employer, caused the displacement. It follows inescapably that the *Postal Service* did not violate Article 41 by removing Roland from his route. Absent any violation of Article 41 in the displacement itself, the Grievant was not entitled to a remedy for the displacement.

If there were any other violation of Article 41, it would have to be because of how the Postal Service treated Roland after the displacement. On that point, it is crucial that the Agreement was silent on USERRA-mandated displacements, unlike separate provisions governing displacements for other reasons. A silent agreement by definition imposes no specific obligations. To the contrary, the Agreement defaults to more general provisions.

Here, the relevant general provision is Article 3 which authorizes the Postal Service to direct and assign employees, subject only to specific provisions of the Agreement and to external law. Designating Roland as an unassigned regular did not violate any other term of the agreement or any external law. Nor was it arbitrary or discriminatory. It was simply a rational choice where no better assignments existed.

AWARD

The Postal Service did not violate Article 41 by displacing the Grievant when USERRA required it to award Roland's route to an employee returning from military service. In the absence of any violation of Article 41, Management had authority under Article 3 to assign the Grievant to another position. Its decision to make him an unassigned regular was a reasonable exercise of its Article 3 authority and did not violate any other provision of the Agreement.

Dennis R. Nolan

Dennis R. Nolan, Arbitrator

March 17, 2016

Date