

C#17692

1 ARBITRATION DECISION AND AWARD

2 In the Matter of the Arbitration) GRIEVANT:
3 between) Cynthia White
4) Post Office:
5 UNITED STATES POSTAL SERVICE) Rancho Cucamonga
6 and) Case No:
7 NATIONAL ASSOCIATION OF LETTER) F90N-4F-C95008745
8 CARRIERS) GTS. No: 28402
9 _____
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11 BEFORE: Louis M. Zigman, Esq. - Arbitrator
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13 APPEARANCES:

14 For the Postal Service: Wanda B. Sanders
15 For the Union: Tom Anderson
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17 Place of Hearing: Rancho Cucamonga, CA
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19 Date of Hearing: November 25, 1997
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21 Date of Decision: November 29, 1997
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Award:

The grievance is sustained and the grievant, Cynthia White shall be entitled to a monetary remedy for lost wages representing the difference in hourly pay between the route 0194 T-6 assignment which she should have been placed into and the hourly pay of the assignment that she worked in during the period from July 31 to September 23, 1994.

Introduction

This matter was heard by Louis M. Zigman, Esq., neutral arbitrator on November 24, 1997 in Rancho Cucamonga, CA. The Postal Service was represented by Wanda B. Sanders and the Union was represented by Tom Anderson.

The parties stipulated to the facts and then they argued their positions at the close of the hearing.

Based on the evidence and contentions of the parties,
I issue the following decision and award.

Statement of the Case

This dispute concerns the question of whether the Service violated the National Agreement when it failed to allow grievant, PTF Cynthia White, to opt on assignment 0194 (a T-6 String) on July 31, 1994.

According to the Union, the grievant should have been allowed to opt on that assignment and when the Service denied her request the Service violated her rights under Articles 25 and 41.

The Service, on the other hand, asserted that there was no vacancy at the time the grievant sought to opt and therefore the grievant had no right to opt on that route. Accordingly, the Service maintained that the grievance should be denied.

Material Facts

The evidence disclosed that route 0194 became available for opt on June 27, 1994. That route was a full time route that was temporarily vacant. The Service decided to put the assignment up for opt instead of assigning a carrier to it. Unfortunately, no one bid on that assignment. As a result, the Service assigned a transitional employee, Holland, to the

1 route because Holland had requested to work that route.
2 Holland began working in the assignment during the week of
3 June 27 and he eventually remained on the assignment through
4 September 23, 1994 when his TE contract expired.

5 On July 23, 1994 the grievant requested to opt on
6 assignment 0194 for the duration of the vacancy, effective on
7 July 31, 1994. The Service denied her request on the basis
that the assignment was filled by Holland.

8 The evidence disclosed that in June, when the 0194
9 route was put up for bid the grievant was not eligible to bid
on it as she was working on another opt at that time. When
11 that opt expired on July 23, she requested to opt to route
12 0194 and, as noted above, she wasn't allowed to because the
Service told her that the assignment was no longer vacant.

13 The grievant disagreed and she filed a timely grievance
14 in protest. The Union, in pursuing the grievance, sought a
15 remedy for unscheduled pay for the period from July 31, 1994
16 through September 23, 1994; the time that the grievant would
17 have been on the assignment had she not been denied the opt.

18 Issue

19 Did the Service violate the collective bargaining
20 agreement when it denied the T-6 assignment to PTF Cynthia
White from July 31, 1994 through September 23, 1994.

21 If so, what is the appropriate remedy?

22 Positions of the Parties

23 Union's Position

24 The Union asserted that the Service violated the
25 grievant's rights under Article 25.4 and 41 when it failed to
allow her to opt into the higher level T-6 assignment on route
26 0194. In pointing to the language in Article 25.4 the Union
27 asserted that the grievant was entitled to be detailed to the

1 higher level T-6 position and pursuant to Article 41.B.4 the
2 grievant was entitled to the assignment by virtue of her
3 seniority and qualifications. While noting that Holland was
4 working on the assignment, the Union pointed out that TEs have
5 no rights to opt or to bid on any higher level assignments nor
6 do TEs have any right to hold on to any assignments over a
7 career letter carrier. While the Union acknowledged that
8 management did have a right to fill the vacancy with a TE if
9 no one bids on the assignment and/or to have assigned another
10 carrier to the assignment, nevertheless the Union maintained
11 that TEs have no right to hold down such assignments or to
12 remain in such assignments when career carriers are seeking
13 those assignments, citing arbitrator Mittenthal's January 16,
14 1992 award.

15 As a result of this contractual violation the Union
16 asserted that the grievant is entitled to a remedy. According
17 to the Union, the grievant should be awarded out of schedule
18 pay for the period in which she was denied the opportunity to
19 have worked on that assignment, from July 31 to September 23,
20 because of the violation and because management did not act in
21 good faith during the grievance process.

22 In this regard the Union asserted that the violation
23 was clear-cut and that management breached its responsibility
24 as set forth in Article 15 when it failed to give the Union
25 any reason for its denial of the grievance in the grievance
26 procedure at steps 1 and 2. By having failed to have given
27 the Union any explanation for its denial the Union contended
28 that the Service obviated its obligation for attempting to
resolve disputes at the lowest possible level.

1 As support for its position with regard to the remedy,
2 the Union pointed to the awards of various arbitrators
3 including arbitrator William Eaton in Case Nos.
4 W7N-5P-C-2040 (-45); W7N-5T-C-21706; WON-5N-C-2308;
5 F90N-4F-C-94030206; Carl Lange III in Case # W4N-5C-C-43784;
6 James Martin in Case # C7T-4H-C-16142; John H. Abernathy in
7 Case # WON-5T-C-862; and arbitrator James T. Barker in Case #
8 F90N-4F-C-94047043.

9 In view of the foregoing, the Union maintained that
10 this situation warrants more than a cease and desist directive
11 to ensure that management will not ignore its obligations
under the collective bargaining agreement.

12 Service's Position

13 The Service asserted that its decision to disallow the
14 opt did not constitute a violation of the collective
15 bargaining agreement inasmuch as there was no open assignment
16 at the time that the grievant sought to opt. As noted above,
17 the Service pointed out that the posting for that assignment
18 had expired in June and that the assignment was filled by
19 Holland.

20 In pointing to the language in Article 25.4, the
21 Service noted that the Service has an obligation to fill the
22 assignment on the basis of "the senior, qualified, eligible
23 employee available employee." In this regard, the Service
24 pointed out that at the time it filled the assignment, in
25 June, that the grievant was not "available". As such, since
she was not available the Service had no obligation to have
offered her the assignment.

26 Furthermore, the Service maintained that it had the
27 right to assign Holland inasmuch as there were no bidders for
28

that assignment.

According to the Service, under the Union's interpretation of the agreement management the Service would be required to keep these assignments open indefinitely by permitting careers to bump into these positions, almost at will. In the Service's view that would create a very difficult and an untenable situation as there would be no stability in those assignments. As such, the Service maintained that to accept the Union's interpretation, management's ability to operate efficiently pursuant to Article 3 would be violated as there would be no assurance of any continuity on these routes. As for example, the Service stated:

13 "Just as an employee who had been assigned to a route
14 became proficient, he/she would be subject to removal by
15 someone who became available to opt for the route after the
initial assignment. The interpretation espoused by the Union
would make management's right to assign vacant routes
virtually useless. Nor would there be any advantage to being
able to us auxiliary help."

As the Service pointed out, it has the right to use auxiliary assistance when there are no other carriers to cover the route and to create this system of bumping auxiliary assistance would be in contradiction of management's rights to operate efficiently.

21 In view of the foregoing, the Service maintained that
22 the grievant did not have the right to opt into that
23 assignment in July and therefore the grievance should be
denied.

Assuming arguendo, that I find a contractual violation, the Service maintained that the Union's requested remedy of out of schedule pay is improper as it would constitute a punitive remedy.

1 In this regard, the Service noted that the grievant did
2 not suffer any economic harm inasmuch as she continued working
3 and she received her regular pay.

4 While the Union asserted that Service was culpable of
5 bad faith in this situation the Service pointed out that there
6 is no requirement for a written response at step 1. And,
7 while the Service could not explain why there was no written
8 response at step 2, the Service pointed out that the
9 collective bargaining agreement provides for a remedy whenever
10 management does not reply in time and that remedy allows the
11 Union to move to the next step of the grievance procedure;
which the Union did.

12 The Service also noted that there was a written
13 response at the third step and that the issues and contentions
14 raised at the arbitration were raised in the third step
15 written response. As such, the Service asserted that the
16 Union's claim that it's arguments should be disallowed under
the language in Article 15 has no merit.

17 The Service also denied the Union's characterization
18 that its position demonstrates bad faith. As noted above, the
19 Service asserted that the grievant had no right to opt into
route 0194 in late July, 1994 because the route was simply not
20 vacant.
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22 In view of the foregoing, the Service maintained that
23 the grievance should be denied and even assuming a contractual
24 violation, that the claim for monetary damages should be
denied.
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Analysis and Conclusion

After having considered the evidence and contentions of the parties I found the arguments as presented by the Union as persuasive as to the issue of the contractual violation.

In this regard, I note the language in Article 41.2.B.4 and 25.4 which gives a PTF the right to fill a full time temporarily vacant assignment. I also note that the grievant was qualified for the assignment and, at the time she requested to opt that she was the most senior qualified carrier for that assignment.

As such, I would agree that the Union did establish that the grievant was entitled to the assignment subject to evidence which might rebut the prima facie case.

In recognizing many of the Service's contentions, especially as those relating to the "bumping", I note that the Union did not disagree with most of the Service's concerns.

As for example, the Union agreed that the Service had the right to assign TEs to the assignment if there are no qualified bidders to fill the vacancy.

In addition, the Union agreed that if management had assigned a regular career carrier to fill the vacancy that the assigned carrier would have the right to have remained in the position until the expiration of the assignment; i.e. obviating the bumping problem. As such, the Service's assertion that the Union's interpretation would undermine management's ability for continuity was weakened considerably.

The only area where the continuity might be affected would be in those situations where a TE has been placed in the assignment.

Therefore, the Service's concerns that other carriers

1 might be bumped by more senior carriers is really not an issue
2 and accordingly, the Service's contentions are weakened in
3 this regard.

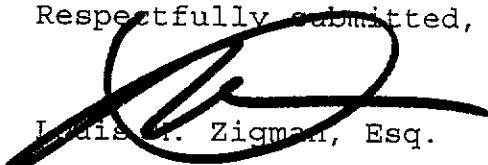
4 Inasmuch as the evidence in this record indicated that
5 TEs do not have rights to occupy assignments in lieu of
6 regular carriers I didn't find the arguments of the Service as
7 persuasive. As the evidence disclosed, TEs do not have
8 rights/protections to remain in these positions over the
9 regular/career carriers.

10 In view of the foregoing, I did not find that the
11 Service presented persuasive evidence to rebut the Union's
12 prima facie case. As such, I find that when the grievant
13 sought the T-6 assignment that she was qualified, eligible and
14 available and that she was entitled to the assignment, even
15 though it meant displacing a transitional employee. Therefore
16 I agree that when the Service denied her the opportunity to
17 take that assignment that the Service violated the collective
18 bargaining agreement.

19 Turning next to the remedy, I agree that the grievant
20 is entitled to some remedy for this violation, although I was
21 not persuaded that the remedy of out of schedule pay is
22 warranted as I do not view the evidence as demonstrating bad
23 faith on the part of management. On the other hand, I agree
24 that a remedy is appropriate and therefore I would award the
25 grievant compensation for lost wages representing the
26 difference in hourly pay between the 0194 T-6 assignment which
27 she should have been placed into and the hourly pay in the
28 assignment she worked in during the period from July 31 to
September 23, 1994.

1 AWARD

2 The grievance is sustained and the grievant, Cynthia
3 White shall be entitled to a monetary remedy for lost wages
4 representing the difference in hourly pay between the route
5 0194 T-6 assignment which she should have been placed into and
6 the hourly pay in the assignment that she worked in during the
7 period from July 31 until September 23, 1994.

8 Respectfully submitted,
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10 Louis A. Zigman, Esq.

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