C#170

ARBITRATION DECISION

UNITED STATES POSTAL SERVICE
Saint Paul, MN

AND

Re: C1C-4C-C 9427
Class Action

AMERICAN POSTAL WORKERS UNION
AFL-CIO

FOR THE UNION: Jerry Fabian, National Business Agent
Larry Gervais, National Vice President

FOR THE POSTAL SERVICE: Roger Marlow, Acting Employee and Labor Relations Officer
Paul J. Sniadecki, Regional Labor Relations Specialist

PANEL ARBITRATOR: William F. Dolson, Louisville, KY

By the terms of the Agreement between the United States Postal Service (hereinafter referred to as the "Postal Service") and the American Postal Workers Union AFL-CIO (hereinafter referred to as the "Union") there is a grievance procedure including arbitration. Accordingly, William F. Dolson, a member of the regular regional arbitration panel, was assigned this case. A hearing was held in Saint Paul, Minnesota on March 2, 1984. The parties were given an equal opportunity to examine and cross-examine witnesses and for oral argument. Neither party filed a post-hearing brief.

OPINION

BACKGROUND

Five part-time flexible clerks were informed on July 19, 1982 by Supervisor Robert Carlson that they would not work on July 20, 1982. A grievance was filed by the Union on July 22, 1982 which claimed there was sufficient work on July 20 for the part-time flexible clerks and that the Postal Service's action of not scheduling them constituted retaliation against the Union.

Jeff Busch, a Union Steward, testified that on July 15, 1982, three grievances were filed over the order in which clerks were being assigned work in another craft, in particular, mail handler work. The Union claimed that Management violated a Memorandum of Understanding reached by the parties on June 10, 1982 to resolve a dispute over the excessing of employees to different crafts. (Union Ex. 3)

Busch met with General Foreman Larry Flannigan on July 16 to discuss the matter. Busch testified that Flannigan told him the procedure in the Memorandum of moving employees was too complicated and that to avoid problems, he would schedule the part-time flexible clerks off. He told Busch he would tell the part-time flexible clerks that the Union was responsible for their not being scheduled. Flannigan, in his testimony, denied telling Busch he

would get even with the Union by making such statements to employees.

Vern Towner, one of the part-time flexible clerks not scheduled to work on July 20, testified that when Supervisor Carlson told him he would not be scheduled to work on July 20, he asked him why, and Carlson answered that the Union and Management went around for four hours over clerks working as mail handlers. In a written statement signed by Towner on July 22, 1982 (Union Ex. 1), he also added that Carlson commented that the meetings were too time consuming. Another reason given by Carlson, according to Towner's written statement, was that the Union did not want the part-time flexible clerks working as mail handlers.

Charles Brown, another part-time flexible clerk not scheduled to work on July 20, testified that he asked Carlson if the problem was in the mail. Carlson answered, "No." and told him the problem was the Union was filing too many grievances over clerks doing mail-handler work. In a written statement dated July 22, 1982 (Union Ex. 2), Brown indicated that when he talked to Carlson on July 21, Carlson told him it was "unfortunate that the Union complained so much about clerks doing mail handler work." Brown also stated that Carlson told him that "the grievances that stem from this problem take too much man hours to work out both from union people and management, so rather than have all the grievances to deal with, then management would

rather keep more mailhandlers here and let PTF clerks off."

Supervisor Carlson testified that the part-time flexible clerks were scheduled off on July 20, not because management wanted to get even with the Union, but rather because of "the unavailability of clerk work." He admitted that prior to, and after July 20, it was common for part-time flexible clerks to perform work other than clerk work, in particular, mail handler work.

Carlson also testified that in the weeks prior to July 20, the Union filed grievances over the part-time flexible clerks performing mail handler work. Due to the number of those grievances, it was decided by Management not to put the part-time flexible clerks in that position. Rather, they would just have them do clerk work or schedule them off.

On cross-examination by the Union Advocate, Carlson was asked: "In view of the fact that part-time flexible clerks had been performing mail handler work, what was so exceptionable about July 20?" Carlson answered: "The amount of grievances filed by the A.P.W.U. about part-time flexible clerks doing mail handler work. To a point where they had to make a decision: to work part-time flexible clerks as mail handlers or not work them. A decision was made on July 20th with the mail volume at hand and work load overlooked, not to work them." Carlson went on to say that on the next day, July 21, the part-time flexible clerks were

back to work. He stated that "there were some calls from the Union people downtown and other places saying that they did not want these part-time flexible clerks off just because there was not clerk work available. So the next day they were scheduled to work." When asked by the Union Advocate whether the Union ever asked for them not to be scheduled, Carlson responded, "No, the Union's part in it was filing the grievances on them doing mail handler work."

General Foreman Flannigan testified that the manpower plan he received from Control and Logistics indicated a need for 29 clerks and 56 mail handlers for July 20. He scheduled 29 full-time clerks and 56 mail handlers for that day and those employees performed work in their own craft. Flannigan insisted that he had his supervisors check to see if any one wanted annual leave to leave without pay. He stated that the need for only 29 clerks was partly due to the small amount of mixed mail projected (3 3/4 vans) which is clerk work.

Flannigan was asked by the Union Advocate, on cross-examination, whether July 20 was the only time he scheduled part-time flexible clerks off because the plan called for less than the full complement of clerks? Flannigan indicated that when more clerks were scheduled than the manpower plan showed were needed, the clerks performed other work. In fact, on the next day, July 21, more clerks were scheduled than called for in the manpower plan.

In his testimony, Flannigan insisted the Union grievances had nothing to do with his scheduling on July 20. When asked on cross-examination if "Carlson's understanding that the grievances had something to do with cutting back on clerks on that day was an improper understanding?", Flannigan answered, "No." Flannigan also testified that July 20 was the only time part-time flexible clerks were sent home.

RELEVANT CONTRACT PROVISIONS

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;

C. To maintain the efficiency of the operations entrusted to it;

D. To determine the methods, means, and personnel by which such operations are to be conducted;

E. To prescribe a uniform dress to be worn by letter carriers and other designated employees; and

F. To take whatever actions may be necessary to carry out its mission in emergency situations, i.e., an unforseen circumstance or a combination of circumstances which calls for immediate action in a situation which is not expected to be of a recurring nature.

ARTICLE 7

EMPLOYEE CLASSIFICATIONS

Section 2. Employment and Work Assignments

A. Normally, work in different crafts, occupational groups or levels will not be combined into one job. However, to provide maximum full-time employment and provide necessary flexibility, management may establish full-time schedule assignments by including work within different crafts or occupational groups after the following sequential actions have been taken:

1. All available work within each separate craft by tour has been combined.
2. Work of different crafts in the same wage level by tour has been combined.

The appropriate representative of the affected Unions will be informed in advance of the reasons for establishing the combination full-time assignments within different crafts in accordance with this Article.

B. In the event of insufficient work on any particular day or days in a full-time or part-time employee's own scheduled assignment, management may assign the employee to any available work in the same wage level for which the employee is qualified, consistent with the employees' knowledge and experience, in order to maintain the number of work hours of the employees' basic work schedule.

C. During exceptionally heavy workload periods for one occupational group, employees in an occupational group experiencing a light workload period may be assigned to work in the same wage level, commensurate with their capabilities, to the heavy workload area for such time as management determines necessary.

ARTICLE 8

HOURS OF WORK

Section 1. Work Week

The work week for full-time regulars shall be forty (40) hours per week, eight (8) hours per day within ten (10) consecutive hours, provided, however, that in all offices with more than 100 full-time employees in the bargaining units the normal work week for

full-time regular employees will be forty hours per week, eight hours per day within nine (9) consecutive hours. Shorter work weeks will, however, exist as needed for part-time regulars.
See Memo Page 166--Letter of Intent Page 170

Section 2. Work Schedules

A. The employee's service week shall be a calendar week beginning at 12:01 a.m. Saturday and ending at 12 midnight the following Friday.

B. The employee's service day is the calendar day on which the majority of work is scheduled. Where the work schedule is distributed evenly over two calendar days, the service day is the calendar day on which such work schedule begins.

C. The employee's normal work week is five (5) service days, each consisting of eight (8) hours, within ten (10) consecutive hours, except as provided in Section 1 of this Article. As far as practicable the five days shall be consecutive days within the service week.

Section 3. Exceptions

The above shall not apply to part-time employees. Part-time employees will be scheduled in accordance with the above rules, except they may be scheduled for less than eight (8) hours per service day and less than forty (40) hours per normal work week.

ARTICLE 15

GRIEVANCE-ARBITRATION PROCEDURE

Section 4. Arbitration

A. General Provisions

(6) All decision of an arbitrator will be final and binding. All decision of arbitrators shall be limited to the terms and provisions of this Agreement, and in no event may the terms and provisions of this Agreement be altered, amended, or modified by an arbitrator. Unless otherwise provided in this Article, all costs, fees, and expenses charged by an arbitrator will be shared equally by the parties.

ARTICLE 19

HANDBOOKS AND MANUALS

Those parts of all handbooks, manuals and published regulations of the Postal Service, that directly

relate to wages, hours or working conditions, as they apply to employees covered by this Agreement, shall contain nothing that conflicts with this Agreement, and shall be continued in effect except that the Employer shall have the right to make changes that are not inconsistent with this Agreement and that are fair, reasonable, and equitable. This includes, but is not limited to, the Postal Service Manual and the F-21 Timekeeper's Instructions.

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RELEVANT HANDBOOKS AND MANUALS

EMPLOYEE & LABOR RELATIONS MANUAL

Chapter 9

Labor Relations

911.2 No interference, restraint, coercion, or discrimination to encourage or discourage membership in a labor organization shall be effected in the Postal Service.

POSITION OF THE UNION

The action of Management in not scheduling the part-time flexible clerks on July 20, 1982 was in retaliation against the Union for filing grievances over the method of excessing clerks to the mail handler craft. This action violated Section 911.2 of the Employee and Labor Relations Manual. The Postal Service's action was also an abuse of discretion in the exercise of scheduling the part-time flexible clerks. It constituted an arbitrary, capricious and unreasonable exercise of management rights.

POSITION OF THE POSTAL SERVICE

The Union's charge of retaliatory measures taken against the Union is completely without validity. The true fact is that there was insufficient mail on July 20, 1982 to

warrant the use of part-time flexible clerks.

It is Management's prerogative, as well as responsibility, to ensure the daily operation of the mail processing department is conducted in an efficient manner. To schedule additional personnel, way beyond what the manpower plan called for, would be poor manpower allocation and very poor management strategy. The Union does not contest the right of Management to run the operation. It did not challenge the scheduling of part-time flexible clerks less than 40 hours.

Even assuming there was sufficient mail for five more employees than scheduled on July 20, the decision to work part-time flexible clerks is a management decision. The crossing of crafts is a management prerogative. Consequently, the Union has not met its burden of proof showing that the Postal Service violated the Agreement.

The part-time flexible clerks have been scheduled off only once. Had the Postal Service intended to retaliate against the Union, it would have scheduled them off on more than one occasion.

DISCUSSION

The issue in this case is whether the Postal Service violated the Agreement when it scheduled the part-time flexible clerks off on July 20, 1982. The Postal Service contends that it did not violate Article 8.3 of the Agreement when it did not schedule part-time flexible clerks to

work on July 20. It argues that under this provision, those employees are not guaranteed a 40-hour week and they can be scheduled as needed. The Postal Service claims there was not sufficient mail on July 20 to warrant scheduling the part-time flexible clerks. The Postal Service points out that actually more clerks worked (32) than were called for by the manpower plan (29).

The Postal Service argues that its scheduling of the part-time flexible clerks was not only a proper exercise of its right under Article 8.3, but also a proper exercise of its managerial prerogative under Article 3 of the Agreement. Moreover, it contends that its decision not to schedule them was consistent with the language in Article 7.2 of the Agreement which gives the Postal Service the right to make work assignments across craft lines under certain conditions.

With respect to the rights vested in the Postal Service under Articles 3 and 8.3, the exercise of those rights cannot be arbitrary, capricious or made in bad faith. It is a general principle of arbitration that the exercise of management rights is subject to that implied limitation. In other words, management cannot abuse the discretion vested in it under the Agreement unless the contract language expressly allows it. Elkouri and Elkouri in How Arbitration Works, 417 (BNA, 1973) state this general principle:

> ". . . Even where the agreement expressly states a right in management, expressly gives it discretion as to a matter, or expressly makes it the 'sole judge' of a matter, management's action must not be arbitrary, capricious, or taken in bad faith."

In my judgment, the exercise of managerial prerogative is in bad faith and improper where it is motivated by a desire to destroy, fragmentize or injure the Union. Likewise, management cannot be motivated by a desire to interfere, restrain, coerce or discriminate in encouraging or discouraging membership in a labor organization. See Section 911.2 of the Employee and Labor Relations Manual. As stated by Arbitrator Roy R. Ray in Phillips Petroleum Co., 69-2 ARB ¶8532, p. 4813 (1969):

> "Where, as here, the contract contains no express restriction on the right of the Company to assign work I believe that the only limitation which can be implied is that the Company must act in good faith in making the assignment. It must not be motivated by a desire to destroy or injure the Union or to discriminate against members of the bargaining unit. . . ."

An examination of Section 911.2, shows that it is based both on Section 8(a)(1) and 8(a)(3) of the National Labor Relations Act. These sections provide:

> Sec. 8. (a) It shall be an unfair labor practice for an employer--
>
> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;
>
> (3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: Provided, That nothing in this Act, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in section 8(a) of this Act as an unfair labor practice) to require as a condition of employment membership therein on or

> or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 9(a), in the appropriate collective-bargaining unit covered by such agreement when made, and (ii) unless following an election held as provided in section 9(e) within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement: Provided further, That no employer shall justify any discrimination against an employee for nonmembership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

Section 7 referred to in Section 8(a)(1) provides:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

Since those statutory provisions obviously form the basis of Section 911.2 of the Employee and Labor Relations Manual,

it follows that the law, as applied to those provisions, represents persuasive authority in determining whether the Postal Service violated Section 911.2 in the present case.

The Union contends that the Postal Service scheduled the part-time flexible clerks off on July 20 in order to retaliate against the Union for filing grievances relating to the method of assigning clerks across craft lines. If the charge of retaliation is supported by the evidence, the action taken by the Postal Service violated Section 911.2 and was improper not only because it violated that provision, but also because it was an abuse of discretion.

Professor Robert A. Gorman in his Basic Text on Labor Law, 337, 338 (West, 1976), makes this comment regarding specific antiunion motivation:

> "It is possible to summarize the present state of the law under sections 8(a)(1) and (3) as follows:
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> * * * *
>
> (7) In any case (other than the shutdown of a business) in which the employer's action was in fact motivated by a desire punish employees for engaging in section 7 activities, or by a desire to oust or circumvent a union as bargaining representative, the action is unlawful."

The United States Supreme Court in National Labor Relations Board v Erie Resistor Corp., 373 U.S. 221 (1963), made this statement regarding the presence of illegal specific intent:

> "Though the intent necessary for an unfair labor practice may be shown in different ways, proving it in one manner may have far different weight and far different consequences than proving it in another. When specific evidence of a subjective intent to discriminate or to encourage or discourage union membership is shown, and found, many otherwise innocent or ambiguous actions which are normally incident to the conduct of a business may, without more, be converted into unfair labor practices. . . . Such proof itself is normally sufficient to destroy the employer's claim of a legitimate purpose, if one is made, and provides strong support to a finding that there is interference with union rights or that union membership will be discouraged. Conduct which on its fact appears to serve legitimate business ends in these cases is wholly impeached by the showing of an intent to encroach upon protected rights. The employer's claim of legitimacy is totally dispelled."
> (373 U.S. at 227. 228)

After a careful review of the evidence, it is my finding that the Postal Service's decision to schedule the part-time flexible clerks off on July 20, 1982 was motivated by a desire to retaliate against the Union for exercising its right to file grievances. This conduct violated Section 911.2 of the Employee and Labor Relations Manual and was an abuse of managerial discretion. This finding is based on the following evidence:

(1) Prior to the incident of July 20, 1982, the relationship between General Foreman Larry Flannigan and the Union was generally one of conflict. He had not accepted the Union, particularly the grievances which restricted his freedom to manage as he liked. The testimony of Union Coordinator Jan Bly and

Union Steward Jeff Busch support this finding.

(2) Immediately prior to the incident, the Union had filed three grievances over the method of assigning clerks to the mail handler craft. In discussing these grievances with the Union, Flannigan threatened to stop assigning clerks to the mail handler craft and to tell the employees that the Union was to blame. Flannigan denies making such a comment, but based on the straightforward manner and believability of Busch's testimony as contrasted with the evasive and equivocal manner of Flannigan in his testimony in general, I have credited Busch's version on what was said.

(3) Four or five days after this threat was made by Flannigan to Busch over the grievances, the part-time flexible clerks were in fact not scheduled. The timing was too close to be coincidental. Moreover, it was the first time that the part-time flexible clerks were not scheduled. It constituted a sharp departure from established practice.

(4) The reasons given by Supervisor Robert Carlson to Charlie Brown and Vern Towner as to why they were not scheduled, indicate that the Postal Service overlooked the workload in reaching the decision not to schedule the part-time clerks.

(5) Carlson's testimony indicates that the Postal Service's action of not scheduling the part-time clerks received the response that was intended. The Union called and said they did not want the part-time flexible clerks off just because there was no clerk work. The

> next day 36 clerks were scheduled, including the part-time flexible clerks, even though the plan called for 32 clerks This action was inconsistent with the claim by the Postal Service that the part-time flexible clerks were not scheduled on July 20 because their presence would have resulted in more clerks than required by the plan.

The Postal Service's primary position in this case is that there was not sufficient mail on July 20 to justify scheduling the part-time flexible clerks. It points out that as it turned out, more clerks worked than were required by the manpower plan. It claims that it asked all the scheduled clerks whether they wanted to take leave that day in an effort to find openings for the part-time flexible clerks. According to Flannigan, this effort proved to be unsuccessful.

In contrast, Union witness Charles Brown testified that he worked, along with some clerks, on July 19, and he did not hear them asked to take leave on July 20.

But, even assuming that Flannigan did ask the clerks to take leave, the Postal Service's argument that it did not schedule the part-time flexible clerks because there was insufficient mail, does not wash, in light of the presence of evidence which overwhelmingly shows that the real motive of the Postal Service was to retaliate against the Union. In my opinion, the part-time flexible clerks would have been scheduled on July 20 had it not been for Flannigan's desire

to retaliate against the Union for filing the grievances.

Based on the above, I find that the Postal Service violated the Agreement by scheduling the part-time flexible clerks off on July 20. Those clerks are entitled to back pay as a result of that violation.

AWARD

The Postal Service is directed to pay eight (8) hours to the part-time flexible clerks on Tour III who were scheduled off on July 20, 1982, including those individuals who were allowed to take annual leave in lieu of being scheduled off.

The request for a cease and desist order is denied due to the lack of evidence that the Postal Service has been guilty of repeating this violation.

April 2, 1984
Louisville, KY

William F. Dolson
Panel Arbitrator