

## REGULAR ARBITRATION PANEL

In the Matter of the Arbitration	)	GRIEVANT: Class Action
	)	
between	)	Post Office: Enid, OK
	)	
UNITED STATES POSTAL SERVICE	)	USPS Case No. G01N-4G-C
	)	05116733
and	)	
	)	NALC Case No.: DRT 04-042381
NATIONAL ASSOCIATION OF LETTER	)	
CARRIERS, AFL-CIO	)	

BEFORE:

Louise B. Wolitz, Arbitrator

APPEARANCES:

For the U.S. Postal Service: James L. Oliver, Jr.

For the Union: David Miller

Place of Hearing: 115 W. Broadway, Enid, OK 73701

Date of Hearing: August 23, 2005

Date of Award: November 12, 2005


Relevant Contract Provisions: Articles 19 and 41

Contract Year: 2001 - 2006

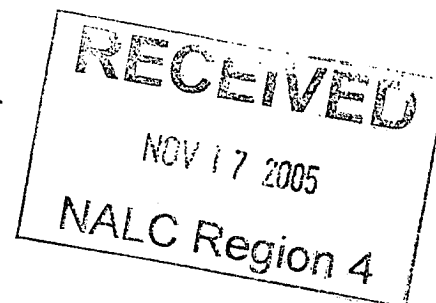
Type of Grievance: Contract

Award Summary:

The grievance is sustained. The Union has shown that management violated Article 41 by not notifying the NALC that a VOMA position was being considered for reversion. The Postal Service is hereby directed to post the VOMA position for bid immediately.



Louise B. Wolitz, Arbitrator



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## RELEVANT PROVISIONS:

### 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 five working days of the day it becomes vacant or is established.*

*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 full-time 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.*

*Positions currently designated in the Letter Carrier Craft:*

*City Carrier (includes the duty assignment of Official Mail Messenger Service in the Washington, D. C. Post Office)*

*Special Carrier*

*Carrier Technician*

*Positions that may in the future be designated in the Letter Carrier Craft.*

*Changes in the foregoing position titles shall not affect the application of this provision.*

*When a position is under consideration for reversion, the decision to revert or not to revert the position shall be made not later than 30 days after it becomes vacant. If the decision is made not to revert, the assignment must be posted within 30 days of the date it becomes vacant. The Employer shall provide written notice to the Union, at the local level, of the assignments that are being considered for reversion and of the results of such consideration.*

....

##### *B. Method of Posting*

1. *The notice inviting bids for Letter Carrier Craft assignments, and to such other assignments to which a letter carrier is entitled to bid, shall be posted on all official bulletin boards at the installation where the vacancy exists, including stations and branches, as to assure that it comes to the attention of employees eligible to submit bids. Copies of the notice shall be given to the local Union. When an absent employee has so requested in writing, stating a mailing address, a copy of any notice inviting bids from the craft employees shall be mailed to the employee by the installation head.*

....

#### *D. Other Positions*

*City letter carriers shall continue to be entitled to bid or apply for all other positions in the U. S. Postal Service for which they have, in the past, been permitted to bid or apply, including the positions listed below and any new positions added to the list:*

*SP 2-188 Examination Specialist*

*SP 2- 195 Vehicle Operations-Maintenance Assistant*

### **ARTICLE 15**

#### **Section 4. Arbitration**

##### **A. General Provisions**

9. *In any arbitration proceeding in which a Union feels that its interests may be affected, it shall be entitled to intervene and participate in such arbitration proceeding, but it shall be required to share the cost of such arbitration equally with any or all other Union parties to such proceeding. Any dispute as to arbitrability may be submitted to the arbitrator and be determined by such arbitrator. The arbitrator's determination shall be final and binding.*

#### **THE HEARING:**

The hearing was held in Enid, Oklahoma on August 23, 2005. The parties agreed at the hearing not to present any witnesses, but to proceed on the basis of the case file (Jt. X 2) which was offered into evidence, opening statements which each party made, and briefs. The parties and the arbitrator also toured the workroom floor to observe where notices are posted. The briefs were to be postmarked by September 30, 2005. In spite of the dislocation occasioned by Hurricane Katrina and the fact that the Postal advocate was located in New Orleans and had not had access to his

case files, the Postal Service brief was submitted timely. There was some confusion with the receipt of the Union brief, which was apparently originally mailed on September 30th, but not received by the arbitrator. The arbitrator received the Union brief on October 20, 2005. After the arbitrator communicated with both parties by e-mail, the Postal Service advocate agreed to accept the Union advocate's representation that the briefs had originally been posted timely on September 30th. The arbitrator appreciates the cooperation of the parties in resolving this matter. The record was closed on October 21, 2005.

#### THE ISSUE:

The issue was stated by the parties in the DRT Case package as: Did management violate Articles 19 and 41 of the JCAM by not notifying the NALC that a VOMA position was being considered for reversion?

#### BACKGROUND:

The basic facts of this case are not in dispute. The incumbent employee in the VOMA position, based in Enid, Oklahoma, Vern Smith, a member of the APWU craft, retired effective May 3, 2005. Enid Postmaster Jeffrey S. Carroll e-mailed Manager of Vehicle Maintenance Lew Flowers in Oklahoma City on May 9, 2005, inquiring about the VOMA position and backup. Lew Flowers responded to this e-mail on May 12, saying that they plan to revert the job. On May 9, the APWU was notified that the VOMA position was being considered for reversion. On May 13, the APWU's Betty Jones responded that the position should not be reverted and gave her reasons. On May 20, the APWU was notified that her response was received by management on May 16, 2005 and that her objections were considered by the Manager of the VMF. However, Postal management determined that there were not the forty hours of vehicle maintenance work required for the position. Postal management determined that the maintenance needs would be supported by the Oklahoma City VMF. Postal management determined that the VOMA position would be reverted. The decision to revert the position was made by Postal management on May 20, 2005. John Cain, a city carrier and a member of the NALC, had served as VOMA assistant before and after Vern Smith's retirement. The consideration to revert and the actual reversion occurred after Vern Smith retired while John Cain was serving as VOMA assistant. The NALC was not notified in writing of the consideration to revert the position. The NALC was not notified in writing of the reversion. The NALC filed a timely grievance at Informal Step A on June 9, 2005 because the Postal Service failed to notify the NALC that it was considering the position for reversion and reverted the position without notifying the NALC. The grievance went through Formal Step A and to the Step B, Dispute Resolution Team. The DRT was unable to resolve the grievance and issued an impasse decision on July 26, 2005. The grievance was appealed to arbitration on August 3, 2005.

#### POSITION OF THE POSTAL SERVICE

The Postal Service at the arbitration hearing raised a threshold issue that the case is not properly before the arbitrator. The parties agree that the VOMA (Vehicle Operations Maintenance Assistant) position was occupied by a clerk, Vern Smith. The parties agree that the APWU was properly notified. VOMA is a multi-craft position. The Postal Service argued that issues regarding a multi-craft position are represented by the union of the occupant of the position. The NALC does not have standing to file a grievance in this case. The NALC cannot file a grievance on the reversion of a clerk position. The NALC is aware that the APWU was notified and had filed a grievance. The NALC's interest is protected by Article 15.4.A. 9 (see above), according to which it is entitled to intervene and participate in any APWU arbitration on the issue. To allow the NALC to present this case at arbitration would give it a second bite at the apple. The NALC is aware that the APWU has already filed a grievance. The Postal Service acknowledged that had the position been posted, NALC members would have had standing to bid for the position. The Postal Service argued that this grievance should be dismissed by the arbitrator on the grounds that the NALC can intervene in the APWU case.

The Postal Service acknowledged at the arbitration hearing that the basic facts in the case are not in dispute. The Postal Service sent the APWU a letter and written notification of the intended reversion of the position. The Postal Service did not do that with the NALC. These facts are undisputed. The question is whether the Postal Service had to notify the NALC, what impact the failure to notify the NALC had, and what is the remedy?

On the merits, the Postal Service argued in its opening statement that the input that the NALC gave to the Postal Service after the reversion was the same input that the APWU gave to the Postal Service. The NALC has the opportunity to intervene in the APWU case. Therefore, any effect of the Postal Service's failure to notify the NALC would be negligible. Nothing would be different today had the NALC been notified. It would be unfair for the arbitrator to put the job back as a remedy when the effect of a procedural deficiency is *de minimus*. The NALC had ample opportunity to give its input. Nothing requires the Postal Service to notify multiple unions and to get input from multiple unions. The position was posted in the customary place for posting clerk postal notices. The NALC had to have known that the position was being reverted because they filed a grievance shortly thereafter. The reversion notice was posted for every one to see by the clerk's time clock, which could be seen by anyone.

In its brief, the Postal Service argued that the arguments of the NALC stem from an improper application of the language of Article 41. The language of Article 41 shows the positions currently designated as being in the Letter Carrier craft. The VOMA position is not listed. The very same provision of the contract goes on to state, "When a position is under consideration for reversion," this language is to be applied to the same positions outlined earlier in the same Article and section. The NALC is unable to site any specific contract language which requires the Service to notify it of the reversion of an assignment which they acknowledge was occupied by a Clerk who is represented by the APWU. The Service was required to follow the notification provisions of the craft that occupied the VOMA position being considered for reversion.

The NALC is attempting to overturn the decision of the Service purely based on a technical argument. The remedy requested is completely inappropriate. The NALC filed the instant case shortly after the reversion of this assignment and they acknowledge the fact that the APWU was given the proper notification. They also acknowledge that the right to intervene would be utilized in regard to the grievance filed by the APWU. Clearly equity would not be served by ignoring the merits and restoring a job that may or may not have productive work still available within its description. When arbitrators have overturned reversions on the basis of violation of the notification provisions, the craft jurisdiction has been clear. In the instant case, there is no due process problem and the NALC can show no appreciable harm should the arbitrator find a violation. The NALC is unable to show a contract violation and can not show any harm to warrant the extreme remedy requested by the NALC.

The Postal Service provided one arbitration citation with its brief, Case No. H 98C-4H-C 99212422, decided by Arbitrator Christopher E. Miles on December 10, 2002. The fact circumstances of that APWU case were substantially different from those in the case before us. The Union was clearly on notice in that case that the Postal Service was considering the reversion of the position. The arbitrator denied the Union's grievance.

#### POSITION OF THE UNION

The Union argued on the Postal Service's threshold argument that the NALC is not representing Mr. Vern Smith, the last occupant of the VOMA position, in this grievance, but rather the NALC members who will not have the opportunity to bid on this position. Management failed to post the position for bid. The NALC received no notification from management, either oral or written. This is a Class Action grievance on behalf of a group of letter carriers who have been denied the opportunity to bid on this position. Moreover, John Cain, who was the replacement assistant to Mr. Smith and has performed the duties since the reversion and after the retirement of Mr. Smith, is an NALC member. The Postal Service has not disputed that Mr. Cain was officially the replacement. This is a multi-craft position, available to both letter carriers and clerks. An NALC member has occupied this position. The NALC in this grievance is not arguing the merits of the reversion, only whether or not the NALC should have been notified. The remedy would be to put the job back, since the NALC was not properly notified.

In its opening statement on the merits, the Union said that the issue here is whether or not it was improper not to notify the NALC. The fact that the NALC was not notified either that reverting the position was being considered or that, in fact, the position had been reverted is undisputed. The letter carriers were not given the opportunity to give input on why the position should not be reverted. The position could be occupied by a letter carrier. The notice of the proposed reversion was posted by a time clock that is used solely by clerks. The letter carriers use another time clock.

In its brief, the Union argued that the undisputed facts of this case prove that management violated Article 41. The parties agreed that the NALC was not notified in

writing of the consideration to revert the position; the NALC was not notified in writing of the reversion; and that the retired VOMA worked 40 hours a week in the VOMA position for over two years. Not only did management fail to notify the NALC properly in writing, but they also failed to notify the NALC orally or in any other fashion. Management has failed to establish a good reason why the NALC should not have been notified. Management alleged that since the VOMA position was occupied by an employee represented by the APWU, only the APWU needed to be notified in writing. Management also alleged that since they posted the notice by the clerks' time clock, they satisfied the provisions of "written notification" under Article 41. The Union argued that this does not satisfy the provisions of Article 41. The Union notes that Article 41.1 D (see above) states that city letter carriers shall continue to be entitled to bid or apply for all other positions in the Postal Service for which they have, in the past, been permitted to bid or apply, including specifically the position SP 2 -195 Vehicle Operations-Maintenance Assistant. This is a multi-craft assignment. Clerks, Maintenance, Level 5 and 6 Motor Vehicle employees are eligible to bid for VOMA positions. Letter carriers in these positions continue in the carrier craft bargaining unit with seniority, bidding and representation rights. (See J-CAM, p. 41-7, February 2004 Edition). After Vern Smith retired, the position should have been placed for bid to all available craft employees, including Letter Carriers. If Letter Carriers have the right to bid on an assignment, then they have the right to written notification if that same assignment is being considered for reversion.

By failing to notify the NALC of the consideration for reversion, management deprived the union of its contractual right to have viable input on the position. Without such input, a decision should be considered null and void.

The Union cited supporting arbitration decisions, which it supplied to the arbitrator. Arbitrator Charlotte Gold (G90C-4G-C 93012081, April 15, 1995, Enid, OK), in sustaining an APWU grievance on this very same VOMA position, stated: *This failure to provide an opportunity to influence the decision deprives the Union of an important right. Once the input has been received and evaluated, Management may then render a decision.* Arbitrator Joseph Brock Sr. (KOLN-4K-C 03039132, April 18, 2003, Silver Spring, MD) said that: *If the language intended reversion to be a unilateral decision, and not subject to query, the term "consideration" would not be necessary to this clause. One must assume that parties bargained in good faith and the term "consideration" was an outgrowth of decades of negotiations. The word "consideration" is of some consequence to the Employer, establishing a contractual requirement. "Consideration" would imply thought, study, reflection, analysis and accommodation. If the term "consideration" were only to accommodate the Management decision without reviewing the effect of such decision of the Employees or the Union, it would render the term superfluous to the clause...Since the term is implanted in an agreement between Management and Union, the term must be material to the purpose or intention of the clause and therefore imply that the Union has a privilege to have input into the judgement and have their concerns, at the very least, evaluated.* Arbitrator Brock sustained the grievance, forcing management to reverse the reversion and post the assignment up for bid. In a very similar grievance, Arbitrator Thomas J. DiLauro (E90N-

2G-C 92021873, August 14, 1993, Statesville, NC) found in favor of the Union when the Service failed to notify the Union that it was considering a VOMA position for reversion. In the DiLauro grievance, the incumbent VOMA employee was a clerk, represented by the APWU, who retired. The retirement resulted in the VOMA position being vacant, not posted for bid, and then reverted. The NALC filed a grievance protesting the reversion and raised the issue of management failing to notify them per Article 41.1.A.1. Arbitrator DiLauro's award mandated that management re-post the position for bid.

The NALC concludes that it has shown, through clear and convincing evidence, that management has violated the National Agreement by failing to notify the NALC of the consideration to revert the VOMA position in the Enid Post Office and of its decision to revert the position. The grievance must be sustained by the arbitrator. The Union requested a make-whole remedy that the Postal Service should post the VOMA position for bid immediately and that the craft that represents the winning bidder be awarded a sum equal to the salary that would have been earned had the position been posted for bid on May 20, 2005.

## DISCUSSION

First, the arbitrator rejects the Postal Service's threshold argument that this case is not properly before her because the NALC has no standing. The NALC surely has standing to grieve the failure to abide by a contractual provision of its own contract. We find that the issue of whether or not the Postal Service's failure to notify the NALC that the VOMA position was under consideration for reversion violated the National Agreement is properly before the arbitrator.

The facts are uncontroverted that the Postal Service failed to notify the NALC that it was considering reverting the VOMA position and it further failed to notify the NALC that the position had been reverted. It is equally clear that according to the National Agreement between the Postal Service and the NALC, the Postal Service had the obligation to notify the NALC specifically in writing that the assignment was being considered for reversion and of the results of the consideration. The Vehicle Operations-Maintenance Assistant position (VOMA) was specifically included in these assignments by Article 41.1.D. Whether or not the Postal Service properly notified the APWU is irrelevant to the independent contractual rights of the NALC. The arbitrator rejects the arguments of the Postal Service that it cannot be responsible for notifying more than one Union or that the rights of the NALC were preserved by its ability to participate in a grievance/arbitration procedure initiated by the APWU. The responsibility to notify the NALC is a contractual one, completely independent of any responsibility to notify the APWU. Moreover, providing input before a decision is made and providing input after a decision is made during a grievance and arbitration process are two entirely different matters. We have no way of knowing whether or not the input provided by the NALC would have made any difference to the decision. We do know that the NALC had a clear contractual right to decide if it wanted to provide any input for the consideration of management and to decide just what that input would be. Failing to notify the NALC that the position was being considered for reversion denied the NALC its contractual right.

The location at which the notice to the APWU was posted was by the time clock used only by clerks. Letter carriers use a time clock in a completely different location. Letter carriers do not routinely pass by the clerk's time clock in the course of their duties. They had no reason to know what was posted there.

The arbitrator disagrees with the Postal Service that the failure to notify the NALC is merely a technical argument and that its impact was *de minimus*. We cannot know what the impact was because the NALC never had the opportunity to provide input before the decision was made. Moreover, failing to meet a clearly stated contractual notification requirement is a serious violation of the collective bargaining agreement in and of itself.

Based on the National Agreement and the undisputed facts of this case, the arbitrator has no choice but to find that the Postal Service violated Article 41 by not notifying the NALC that a VOMA position was being considered for reversion.

The problem now is the remedy. The Postal Service argues that even if the arbitrator finds a contractual violation, no harm was suffered by the NALC, the outcome would not have been any different, and, therefore, a remedy would be inappropriate. The arbitrator finds that harm was suffered by the NALC because one of the provisions of its National Agreement was violated. Moreover, we cannot know if the outcome would have been any different if the NALC had been properly notified and had been able to provide input for management's consideration.

In the case cited by the Union decided by Arbitrator Gold, although Arbitrator Gold found for the Union, she also found that the procedural violation was *de minimus* because in her case, the Union did have an opportunity to influence the decision, however, notification of the action taken and the reasons therefore was not posted. In fact, Arbitrator Gold commented that a failure to provide an opportunity to influence the decision deprives the Union of an important right. Once the inputs have been received and evaluated, Management may then render a decision. In her case, input was solicited and Management informed the Union of the reasons for its decision, but management did not post its reasons. Arbitrator Gold concluded that the failure to post, while a violation of the contract, did not rise to the level of reversible error. In our case, however, the Union was not notified of the consideration for reversion and was not provided an opportunity to influence the decision.

In the case cited by the Union decided by Arbitrator Brock, while the arbitrator decided in favor of the Union and concluded that the Employer violated the good faith implications of Article 41.1.A.1, he failed to award a penalty of monetary payment to the Union. He did, however, order the job to be posted.

In the case cited by the Union decided by Arbitrator DiLauro, Arbitrator DiLauro says that the contractual language, the interpretation of that language and arbitral authority supports the Postal Service's position that it does have the almost unfettered right to revert a position when it becomes vacant. The only exception to that right is that

the Postal Service must follow the proper procedures set forth in Article 41 in notifying the Union of the reversion. In his case, Arbitrator DiLauro found that the Postal Service did not follow the proper procedure for reversion of the position as set forth in Article 41, Section 1. A. 1. There was no evidence that the Union was notified in writing that the assignment was being considered for reversion. The only notice the Union received was a fait accompli notice that the VOMA job was being reverted. The Union was also not notified timely of the reversion. Arbitrator DiLauro concluded: *Based on the foregoing, the Postal Service's objections regarding the Union's procedural position are overruled. As noted, the evidence established the fact that the proper procedures for notification of a reversion were not given. Consequently, the Union's request to post the VOMA job for bid is sustained. The Postal Service is directed to post the position, in conformance with the provisions of Article 41.1.A.1...., with the noted VOMA position duties and whatever other clerical or letter carrier duties are needed to make the position a full time assignment in the same manner it has existed for the past eighteen years. The Union's request for backpay is denied on the basis that it has not presented sufficient evidence that any employees incurred any loss of wages by the Postal Service's failure to properly post the position.*

We must find that the Postal Service in this case has clearly violated Article 41.1.A. 1 when it failed to notify the NALC that the VOMA position was under consideration for reversion and when it failed to notify the NALC of the reversion. In order to make the Union whole, the arbitrator rules that the Postal Service should post the VOMA position for bid immediately. The position could not have been properly reverted without first having notified the NALC that it was under consideration for reversion. We do not, however, find any entitlement to any monetary award because the Union has not shown that any employee has lost any wages as a result of this contractual violation.

#### DECISION AND AWARD

The grievance is sustained. The Postal Service is hereby directed to post the VOMA position for bid immediately.