C# 15091

NATIONAL ARBITRATION PANEL

In the Matter of the Arbitration between UNITED STATES POSTAL SERVICE -and- NATIONAL ASSOCIATION OF LETTER CARRIERS	GRIEVANT: NALC PRESIDENT CASE NO. Q90N-4Q-C 93034611

BEFORE: Richard Mittenthal, Arbitrator

APPEARANCES:

For the Postal Service:	Howard Kaufman Attorney (Office of Labor Law)
For the NALC:	Keith Secular Attorney (Cohen Weiss & Simon)
Place of Hearing:	Washington, D.C.
Dates of Hearing:	May 10 & 12, 1995
Date of Post-Hearing Briefs:	November 22, 1995
AWARD:	The grievance is denied.

Date of Award: February 8, 1996.

Richard Mittenthal
Arbitrator

BACKGROUND

This grievance maintains that transitional employees (TEs) throughout the country, although properly hired, are being improperly used by the Postal Service. First, NALC alleges that a ceiling exists on the number of hours TEs may work per week in a delivery unit and that Management has ignored such ceilings. Second, NALC alleges that TEs hired into a particular five-digit delivery unit have been improperly assigned to work in another delivery unit. The Postal Service insists neither claim has merit. It asserts that there is no ceiling on TE hours once TEs have been properly hired and there is no prohibition against assigning TEs, as needed, from one delivery unit to another.

The June 1991 Interest Arbitration Award (IAA) established a new non-career bargaining unit classification, "transitional employee." This was a response to the anticipated downsizing of the work force as a result of a large automation program then underway. The purpose of TEs was to fill jobs likely to be impacted by the new methods of mail handling and delivery. It was expected that these TEs would allow Management to reduce the work force smoothly and thus avoid layoffs or excessing of career employees. The IAA directed the parties to meet and negotiate on all aspects of this new TE program, for instance, when TEs would be employed and what their terms and conditions of employment would be.

The Postal Service and APWU successfully negotiated a Memorandum of Understanding (MOU) for TEs within the APWU crafts. The Postal Service and NALC were unable to do so. They chose instead to submit their differences to interest arbitration. The resultant January 1992 TE Award (TEA) read in part:

> 1c. The parties agree transitional employees will only be utilized consistent with the following principles:
>
> (1) To cover the number of work hours which constitute the difference between the delivery unit baseline staffing analysis and the projected delivery unit staffing analysis as described in Part 2. (See Attachment A.)
>
> (2) To cover duty assignments held pending reversion due to automation.

(3) To cover the vacancy created by a part-time flexible, reserve or unassigned letter carrier opting for the held pending reversion assignment or the subsequent vacancy created by multiple opts.

(4) To cover part-time flexible attrition.

(5) To cover, in addition to the hours determined in (1) above, residual vacancies withheld pursuant to Article 12.

The term "held pending reversion" is a vacant duty assignment which is due to be eliminated as a result of automation. The term "residual vacancies" are those positions that remain vacant after the completion of the voluntary bidding process.

Except for part 1c(5)[1], the parties agree that TE employment was to be dependent upon the anticipated work-hour savings calculated through 1c(1). That calculation involved three distinct numbers - "baseline staffing" (i.e., the then current work hours required in a delivery unit), "projected...staffing" (i.e., the work hours estimated to be required after automation), and the difference between such "baseline" and "projected" hours. That difference is described in part 2 as the "projected hourly impact for the delivery transition period." That difference was the initial hiring guide to determine the dimension of the TE force necessary to "cover" the kind of vacancies or assignments mentioned in part 1c(2), (3) and (4).

Several NALC publications were written following the January 1992 TEA. A Bulletin to the membership, articles in the Postal Record and the NALC Activist, and an Instructor's Manual all dealt with the new TE program. They addressed, among other things, the question of when and to what extent

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[1] Part 1c(5) deals with "residual vacancies" which have been "withheld" because they will at some later date be filled by employees who are scheduled to be excessed. During this intervening period, these vacancies must be temporarily filled and 1c(5) gives Management the right to do so through the use of TEs.

TEs could be hired. Similar publications were no doubt prepared by the Postal Service.

From these materials and meetings between the parties, it soon became evident that there were disagreements about the impact of the TEA. One disagreement concerned the effect of employee attrition on the part 1c(1) calculation; another concerned the timing of TE hiring. Still another raised the question of whether 1c(1)limited the number of TEs who could be hired in a delivery unit. NALC believed there was such a limitation. It noted that the "projected hourly impact", the work-hour savings per week, should be expressed in terms of full-time equivalent positions (i.e., work-hour savings divided by 40 hours) and that the resultant figure would limit the number of TEs who could be employed. The Postal Service disagreed. It be-lieved that Management had the discretion to determine how many TEs to hire and that NALC had no sound reason to object so long as Management did not hire TEs for more work than the "projected hourly impact." For instance, it claimed that if the "projected hourly impact" in a delivery unit was 40 hours, Management was free to hire one TE to cover the 40 hours or two TEs to cover 20 hours each or some other combination.

The parties apparently resolved these and other matters. Their agreements are set forth in a September 1992 MOU which dealt with many subjects including the relationship between TE hiring and projected attrition and the relationship between TE hiring and possible excessing of full-time carriers. The only portion of the MOU relevant to this dispute reads as follows:

> TE Hire versus Baseline DSSA [Delivery Services Staffing Analysis] -- For purpose of implementing Parts 1c(1)-(4) of the [TE] Award, TEs may be hired only after a [delivery] unit's baseline and projection DSSAs have been completed and the difference between the two has established a ceiling for TE hours. If, at that point, existing staffing is insufficient to meet the weekly requirements demonstrated by the baseline DSSA, TEs may be employed without current attrition as a prerequisite. However, those TE hours will be offset against the established ceiling of hours. The parties agree that TEs may be used to cover only those residual vacancies withheld pursuant to Article 12 since September 3, 1991.

In order to help Management and NALC representatives better understand the terms of this MOU as well as the January 1992 TEA, the parties met and agreed upon certain "explanations." Those "explanations" were then incorporated in a Joint Training Guide, a joint publication of the parties dated November 19, 1992.

TEs were being hired throughout this period, February through December 1992. Their numbers increased, month by month, until there were some 11,000 on the rolls by mid-December. Another manpower problem arose with the Postal Service's restructuring program which began in August 1992. A major theme of that program involved an effort to downsize the work force through retirement incentives. The effort was successful and close to 20,000 carriers retired in the following months. The resultant vacancies were filled typically by part-time flexibles (PTFs) who then found themselves working at least 40 hours per week on their new duty assignments. Many grievances were filed when they were not converted from part-time to full-time status after six months on such assignments.

These circumstances led to the December 1992 MOU. Its principal terms, for purposes of this case, were that the Postal Service agreed to offer all PTFs the opportunity to convert to full-time regular status and NALC agreed to permit additional TE hiring. This MOU also replaced the impact formula (baseline versus projected hours) found in part 1c(1) of the January 1992 TEA with a much simpler formula based on an estimate of the percentage of mail in a delivery unit which would, through automation, be subject to delivery point sequencing (DPS).

These matters, along with certain TE limits, were covered in items 2, 3 and 5 of this December 1992 MOU:

> 2. In lieu of the DSSA analysis provided in the January 16, 1992...TE...Award, the parties will use the impact formula contained in the September 21, 1992, Hempstead Memorandum of Understanding to determine the number of TE hours allowed in a delivery unit due to automation impact. All such TEs will be separated in a delivery unit when...DPS is on-line and operational.
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> 3. The parties agree that in offices (automation impacted or non-impacted) where the number of PTF conversions exceeds the number of TEs

allowed under the above impact formula, additional TEs may be hired to replace such PTF attrition. All such TEs will be separated from the rolls by November 20, 1994.

* * *

5. The parties at the local level will meet to review the current TE complement and pending TE or PTF grievances as follows:

* * *

- The parties will attempt to resolve any pending grievances, including appropriate remedies for violations, if any. The Postal Service's liability, if any, will be limited to any TE hours in excess of that allowed by paragraphs 2 and 3 above which occurred prior to the date of this agreement.

- If TE hours in a delivery unit exceed that allowed by paragraphs 2 and 3 above, management must, no later than 3/1/93, either: (1) relocate TEs to another delivery unit to stay within the allowable limits; or (2) reduce work hours per TE, so as to stay within the allowable limits; or (3) remove excess TEs from the rolls.

As a consequence of item 3 above and the large number of PTF conversions, many more TEs were hired after December 1992. The TE force increased to more than 23,000.

This dispute arose in April 1993 when NALC asserted that Management was overusing and misusing TEs. Its grievance claims that the January 1992 TEA and the subsequent MOUs place a ceiling on the number of TE hours to be worked each week in a delivery unit, that Management has failed to honor this ceiling, and that Management has also improperly taken TEs hired for one delivery unit and assigned them to another. The Postal Service disagrees. It contends that the TEA and subsequent MOUs dealt with the hiring of TEs, not with their subsequent use after being hired. It asserts that TEs, if properly hired, are not subject to any ceiling on the number of hours they may work in a delivery unit. It asserts further that there is no prohibition against Management assigning TEs from one delivery unit to another as the need arises.

DISCUSSION AND FINDINGS

The TE rules are found in three documents, the January 1992 TEA as clarified or modified by the September 1992 and December 1992 MOUs. The issue here, simply stated, concerns the scope of these rules.

The Postal Service argues that the rules were meant to apply only to the hiring of TEs and that, assuming the hiring was not improper, Management was then free to use TEs for whatever hours and in whatever delivery units they were needed. It insists the parties at no time agreed to limit the work hours of TEs who had been hired in strict accordance with whichever methodology was then in effect. It relies on the following considerations: the language of the January 1992 TEA; the bargaining history regarding TEs; the parties' course of conduct following the TEA; and certain general principles of contract construction.

NALC, on the other hand, urges that the TE rules have a much broader reach. It asserts that the rules apply not just to hiring but also to the use of such TEs. It contends, to repeat what has already been said, that there is a ceiling on the number of hours TEs may work per week in a given delivery unit and a prohibition against their being assigned from one delivery unit to another. It relies heavily on the language of the MOUs, particularly the references to "a ceiling for TE hours" and "the number of TE hours allowed in a delivery unit..."

A brief illustration will bring the problem into sharper focus. Suppose the "projected hourly impact" of automation in a delivery unit is 40 hours. Suppose further that Management hires one TE for this unit when one of the other relevant "triggers" takes place, for instance, a duty assignment, destined to be eliminated on account of automation, becomes vacant. The parties agree that the hiring of this TE in such circumstances would be justified. The dispute arose when Management assigned more than 40 hours' work to this TE in a week. NALC says the "projected hourly impact" serves as a limitation not just on the extent of TE hiring but also on the number of hours a TE (or TEs) may work in a given week. The Postal Service contends, however, that there is no restriction on the number of hours the TE may work assuming he was properly hired.

I - January 1992 TEA

The January 1992 TEA is crucial to the disposition of this case. It conditioned the employment of TEs upon the occurrence of certain "triggers." The threshold "trigger" involved a methodology through which Management was to demonstrate the extent to which automation would reduce the number of hours worked in a delivery unit. This "projected hourly impact" was the key figure in determining how much TE hiring was permissible when one of the other "triggers" took place. True, this "...impact" was expressed in terms of carrier hours per week in a delivery unit. But that simply gave Management the discretion to determine the number of TEs to hire to cover the "projected hourly impact." A 40-hour "...impact", for instance, could be handled by the employment of one TE for 40 hours, two TEs for 20 hours each, or perhaps some other combination. The exercise contemplated by this portion of the TEA clearly dealt with hiring. Neither the language of the TEA nor the parties' behavior immediately before or after the issuance of the TEA suggest that the "...impact" hours were intended as a limitation on the number of hours TEs could work after being hired.

Part 1b of the TEA speaks of TEs being "hired for terms not to exceed 359 calendar days..." Part 1c says TEs "will be utilized consistent with the following principles...", namely, the several "triggers" quoted earlier in this award. NALC urges that "utilized" must mean something other than "hired" and must refer therefore to the actual usage of TEs, hours per week, in a delivery unit. But the sense of part 1c, particularly the "triggers", plainly is that the parties were concerned with the establishment of the TE work force, the circumstances under which TEs could be hired, and not their hours of work after they were hired.[2] These are separate and distinct matters. It is difficult to believe that 1c was addressing Management's post-TE hiring conduct when the real issue before the parties was the initial hiring of TEs. Indeed, provision had to be made for TE hiring before any consideration could possibly be given to any post-hiring work limitation.

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[2] Note that parts 1b and 1c were agreed to by the parties and the arbitrator played no role in the creation of those provisions.

This view is supported by other factors as well. It should be emphasized that the "projected hourly impact" due to automation was simply an estimate. That "...impact" was, under the methodology described in the TEA, the basis for determining the scope of TE hiring. But because it was a "projected..." figure, because the actual reduction in hours could understandably prove to be somewhat more or less than the estimate, it is difficult to believe that this methodology intended the estimate to set rigid limits on the hours later worked by the TEs who had been hired.

Moreover, part 1c of the TEA states that TEs are to be used to "cover" certain duty assignments, vacancies, and PTF attrition. If, for example, the impacted duty assignment involves an estimated 40 hours but subsequently turns out to require a few additional hours, the parties could hardly have contemplated that the TE could "cover" only the first 40 hours. True "cover[age]" calls for the TE to do what the carrier he replaces was doing. The kind of limits urged by NALC could prevent such "cover[age]" and create an awkward, inefficient operation. Indeed, because of the opting permitted by part 1c, there is no assurance that the newly hired TE will be placed on the impacted duty assignment or vacancy. He may well end up on an entirely different assignment. It is once again difficult to believe that the parties would limit the work hours of a TE whose ultimate assignment is uncertain at the time of hire. Thus, the Postal Service's consent to part 1c hiring restrictions does not appear to constitute agreement to strict limits on the number of hours TEs could work after being hired.

In addition, NALC's proposals during the negotiations that preceded the TEA dealt with "hiring." It was concerned with how many TEs "may be hired", when they "may...be hired", and so on. Its objective was to place limits on the TE hiring process. Nothing in these proposals suggests that NALC's goal was to place limits on the work hours of TEs after they were hired. Nor did this subject surface after the TEA was issued. A NALC Bulletin in late January 1992, written shortly after the issuance of the TEA, referred to the "detailed justification required for hiring transitionals..." and the contractual overtime pay due TEs "after ...40 hours in a week...". These latter words strongly suggest that a TE hired because of a "projected hourly impact" of 40 hours could nevertheless work more than 40 hours. Obviously, limitations on TE work hours per week was not then a matter upon which NALC had focused. Subsequent NALC publications similarly describe the methodology in part 1c as a hiring limitation. These

publications dealt with many facets of the newly established TE classification. But nowhere do they state that this methodology not only limits TE hiring but also limits the number of hours TEs can work each week in a delivery unit after they have been hired. This history serves to reinforce the observations I have already made.

For these reasons, my conclusion must be that the TEA did not establish any limit on the number of hours TEs could work in a delivery unit after they had been properly hired in that unit. If any such limitation can be justified, it must be derived from the language of the later MOUs.

II - The September 1992 MOU

Within a few months after the TEA was announced, disagreements arose as to the impact of the award. The parties addressed these disagreements and produced this MOU. Among the subjects covered were the need for realistic data in completing the part 1c comparison of baseline versus projected staffing, the availability to NALC of all relevant information used in making this staffing analysis, the effect of attrition on TE hiring, the timing of TE hiring, and so on. Just one of the subjects, "TE hire versus baseline DSSA", is relevant to the present dispute.

The MOU states that in implementing part 1c of the TEA, "TEs may be hired only after a unit's baseline and projection DSSAs have been completed and the difference between the two has established a ceiling for TE hours...". NALC believes this "ceiling" is evidence that the parties intended to limit the number of hours TEs were to work in a delivery unit. The quoted sentence, however, deals only with the timing of TE hiring. It bars such hiring until "after" the staffing analysis has been finished. Given the purpose of this sentence, it seems obvious that the "ceiling" relates to how many TEs are to be "hired", relates to the hiring process itself. Indeed, the term "ceiling" appears to be a shorthand description of what part 1c refers to as "the number of work hours which constitute the difference between...baseline...and...projected...staffing analysis" or what part 2 refers to as the "projected hourly impact." Inasmuch, as I have already explained, this TEA language did not limit the number of hours TEs could work after they had been properly hired, surely the MOU language provides no such limit.

The MOU goes on to say that if, after the staffing analysis, "the existing staffing is insufficient to meet the

weekly requirements demonstrated by the baseline DSSA, TEs may be employed without current attrition as a pre-requisite." In other words, when actual staffing was insufficient to meet the then current staffing needs, TEs could be "employed" to make up the difference. The word "employed" is used here as a synonym for "hired."

A Joint Training Guide, prepared by the parties, was published in November 1992. It dealt with, among other matters, the impact of the September 1992 MOU on TEs. Its explanatory material, Chapter 6, had such headings as "Clarification of rules on TE hiring and utilization", "Preconditions to TE hiring reaffirmed", and "Additional TE hiring 'trigger': baseline versus existing staffing." It spoke, like the MOU, of a "TE hours ceiling...based on the difference between the DSSAs...", between the baseline and projected staffing. Nothing in this Joint Training Guide, however, alters my earlier observations about the scope and meaning of the TEA or this MOU. The Guide does not prove that the parties intended this MOU to set a strict limit on the number of hours TEs may work in a delivery unit after they have been properly hired.

III - The December 1992 MOU

The Postal Service restructuring in mid-1992 prompted a large number of retirements with the resultant vacancies being filled by PTFs or sometimes by the hiring of TEs. These conditions prompted grievances by PTFs seeking conversion to full-time regular status and by NALC objecting to excessive employment of TEs.

The December 1992 MOU was an attempt to resolve these and other problems. It provided for all PTFs to be given the opportunity to convert to full-time status; it permitted the Postal Service, for the most part, to hire TEs to replace PTFs who converted; and it changed the methodology for determining the "projected hourly impact" on account of automation from a formula using a baseline versus projected staffing analysis to a formula using an estimate of the percentage of mail in a unit which would be subject to DPS. None of these matters dealt in any way with the issue presently before the arbitrator, that is, whether these formulas establish a limit on the number of hours TEs may work per week in a unit after such TEs have been properly hired.

This MOU, however, went on to address the question of what to do about the delivery units in which there had been

excess hiring of TEs. The Postal Service suggested prompt removal of such excess TEs. NALC apparently wanted a more gentle solution. The parties agreed that "if TE hours in a delivery unit exceeded that allowed..." by the formulas in this MOU, Management must remedy the matter by a date certain through any of the following devices: either "relocate TEs to another delivery unit to stay within the allowable limits" or "reduce work hours per TE, so as to stay within the allowable limits" or "remove excess TEs from the rolls."

This language was clearly intended as a remedy for excess TE hiring. Its scope is restricted by the nature of the underlying violation it seeks to correct. That violation relates to TE hiring, namely, the hiring formulas which determine the extent to which, if at all, TE hiring was excessive. The DPS formula measures permissible TE hiring from the standpoint of the estimated impact of DPS on carrier hours; the TE formula for replacing PTFs converting to full-time status is, insofar as PTF conversions exceed this DPS impact, strictly a person for person arrangement. These are, to repeat, hiring formulas. Hence, when the MOU refers to "the allowable limits" of TE hours, it is obviously concerned with the "projected hourly impact" of DPS or the number of TEs who can properly replace PTF conversions. Nothing in this MOU language demonstrates that the parties meant to establish strict limits on the number of hours TEs may work per week in a unit after they have been properly hired.

IV - A Caveat

One of the difficulties in this case is that the parties' arguments are couched almost entirely in contractual terms. I have not had the benefit of specific fact situations, examples of TE hiring and later use in a given unit, under the TEA and MOUs. Such specifics could be extremely helpful in calibrating the answer to a complex question.

My ruling here is that the TEA and MOUs do not limit the number of hours TEs may work per week after they have been properly hired. But the number of hours TEs work may nevertheless be significant in determining whether they were properly hired in the first place. Suppose, for instance, that the "projected hourly impact" under the relevant hiring formula is 40 hours and that Management hires two TEs for 20 hours each. Suppose further that within a matter of weeks, perhaps months, both TEs are working no less than 40 hours

each and often more. A strong argument could be made that this TE hiring was excessive. If the estimated "impact" is 40 hours and the early usage is at least 80 hours, more TEs were employed than could be justified by the hiring formula.

How realistic this example is I do not know. But it should be apparent that TE hours worked in a unit could in appropriate circumstances have a strong bearing on the question of whether the initial TE hiring was excessive.

V - The Delivery Unit

NALC urges that "Management has no right to have TEs work in delivery units other than those for which they were hired." It points to part 1c(1) of the TEA which speaks of TEs covering "the number of work hours which constitute the difference between the delivery unit baseline staffing analysis and the projected delivery unit staffing analysis." And part 3(A) speaks of Management providing NALC with the information used to, among other things, "define the specific site(s) that will be impacted..." It notes that the December 1992 MOU likewise refers to the new DPS formula for determining "the number of TE hours allowed in a delivery unit due to automation." It notes too that the Joint Training Guide refers to the old baseline/projected staffing formula for calculating "the maximum TE hours that may be used in the delivery unit." It contends that these provisions and joint statements must necessarily mean that "TEs may only be utilized within the delivery unit into which they were hired."

This argument is not persuasive. In order to calculate the estimated impact of automation on carrier work hours, sensible geographic limits had to be recognized. A national, regional or state-wide calculation would have been far too broad and would have drawn Management's attention, at least temporarily, away from the impacted areas. The "delivery unit" was the group chosen, I suppose, because it was the easiest group for purposes of the calculation and later administration. What is important, however, is the fact that this calculation was part of a hiring formula. The TE hours "allowed" or "used" were the impact hours, whatever the formula, upon which the hiring limit would be set. Nothing in the language of the TEA or the December 1992 MOU suggests that TEs were, once hired, irrevocably bound to the delivery unit in which they were hired. Had that been the parties' intention, they surely would have said so.

There are other considerations as well. Under part 1c(3) of the TEA, a TE may be used to "cover the vacancy created by a part-time flexible, reserve or unassigned letter carrier opting for the held pending reversion assignment or the subsequent vacancy created by multiple opts." In short, a TE may be hired because of a vacancy in a particular delivery unit but due to opting or multiple opts could end up filling a vacancy in another delivery unit. He may not go to the delivery unit in which the vacancy originally appears because of discretionary moves by others. The calculation of impact hours in the initial delivery unit is simply the trigger which justifies the later TE hiring. The ultimate location of that TE may not be known at the time he is hired. It is difficult to believe that the parties' choice of a "delivery unit" as the group in which to make the impact hours calculation meant that any TE thereafter hired could work only in that same delivery unit. The terms of the TEA and the December 1992 MOU do not support such a restriction.

Moreover, if the TE fills a vacancy left by a PTF who in turn worked in more than one delivery unit, surely the parties meant that TE to do what the PTF had done. That would have been true also under the December 1992 MOU which permitted TEs to be hired to replace PTFs who converted to full-time regular status. These TEs were expected to do what the PTFs did. If the PTF had been assigned to two or more delivery units, the parties must have realized the TE would be assigned to the same units. It is difficult to believe the parties meant to embrace the kind of restrictive arrangement urged by NALC.

Just as the impact hours, the "projected hourly impact" of automation, did not establish a strict limit on how many hours TEs could work in a week after being hired, so too the fact that these impact hours were calculated in a particular "delivery unit" does not establish a strict limit as to where these TEs could work.

AWARD

The grievance is denied.

Richard Mittenthal, Arbitrator