C#09918

A+B

REGULAR ARBITRATION

SOUTHERN REGION

USPS - NALC

In The Matter of Arbitration	)	Case #S7N-3S-C-66004
Between	)	GTS #11409
United States Postal Service	)	Class Action
Ft. Lauderdale, Florida	)	Case #S7N-3S-C-~~88015~~ 66091
and	)	GTS #11715
Branch 2550	)	Fred Eadeh
National Association of Letter	)	(Grievant)
Carriers AFL-CIO	)	Hearing File Closed:
	)	October 18, 1989

Before Irvin Sobel, Arbitrator of Record

Appearances:

For the United States Postal Service (Service, Employer, Management)

Jerry Foster

Labor Relations Assistant,

Ft. Lauderdale, Florida.

For the National Association of Letter Carriers (NALC, Union)

Don McMahon

President Branch 2550, NALC,

Ft. Lauderdale, Florida.

Preliminary Statement:

Pursuant to modified Article 15 of the National Agreement (LMRA) between the parties, a hearing was held before the above cited arbitrator on October 18, 1989 at the Main Post Office in Ft. Lauderdale, Florida. At the hearings the parties appeared, introduced testimony, presented evidence, examined and cross examined witnesses and made closing arguments. No issues of arbitrability, timeliness or defect of form were introduced by either of the parties and the hearing files were closed at the termination of the hearing.

This arbitrator will like to express his thanks and gratitude for the understanding, forebearance and tolerance of both parties in regard to the inordinate delays in rendering a verdict. Those delays and any other defiances on my part resulted from Mrs. Sobel's lingering and protracted illness. I would also like to express my appreciation for the heart felt sympathy and expressions of concern by all the parties in the Southern Region.

Case #S7N-3R - Class Action

Issue:

Did the Employer violate the National Agreement when it moved successful bidders on Carrier List 88-10 to their new bid positions in December. If so, what is the appropriate remedy.

Facts in Case:

The Union timely introduced the following Class Action grievance on December 12, 1988. That grievance stated in its relevant parts:

> On December 3, 1988, carriers who were successful bidders on Carrier Advertisement #88-10 were moved to their new duty status in the month of December. This is in violation of the National Agreement. It is

requested that all employees moved in the month of December shall be paid out of schedule overtime.

The Employer's position was enunciated at the Step 2 level of the modified grievance procedure by Employer Labor Relations Representative Carlton Tynes. Tynes stated:

> The Union has not shown that placement of successful bidders into their assignments during the month of December is an improper violation of contractual provisions. While Management is not obligated to assign successful bidders during the month of December nothing prohibits such.

Relevant Contract Provision

Article 41.1 C. - Successful Bidder

> 3. The successful bidder must be placed in the new assignment within 15 days except in the month of December.

Item 22 of the Ft. Lauderdale Local Memorandum of Understanding (LMU) 1907-1990 (p11).

D. - Successful Bidder

> Qualified bidders shall be placed in their new assignment within fifteen (15) days of the closing of bids unless on leave, except during the month of December they shall be placed in the new assignment on the 1st working day in January.

Position of the Parties

Introduction:

The parties basic positions in the main are amply brought forth in the Step 2 Appeal and Step 2 responses respectively. Accordingly, only a brief summary statement if each party's position is warranted at this juncture.

The Union Position:

The Union position is that Article 4.1 C (1) 3 of the LMRA as well as Article 22 of the LMU are clear and unambiguous and do not permit carriers to be assigned to their new bid positions in December. Moreover the Union presented evidence to show that prior to the instant grievance assignments of carriers to their new bid positions had always been effectuated in January rather than in December.

The Employer's Position:

The Employer's essential argument is that Article 41.1 C 3 does not forbid the movement of successful bidders in December but only waived the 15 day rule for that month. Its representative also argued that the Local Memorandum of Understanding, by exceeding the bounds of Article 41.1 C 3, was in conflict with the National Agreement. Moreover, the prohibition against assignment changes in December applied solely to the Clerk's craft and excludes Carriers. Despite the Union's claim to the contrary carriers had been moved to their changed assignments in December and thus the Union had, by not grieving the practice sanctioned it. In addition even if a violation had taken place, it was of a harmless nature and the affected carriers had not been hurt by the assumption of their changed assignments in December. Thus, under the commonly held adage of "no harm, no damages" the grievants should not be accorded any monetary award for work they did not perform.

Opinion and Award:

Theodore St. Antoine Dean of the University of Michigan's "world renowned School of Law" and one of the nation's leading arbitrator has held that the arbitrator is solely "a reader of the contract". As such any detached reading of the two Articles, one in the LMRA and the other Article 22 of the LMU, would strongly support the Union's version of the meaning of the two provisions. The clear intention of the national parties was to exclude carriers the burden of learning new assignments in that busiest of months. Otherwise if both parties had not deemed it in their interest they would have written the 15 day rule into the LMRA without any mention of the month of December. That rule in the LMRA was expressly strengthened by the local signatories to the LMU to remove any possible ambiguity. That negotiated clarifactory provision in the LMU cannot be interpreted as in conflict with the National Agreement. Moreover, neither the provisions in both agreements nor, past practice can be construed as applicable soley to the Clerk's craft.

The Union convincingly showed through previous assignment orders dating back to the beginning of the decade that a past practice had prevailed in which movement of successful bidders to their changed assignments always took place in January. The Employer cited at least one successful bidder whose assignments had commenced in December as proof that the Union had allowed it to implement changes in that month. However, even if the specific wording of the LMU were ambiguous, the Union's failure to grieve in that one instant cannot be interpreted as proof that it had conceded the matter in the face of

the overwhelming majority of workers whose changed assignments, over the decade, took effect in Januray.

At this juncture it should be quite apparent that the grievance will be sustained but the matter of remedy must be established. The Union's requested remedy is not only open ended and unclear but also in no manner did the Union even remotely justify its proposed remedy in the context of making the grievants whole. On the other hand the parties had already determined that some greater degree of difficulty in making adjustment to a new assignment were to eventuate, if that change took place in December. Accordingly the contractual violation requires some redress and a lump sum payment will be awarded to all of those whose assignments were changed in December.

Award:

The grievance is sustained. Each carrier improperly transferred to a new assignment on December 3, 1988 will receive a lump sum payment of $100.00

Case #S7N-3S-C-89015 - Fred Eadeh (grievant)

Issue:

The issue as stipulated by the parties was stated as follows:

> Did the Employer violate the National Agreement when it denied the grievant his request for a schedule change for jury duty? If so, what is the appropriate remedy?

Facts in Case:

On April 26, 1989 the Union, following an adverse Step I decision on April 21 by Supervisor Ed Boltz, introduced a modified Article 15 Step 1-A grievance on behalf of carrier Fred Eadeh. That grievance stated in its relevant parts:

> Fred Eadeh on April 10, 1989 was denied a change of schedule to change N/S days for jury duty.

The Union requested the following remedy:

> Eadeh shall be paid for April 15, 1989 (Jury Duty date) and employees whall be granted changes of schedule for Jury Duty.

The grievance was denied on May 24, 1989 by Jerry Foster. He stated:

> There is no evidence of a contractual violation. While posted procedures provided for changes of schedule to "conform to the hours of court service" there is no requirement to change the schedules of employees to conform to the days of jury duty. Furthermore, the Union provides no documentation to support its contentions.

Relevant Provisions:

Employment and Labor Relations Manual (E/LR)

Paragraph 516.334-Accomodations of Employees Called for Court Service

Employee Option

a. Employees who are eligible for court leave and who have a conflict with court duties and work schedule have the following options.

b. Have their work schedule changed temporarily to the hours of court service.

c. Employees who choose to have their work schedule changed temporarily to conform to court service hours, submit as soon as possible a request for such schedule change in writing to the appropriate postal official at their installations. Employees who exercise this option shall receive full compensation for the period of court service.

Arbitrator's Discussion

Position of the Parties:

The position of each of the parties is amply reflected in their respective Step 2 Appeal statements. Therefore, any additional statements of position under separate attribution to each of the parties would be superfluous.

Opinion and Award:

Due to the ambiguous wording of Paragraph 516.334 grievances based upon Postal Employee requests for schedule changes to conform to schedules for jury duty have abounded. Thus, the above cited provisions of the E/LR Manual have been the subject of arbitral decisions, both at National and Regional levels. The precedential decision (N8-1E-0089) rendered on October 1980 by National Arbitrator

Howard Gamser established the basic frame of reference for handling subsequent cases of this genre. In referring to the twenty-two years in which the Service's Philadelphia Unit permitted employees to change days off to conform with their days in court. Gamser stated:

> For the reasons set forth above it must be ultimately concluded based upon the record made in this proceeding that the postal employees in the Philadelphia Post Office were previously entitled and continued to be entitled to make a temporary change on their weekly work schedule to coincide their jury days with the days they were assigned to be on court leave.

The Union sought to broaden Gamser's conclusions for Philadelphia to make it applicable to all employees wherever they happened to be located. Gamser stated:

> Evidence to demonstrate a consistent practice of so interpreting the provisions of the E/LR Manual and similar provisions covering court leave in earlier manuals, regulations, and the Federal Personnel Manual are not sufficiently conclusive, as it was presented by the Union to support the Union's position in this regard. The substantiation of this Union's claims in this regard must be established in other proceedings initiated at the appropriate postal installations.

In short, Gamser's ruling meant that whenever past practice in any postal installation has sanctioned changing non-scheduled days to coincide with court duty, that practice will continue to be honored. Whenever such past practices cannot be demonstrated as evidenced by Arbitrator Edmund Shedler's decision (Case #S1C-3W-C-23711) such changes in daily schedules are not sanctioned.

On September 1987 a notice bearing Ft. Lauderdale Postmaster Vacca's signature, was designed to change the installations' previous practice in regard to a change in schedule for jury duty. That notice stated:

> It has been the practice in this office when allowing revised schedules for the purpose of court leave to

> allow an employee to change their days off, as well as their daily schedules to conform to the hours of court service.
> We recently have been informed that the practice is not in order.....
> Accordingly effective no sooner than thirty days from the date of this notice employee's who submit a request for a revised schedule for court service may receive a change of schedule involving only their daily schedule, No further changes of days off will be granted for court service.

Postmaster Vacca's Notice was challenged by the Union. The decision in that case (#S4C-3S-C- & S7C-3S-C-84) by Arbitrator Elvis Stephens in September 1988 is precedential. Stephens argues:

> Therefore, the arbitrator concluded that the Employer violated Article 5 of the contract when it unilaterally changed said practice in its September 17, 1987 notice. The contractual basis for the practice is found in the language of Part 516.334 of the E.L.M. That language can be interpreted as allowing daily work schedules to be changed.

He concluded that Postmaster Vacca's unilateral Notice did not conform to the proper procedures for affecting changes in policy and as a consequence the admitted past practice at Ft. Lauderdale prior to September 17, 1987, was still in effect.

Accordingly the grievance of Fred Eadeh is hereby sustained.

Award:

The grievance of Fred Eadeh is sustained. Mr. Eadeh will be compensated at his hourly rate for eight (8) hours at his prevailing wage rate as of April 15, 1989.

Tallahassee, Florida
March 5, 1990

This is a certified true copy of Arbitration Award

Irvin Sobel, Arbitrator