

C# 03807

ARBITRATION AWARD

July 22, 1983

UNITED STATES POSTAL SERVICE
West Linn, Oregon

-and-

Case No. H1N-5D-C-2120

NATIONAL ASSOCIATION OF LETTER
CARRIERS

Subject: Assignment of Work by Seniority - Enforceability
of Local Practice

Statement of the Issue: Whether a past practice
of assigning part-time flexible carriers to available work by seniority in the West Linn Post
Office is inconsistent or in conflict with the
National Agreement?

Contract Provisions Involved: Article 7, Section 1;
Article 30; and Article 41, Section 2 of the
July 21, 1981 National Agreement.

Appearances: For the Postal Service,
James G. Merrill, General Manager, Labor Relations
Division, Northeast Region; for NALC, Keith
Secular (Cohen, Weiss & Simon), Attorney.

Statement of the Award: The grievance is denied.

BACKGROUND

This grievance protests the Postal Service's action in failing to comply with a past practice of assigning part-time flexible carriers by seniority in the West Linn, Oregon Post Office. The Postal Service insists this practice is inconsistent or in conflict with the terms of the National Agreement and is hence unenforceable. NALC disagrees.

The essential facts are not in dispute. The West Linn Post Office employs nine regular carriers and two part-time flexible carriers. Management had enough work for just one part-time flexible carrier on December 2 and 3, 1981. It called in the junior man on both days. A grievance was filed on behalf of G. Seaver, the senior man. NALC claims that the past practice in West Linn had been to assign available work to part-time flexibles on the basis of seniority. More specifically, it alleges that when there was sufficient work for just one part-time flexible, the practice has been to assign such work to the senior man.

The Postal Service contends the grievance lacks merit for two reasons. First, it denies the existence of the practice alleged by NALC. Second, even if NALC were correct on this first point, it says any such practice would be inconsistent or in conflict with the National Agreement and hence unenforceable.

For purposes of this case, the parties stipulated that the arbitrator should assume the existence of the alleged practice and should rule only on the contractual question posed here. That is, whether the practice of assigning available work to part-time flexibles by seniority is inconsistent or in conflict with Article 7, Section 1 or Article 41, Section 2 of the National Agreement? If this question is answered in the Postal Service's favor, there is no need to go further. If this question is answered in NALC's favor, the parties will have to arbitrate their disagreement as to the existence of the practice.

The relevant provisions of the National Agreement read in part:

Article 7 (Employee Classifications)

"Section 1. Definition and Use

A. Regular Work Force. The regular work force shall be comprised of two categories of employees which are as follows:

1. Full-Time...

2. Part-Time. Employees in this category shall be hired pursuant to such procedures as the Employer may establish and shall be assigned to regular schedules of less than forty (40) hours in a service week, or shall be available to work flexible hours as assigned by the Employer during the course of a service week..." (Emphasis added)

Article 41 (Letter Carrier Craft)

"Section 2. Seniority

A. Coverage

1. This seniority section applies to all regular work force letter carrier craft employees when a guide is necessary for filling assignments and for other purposes and will be used to the maximum extent possible...

B. Definitions

1. Seniority for bidding on preferred letter carrier craft duty assignments and for other purposes for application of the terms of the National Agreement shall be restricted to all full-time regular city letter carriers.

2. Part-time regular letter carriers are considered to be a separate category and seniority for assignment and other purposes shall be restricted to this category

3. Full-time reserve letter carriers, and any unassigned full-time letter carriers whose duty assignment has been eliminated in the particular delivery unit, may exercise their

preference by use of their seniority for available craft duty assignments of anticipated duration of five (5) days or more in the delivery unit within their bid assignment areas, except where the local past practice provides for a shorter period.

4. Part-time flexible letter carriers may exercise their preference by use of their seniority for vacation scheduling and for available full-time craft duty assignments of anticipated duration of five (5) days or more in the delivery unit to which they are assigned..."
(Emphasis added)

Article 30 (Local Implementation)

"A. Presently effective local memoranda of understanding not inconsistent or in conflict with the 1981 National Agreement shall remain in effect during the term of this Agreement unless changed by mutual agreement pursuant to the local implementation procedures set forth below.

"B. There shall be a 30-day period of local implementation to commence October 1, 1981 on the 22 specific items enumerated below, provided that no local memorandum of understanding may be inconsistent with or vary the terms of the 1981 National Agreement..." (Emphasis added)

DISCUSSION AND FINDINGS

A starting point in this analysis is Article 30. It provides that the terms of the local memoranda of understanding shall be effective only if they are "not inconsistent or in conflict with the...National Agreement." The parties seem to recognize that this principle applies to practices as well.* Thus, practices shall be effective only if they are "not inconsistent or in conflict with the ...National Agreement." This viewpoint is compelled by collective bargaining reality. For practices are clearly a means of supplementing, rather than supplanting, the terms of the National Agreement.

* See, for example, my restatement of the parties' stipulated issue on page 1 of this award.

The West Linn practice has been to assign available work to part-time flexible carriers on the basis of seniority. If there was one day of work for part-time flexibles, the practice was to assign such work to the senior man. The issue here is whether this practice is inconsistent or in conflict with either of two provisions cited by the Postal Service - Article 7, Section 1A2 or Article 41, Section 2B4.

The following observations relate to the meaning of Article 41, Section 2B4. First, this provision says "part-time flexible...carriers may exercise...their seniority...for available full-time craft assignments of anticipated duration of five (5) days or more..." There is no ambiguity here. These words describe the precise circumstances under which a part-time flexible "may exercise" his seniority to claim available work. They plainly imply that a part-time flexible may not exercise his seniority to claim available work of "anticipated duration of [less than] five (5) days..." This implication is also supported by a familiar rule of contract construction, "To express one thing is to exclude another."

Second, it could be argued that 2B4 dealt only with seniority rights to available work of five days or more and that the parties meant to allow local practice to govern the exercise of seniority with respect to available work of less than five days. That argument has a surface appeal. But it ignores the fact that the parties expressly dealt with the local practice question in 2B3. That provision covers "full-time reserve letter carriers" and "unassigned full-time letter carriers whose duty assignment has been eliminated..." Such full-time carriers "may exercise...their seniority for available craft duty assignments of five (5) days or more...except where the local past practice provides for a shorter period." The underscored exception is significant. It reveals that the parties were aware that seniority rights established by 2B3 (or 2B4) could be enlarged by reference to past practice. The parties placed such a local practice exception in 2B3, thereby permitting certain carriers to exercise their seniority to claim available work of less than five days where this had been the practice. But the parties placed no such local practice exception in 2B4. This omission must have been a conscious one. To accept NALC's position would be

to engraft a local practice clause onto 2B4 contrary to the parties' apparent intentions.*

Third, my reading of 2B4 finds further support in the parties' negotiating history. NALC made a variety of Article 41, Section 2B proposals in the 1981 negotiations. It suggested that 2B be changed to provide -

"3. ...part-time flexible...carriers may opt, by virtue of their seniority, to be assigned to temporarily vacant...assignments of anticipated duration of one (1) day or more. If more than one letter carrier opts for a single assignment, the senior shall be selected.

"4. Part-time flexible letter carriers may exercise their preference by use of their seniority for vacation scheduling and for other purposes..."

This proposal was unacceptable to the Postal Service and none of this language found its way into the 1981 National Agreement. Similar NALC proposals had apparently been made and rejected in the 1978 negotiations. Given this history, it seems clear that 2B4 recognizes that a part-time flexible may not exercise seniority to claim available work of less than five days.

Fourth, my findings are consistent with an earlier impasse award by Arbitrator Wayne Howard (April 17, 1980). That case involved a Philadelphia local memorandum of understanding which permitted the senior part-time flexible carrier to exercise his seniority for daily vacant assignments. The issue was whether such a local clause was in conflict with Article 41, Section 2B4 of the National Agreement. The arbitrator held there was a conflict and hence rejected NALC's argument. His award stressed the difference between the language in 2B3 and 2B4:

* Or, to express this point somewhat differently, acceptance of NALC's argument would make the local practice language in 2B3 mere surplausage. That is, the local practice exception would be part of 2B3 even if the parties had not taken the trouble to write it into the National Agreement.

"...More importantly..., the negotiators of the National Agreement specifically conferred upon 'floats' [full-time reserve carriers] any additional seniority rights that they had been able to secure in shorter assignments through local agreements or local past practices. This is the clear meaning of the term, 'except where local past practice provides a shorter period,' contained in Article 41, Section 2B3. The failure of the negotiators of the National Agreement to include such a term in the immediate subsequent provision [Section 2B4] covering 'flexies' indicates a contrary intent, namely that the seniority rights of 'flexies' in work assignments could be exercised only in work five...days or longer..., irrespective of the existence of more liberal local agreements or of local past practices. Article 41, Section 2B3...indicates that the parties could easily have provided the additional benefits for 'flexies' as they did for 'floats' and their failure to do so in Article 41, Section 2B4 must be deemed as deliberate."

I believe Arbitrator Howard's decision was correct and should be followed.

For these reasons, my conclusion must be that the West Linn practice is inconsistent or in conflict with Article 41, Section 2B4 and is hence not binding on the Postal Service. The grievance must be denied.

One final comment is appropriate. Nothing in my earlier awards in Case No. N8-W-0406 (Helena) or in Case Nos. H8N-4B-C-16721, 25427 (Saginaw and Livonia) calls for a different result in the present case. Those awards raised different issues and are clearly distinguishable from this West Linn dispute. The Saginaw-Livonia award expressly recognized that "there may be post offices... where carriers have been permitted for years to exercise seniority in filling day-to-day assignments" and that the question of "whether such practices are binding on the Postal Service..." was not then before me.

AWARD

The grievance is denied.

Richard Mittenthal
Richard Mittenthal, Arbitrator