

NATIONAL ARBITRATION
BEFORE IMPARTIAL ARBITRATOR STEPHEN B. GOLDBERG

In the Matter of Arbitration)
)
between)
)
UNITED STATES POSTAL SERVICE) Case No. Q10C-4Q-C-12265307
) Article 12 Minimum Qualifications
and)
)
AMERICAN POSTAL WORKERS)
UNION, AFL-CIO)
)
and)

NATIONAL ASSOCIATION OF LETTER)
CARRIERS, AFL-CIO (INTERVENOR))

BEFORE: Stephen B. Goldberg, Arbitrator

APPEARANCES:

United States Postal Service: Brian M. Reimer, Attorney; Vijay V. Virk, Labor Relations Specialist

American Postal Workers Union, AFL-CIO: Darryl J. Anderson, Attorney; Sarah Kanter, Attorney (O'Donnell, Schwartz & Anderson, P.C.)

National Association of Letter Carriers, AFL-CIO: Keith Secular, Attorney (Cohen, Weiss & Simon, LLP)

Place of Hearing: United States Postal Service, 475 L'Enfant Plaza, S.W., Washington, D.C.

Hearing Dates: January 22, February 25, 2014

Date of Award: June 24, 2014

Relevant Contract Provisions: Article 12

Contract Year: 2010-2015

Type of Grievance: Contract Interpretation

SUMMARY OF AWARD

When the Postal Service intends to reassign an excessed employee to a position across craft lines under the provisions of Article 12, it must determine, prior to the actual reassignment, that the employee meets the minimum qualifications for that position, including the physical requirements.



Stephen B. Goldberg, Arbitrator

June 24, 2014

I. DISCUSSION

As is well known, the reduction in mail volume in recent years has resulted in the consolidation or closing of many mail processing facilities, as well as a reduction in opening hours at thousands of post offices. This, in turn, has led to a reduction in the Postal Service's need for clerk craft employees, and to the excessing and reassignment of many such employees. Such reassessments have frequently been across craft lines into the city letter carrier craft, which is represented by the Intervenor, National Association of Letter Carriers (NALC).

It is undisputed that some of the excessed clerks who have been reassigned to carrier positions have proven to be physically unable to carry and deliver mail. Pursuant to current Postal Service practice, such employees, after their reassignment, are provided by the District Rehabilitation Assignment Committee (DRAC) in the District to which they have been reassigned, with a reasonable accommodation to their physical limitations, such as casing mail or delivering mail by truck, to the extent such work is available.

The evidence is conflicting concerning the treatment of former clerks who have been reassigned to the carrier craft, but for whom there is insufficient carrier craft work within their physical capacities to occupy them for a full 40-hour week. Both APWU and Intervenor NALC introduced testimony and documentary evidence that some employees in this situation were sent home without pay. Conversely, Bob Brenker, USPS Manager of Strategic Complement Reassignment, testified that it was his understanding of USPS policy and practice that an excessed full-time employee who has been assigned by DRAC to light duty, is guaranteed full-time pay, regardless of whether there is full-time work available for him within his physical capacities.¹

APWU, joined by NALC, asserts that regardless of the validity of Mr. Brenker's testimony, the Postal Service violates Article 12.5 by failing to

¹ Counsel for the Postal Service confirmed that Mr. Brenker's understanding of USPS policy was accurate, further stating that "this transcript can be used in any instance where the Postal Service isn't following that out in the field".

determine, prior to involuntarily reassigning a full-time clerk to a position in the letter carrier craft, whether that clerk meets the minimum qualifications of the position to which he/she is reassigned. For, APWU points out, Article 12.5.C.1.c (Discontinuance of an Independent Installation) provides for involuntary reassessments of excessed full-time employees into other crafts or occupational groups "in which they meet minimum qualifications". Similarly, Article 12.5.C.5.a.(4)(Reductions in the Number of Employees in an Installation Other Than by Attrition) requires that reassessments of excessed full-time employees into other crafts in the same installation be made to employees "who meet the minimum qualifications for vacant assignments in other crafts", and Article 12.5.C.5.b.(2)(Reassessments to other installations after making assignments within the installation) provides that reassessments to other crafts in other installations be to "crafts or occupational groups in which they [the employees to be reassigned] meet minimum qualifications at the same or lower level".²

The Postal Service does not challenge the APWU position that it must determine, prior to reassigning an excessed employee to a position in another craft, that the employee satisfies the minimum qualifications for that position. It argues, however, that minimum qualifications do not include physical requirements. Hence, says the Postal Service, it does not violate the Agreement by its existing practice of delaying determination of an excessed clerk's physical capacity to perform the duties of a letter carrier until the excessed clerk has been reassigned to the letter carrier craft, and at that point, if necessary, making reasonable accommodations to enable the former clerk to perform duties within the letter carrier craft.

APWU asserts, without contradiction, that excessed clerk craft employees who are reassigned to carrier craft positions which they are physically incapable of performing sustain significant harm even if they are provided with reasonable accommodations that enable them to perform work in the carrier craft. It states (Brief, pp. 3-4):

² Similar language, applicable to part-time flexible employees in the discontinuance of an independent installation, is contained in Article 12.5.C.1.e.

- They lose their bid jobs;
- They lose their seniority for bidding, becoming the junior regular in the clerk craft;
- They lose the APWU 2010 National Agreement Protection against excessing to positions more than 50 miles away;
- They lose the protection of the APWU MOU protecting employees against layoff and reduction in force.

The issue for decision presented by the parties' competing contentions is whether, under Article 12, the physical requirements of a position are encompassed within the minimum qualifications for that position, and thus must be determined to be met before the Postal Service may reassign an excessed employee across craft lines.

Common understanding of the term "minimum qualifications" to perform a job would appear to support the Union's position that minimum qualifications include the physical requirements to perform the job. After all, one can hardly be qualified to perform a job, even minimally, if one is incapable of satisfying the physical requirements of that job.

This view finds support, as applied to the proper interpretation of Article 12, in the July 2010 Joint Contract Interpretation Manual (JCIM). In commenting on Article 12.5.C.5.a, the JCIM states (p. 112):

Minimum qualifications are usually the requisite entrance examination, a driving license (including a Commercial Driving License –CDL where necessary), an experience requirement, or a demonstration of a skill (e.g. typing).

Please check the qualification standards to determine the minimum qualifications for a particular position.
(Emphasis supplied.)

The Postal Service Qualification Standards for the position of City Carrier (August 15, 2005) provide:

PHYSICAL REQUIREMENTS

Applicants must be physically able to perform the duties of the position, which require arduous exertion, prolonged standing, walking, bending and reaching, and may involve handling heavy containers of mail weighing up to the allowable maximum mailing weight.

The Position Description for the City Carrier position (August 15, 2005) spells out the maximum weight that a City Carrier may be required to carry:

May be required to carry mail weighing up to 35 pounds in shoulder satchels or other equipment and to load or unload containers of mail weighing up to 70 pounds.

In sum, the JCIM direction that the minimum qualifications for a particular position are to be determined by checking the qualification standards for that position, when read together with the inclusion of physical requirements in both the Qualification Standards and the Position Description for the City Carrier position, would appear to lead to the conclusion that the minimum qualifications for the City Carrier position include satisfying the physical requirements for that position.

The Postal Service, however, argues that the physical requirements set out in the Qualification Standards for a position are not the same as the minimum qualifications for that position. It states (Brief, p. 11):

By applying the adjective 'minimum' to the word 'qualifications', the parties agreed that Article 12 did not require an excessed employee to meet each and every one of the listed qualification standards of a new position, but only those that are 'minimum'.

The JCIM discussion of Article 12.5.C.5.a does not, however, distinguish between minimum qualifications for a position and other qualifications for that

position. Rather, it directs the reader to "check the qualification standards to determine the minimum qualifications for a particular position". The Qualification Standards for the city carrier position do not distinguish between minimum qualifications and qualification standards. Hence, at least as far as the city carrier position is concerned, the Postal Service's effort to distinguish between qualification standards and minimum standards is without merit.³

The Postal Service next relies on the parties' 2005 jointly drafted "Article 12 Questions and Answers", in which the following appears:

Q4. Is an employee's light or limited duty status considered in excessing situations?⁴

A4. No. An employee in a light/limited duty status will be excessed in the same way that employees in a full duty status are excessed, based on the pay level of the duty assignment they hold and their seniority. They will receive reasonable accommodation if necessary in their new duty assignment/installation.

The same language is found in a September 2012 MOU entitled "Temporary Assignment, Reassignment or Reemployment in APWU Represented Crafts of Employees Injured on the Job".

Both the 2005 Question and Answer and the 2012 MOU deal solely with employees on light or limited duty status. Neither refers to the type of employee at issue in this case - an excessed employee in a regular duty assignment who is

³ The JCIM discussion of the selection of withheld full-time regular clerk craft duty assignments by impacted clerk craft employees under Article 12.5.B (Reassignments: Principles and Requirements) is even clearer on this point. It states (page 99):

Impacted employees will use their seniority to select a withheld duty assignments for which they meet the minimum qualification(s). . . . The minimum qualifications for a particular position are determined by the qualification standards. (Emphasis supplied.)

There is no reason to suppose that the drafters of the JCIM intended different interpretations of minimum qualifications within the same Article 12.

⁴ Light duty is available for employees who have sustained an off-the-job injury or illness; limited duty applies to on-the-job illness or injury.

not on light or limited duty, but who does not meet the physical requirements contained in the minimum qualifications for the cross-craft position to which the Postal Service has assigned him/her .

Nor is there any reason to suppose that the omission of employees in a regular duty assignment, who are not on light or limited duty, from the 2005 Question and Answer and the 2012 MOU was inadvertent. The distinction between employees on light and limited duty and those in regular duty assignments is well-known to the parties. Hence, their decision to except employees on light and limited duty but not to except employees in regular duty assignments from the Article 12 requirement that minimum qualifications be met prior to cross-craft reassignment must be respected as intentional.

Finally, the Postal Service argues that if Article 12 requires that an excessed employee meet the physical requirements of a position before being reassigned to that position, the Postal Service could be forced to violate the Rehabilitation Act of 1973. It states (Brief, pp. 15-16):

This federal law protects qualified individuals with a disability who can perform the essential functions (not all the functions) of their position, with or without reasonable accommodation. The Postal Service's physical requirements, however, do not distinguish between essential and non-essential functions. Nor do they provide for reasonable accommodations. . . If the Postal Service were to decline assignment of a disabled employee to a position because of an inability to meet its physical requirements, it could very well find itself in violation of the Rehabilitation Act.

The situation raised by the Postal Service is that of a clerk craft employee who is excessed and, because there are insufficient clerk craft vacancies to accommodate him, is scheduled for reassignment to a carrier craft position. That employee, albeit fully capable of performing his current clerk craft duty assignment, is physically incapable of carrying mail. Hence, under the APWU interpretation of Article 12, he cannot meet the minimum qualifications of the

position to which the Postal Service would assign him, and is retained in the clerk craft, rather than being reassigned to the carrier craft.

The Postal Service argument is that if the employee in this situation wants to be reassigned to the carrier craft rather than remain in the clerk craft, and the Postal Service denies him that reassignment because he does not meet the minimum qualifications of the carrier position, it runs the risk of being found to have violated the Rehabilitation Act by not making the reasonable accommodations necessary to enable him to serve as a carrier.

In the first place, however, the Postal Service assumption that a clerk craft employee who was denied reassignment to a carrier craft position because he was physically unfit to carry mail would file a Rehabilitation Act complaint seeking assignment to the carrier craft is highly unlikely, not only in view of the more arduous nature of the carrier's duties, but also in view of experience. Both the APWU complaint in this case and the complaints in the many other grievances introduced into evidence by both APWU and NALC were precisely the opposite – clerks complaining that they were reassigned to the carrier craft despite their inability to meet the physical requirements of the carrier position. No evidence was presented of any grievance having been filed by an excessed clerk protesting the Postal Service's denial of reassignment to the carrier craft. It is thus difficult, as a practical matter, to assign weight to the Postal Service's asserted concern that if Article 12 requires it to determine that an excessed clerk meets the physical requirements of the carrier position before being reassigned to that position, the Postal Service is at risk of being found to have violated the Rehabilitation Act.

Furthermore, even if an excessed clerk who was denied reassignment to a carrier position because he did not meet the physical requirements of that position were to file a Rehabilitation Act complaint, that complaint would be denied. If the clerk were on a regular duty assignment, not on light or limited duty, the Rehabilitation Act, which protects only disabled employees, would be inapplicable. If the clerk were viewed as disabled because of his inability to satisfy the physical requirements of the carrier position, he would, pursuant to Question

and Answer No. 4 (p. 8, *supra*), be reassigned to the carrier position and provided with reasonable accommodation in that position, just as is provided in the Rehabilitation Act.

In sum, the Postal Service argument that the Unions' interpretation of Article 12 puts the Postal Service at risk of violating the Rehabilitation Act if it denies an excessed clerk craft employee a desired reassignment to a carrier craft position for which he/she does not meet the physical requirements is without merit.

The parties' remaining contentions, neither of which require extensive discussion, are these:

- The Postal Service asserts, relying on the testimony of Bob Brenker, that it has never treated the physical requirements of a position as being included in the minimum qualifications for that position. Mr. Brenker's testimony was, however, contradicted by that of Steve Raymer, ACLU National Maintenance Craft Director since 2001, who testified that in his experience the physical capacity of an excessed clerk was routinely determined by the Postal Service prior to placing the clerk into a cross-craft residual duty assignment. Nor did the Postal Service introduce documentary evidence in support of Mr. Brenker's testimony. Under these circumstances, Mr. Brenker's testimony is insufficient to override the conclusion here reached, based primarily on the language of the Agreement, the JCIM explanation of minimum qualifications, and the qualification standards for the City Carrier position.
- APWU relied upon both Article 12 of the National Agreement and USPS Handbook EL-312, *Employment and Placement*, in support of its position in this case. Inasmuch as the APWU position has been sustained under Article 12, I need not decide whether it would also be sustained by EL-312.

II. PROPOSED REMEDY

The Union requested, as an appropriate remedy for the Postal Service's violation of Article 12, that the Arbitrator:

- (1) Hold that, when the Postal Service intends to reassign an employee across craft lines under Article 12 of the National Agreement, the Postal Service must determine before the actual reassignment that the employee meets the minimum qualifications for the position to which the employee is to be reassigned, including physical qualifications and driver's license requirements, in addition to other minimum qualifications;
- (2) Order the Postal Service to make whole all employees and former employees adversely affected by violations of this requirement;
- (3) Remand to the parties the question of what the eligibility period for this remedy should be; and
- (4) Retain jurisdiction to resolve the question of the retroactive remedy period and other questions related to the make-whole remedy if the parties are unable to resolve them.

The Union's requested remedy will be granted, subject to the following exceptions (and to some editorial modifications):

- Paragraph (1). The reference to driver's license requirements will be omitted. At an earlier stage in these proceedings, the Postal Service took the position that an excessed employee could be reassigned into a position that required a driver's license and a clean driving record even if the excessed employee did not meet those qualifications prior to the reassignment. Subsequently, the Postal Service accepted the Union argument that it must determine in advance that an excessed employee meets the driving requirements for a position that contains such requirements. There is no need for an order directing the Postal Service to take an action that it has already acknowledged is required by the National Agreement.

- Paragraph (3). The Union's request that this matter be remanded to the parties for a determination of the eligibility period for the Paragraph (2) make-whole remedy is predicated on the fact that two Step 4 disputes were filed by APWU protesting the Postal Service's reassignment of APWU bargaining unit employees to city letter carrier craft positions. The first of these was filed on March 26, 2010; the second was filed on July 24, 2012. Union witness Steve Raymer testified that he and Postal Service Labor Relations Specialist Todd Coffey had agreed to combine the two cases.⁵ Relying on Mr. Raymer's testimony, the Union asserts that any remedy awarded in this matter should be retroactive to the March 26, 2010, filing. Mr. Coffey, however, testified that in response to Mr. Raymer's request that the two cases be combined, he told Mr. Raymer that "if we were going to agree to something like that, it would have to be in writing. That's our normal practice." No such writing was introduced into evidence.

In view of the contradictory testimony and the absence of any documentary evidence that the Postal Service agreed to consolidate the March 26, 2010, dispute with the July 24, 2012, dispute – which would have expanded the period of potential Postal Service liability by more than two years – I reject the Union's assertion that the two disputes should be combined on the basis of a Postal Service agreement to do so. Nor is there any other basis put forward by the Union on which the two disputes should be combined. Accordingly, I hold that the eligibility period for the make-whole remedy of paragraph (2) should be determined on the basis of the July 24, 2012, filing. It follows that there is no need to remand to the parties the question of what the eligibility period should be, and I deny the Union's request that I do so.

⁵ At one point in his testimony, Mr. Raymer stated that Mr. Coffey had agreed to combine the two cases; at another point he stated that Mr. Coffey had not objected to his proposal that they be combined.

III. AWARD

1. When the Postal Service intends to reassign an excessed employee to a position across craft lines under the provisions of Article 12, it must determine, prior to the actual reassignment, that the employee meets the minimum qualifications for that position, including the physical requirements.
2. The Postal Service shall make whole all employees and former employees adversely affected by violations of this requirement. The eligibility period for the make-whole remedy shall be based upon the July 24, 2012, filing of the dispute dealt with in this Decision.
3. The Arbitrator retains jurisdiction to resolve any questions related to the make-whole remedy that the parties are unable to resolve.



Stephen B. Goldberg, Arbitrator

June 24, 2014