

IN THE MATTER OF ARBITRATION BETWEEN

C# 11659

U.S. POSTAL SERVICE
Eau Claire, WI

"Employer"

and

NALC
Minneapolis, MN

"Union"

NALC Case No.
GTS001027

C7N-45-C-22594
EAU CLAIRE, WI

NAME OF ARBITRATOR: John J. Flagler

DATE AND PLACE OF HEARING: January 23, 1992

DATE OF RECEIPT OF POST-HEARING BRIEFS: None

APPEARANCES

FOR THE EMPLOYER: Roger B. Rubin
USPS
180 E. Kellogg Blvd., Room 805
St. Paul, MN 55101-9401
Donna Moore, Mgr., Safety & Health
Warren Anderson, Supervisor, EAP

FOR THE UNION: Barry J. Weiner
NALC
312 Central Avenue, Room 490
Minneapolis, MN 55414
Thomas Dobrick, Shop Steward
Merlin Stratton, Grievant
Warren Anderson, Employee Assistance Coordinator

THE ISSUE

1. Is this matter arbitrable?
2. If so, did the U.S. Postal Service violate any applicable provisions of the collective bargaining agreement by eliminating the EAP position in the Eau Claire Post Office?
3. If so, what remedy applies?

BACKGROUND

The grievance arises from the U.S. Postal Service (the "Service") decision to eliminate the Employee Assistance Program (the "EAP") position located in the Eau Claire, Wisconsin Post Office effective on or about September 23, 1989. The record shows that the Service established the subject EAP program in May of 1985 through its then Eau Claire area Labor Relations Representative Jan Smith who, according to the undisputed testimony, appointed letter carrier Merlin J. Stratton to perform said EAP Program Specialist (Ad Hoc) position duties on an "as needed" basis.

On March 6, 1987, Jan Smith's successor Steven P. Govin, in his role as Acting Director of Employee and Labor Relations for the Eau Claire Post Office, informed Merlin Stratton that, following a job posting and bidding procedure pursuant to the labor contract and applicable service rules and regulations, he was appointing him to the position effective the next day, March 7, 1987. In the early part of his tenure, Stratton was provided with a desk, telephone, and file cabinet in a corner of the Eau Claire Post Office training facility. Early in 1987 he was assigned separate office space with a private entrance in a postal service annex in order to meet the need for client confidentiality and privacy.

About this same time his assignment hours were stabilized at an average of 20 hours a week on a rotation of 2 days one week followed by 3 days the next week. From the time of his first appointment, Stratton received his training for his duties in St. Paul and reported to Warren Anderson, EAP Coordinator for the St. Paul Division who assigned him the client files for Sectional Center Facilities #546, #547 and #548. These sectors run from Hayfield and Douglas Counties on Lake Superior South to Vernon County below LaCrosse, all in western Wisconsin, a straight line distance of some 200 miles north to south, and roughly 80 miles east to west. The area served by EAP Program Specialist Stratton covered 147 post offices.

Stratton's duties included site visitations to about 95 percent of these offices where he met with the local postmasters face to face to explain the services of the Employee Assistance Program and how to refer employees in need to the EAP for help. Where warranted by the size of the post office, Stratton would give floor talks and hand out materials to employees and supervisors. From this activity Stratton generated 75 requests for direct client assistance during the period of May 1985 through September of 1989. Of these, 35 clients completed chemical dependency treatment programs and most continued successfully in aftercare.

In September of 1989 the former St. Paul Division was downgraded to a Management Sectional Center (MSC) as part of a national consolidation program. In that same process, the MSC office at Eau Claire was downgraded to that of an Associate Office (AO) and directly involved the elimination of duties and positions in offices affected by the consolidation.

Immediately before the consolidation there were thirty-three authorized EAS (management positions) in the Eau Claire Post Office. With the downgrading to AO status, twenty-four of these were eliminated, four were added, and one renamed leaving Eau Claire with a total of thirteen authorized EAS positions.

The EAP Program Specialist (Ad Hoc) position was also eliminated at this time and the office in the Eau Claire Post Office Annex designated for the area EAP program closed.

RELEVANT CONTRACT PROVISIONS

Article 3 Management Rights

The Employer shall have the exclusive right, subject to the provisions of this Agreement and consistent with applicable laws and regulations:

- A. To direct employees of the Employer in the performance of official duties;
- B. To hire, promote, transfer, assign, and retain employees in positions within the Postal Service and to suspend, demote, discharge, or take other disciplinary action against such employees;
- C. To maintain the efficiency of the operations entrusted to it;
- D. To determine the methods, means, and personnel by which such operations are to be conducted;
- E. To prescribe a uniform dress to be worn by letter carriers and other designated employees; and
- F. To take whatever actions may be necessary to carry out its mission in emergency situations, i.e., an unforeseen circumstance or a combination of circumstances which calls for immediate action in a situation which is not expected to be of a recurring nature.

Article 5 Prohibition of Unilateral Action

The Employer will not take any actions affecting wages, hours and other terms and conditions of employment as defined in Section 8(d) of the National Labor Relations Act which violate the terms of this Agreement or are otherwise inconsistent with its obligations under law.

Article 17
Representation

Section 5. Labor-Management Committee Meetings

A. The Unions party to this Agreement through their designated agents shall be entitled at the national, regional, and local levels, and at such other intermediate levels as may be appropriate, to participate in regularly scheduled Joint Labor-Management Committee meetings for the purpose of discussing, exploring, and considering with management matters of mutual concern; provided neither party shall attempt to change, add to or vary the terms of this Collective Bargaining Agreement.

Article 19
Handbooks and Manuals

Those parts of all handbooks, manuals and published regulations of the Postal Service, that directly relate to wages, hours or working conditions, as they apply to employees covered by this Agreement, and shall be continued in effect except that the Employer shall have the right to make changes that are not inconsistent with this Agreement and that are fair, reasonable, and equitable. This includes, but is not limited to, the Postal Service Manual and the F-21, Timekeeper's Instructions.

Notice of such proposed changes that directly relate to wages, hours, or working conditions will be furnished to the Unions at the national level at least sixty (60) days prior to issuance. At the request of the Unions, the parties shall meet concerning such changes. If the Unions, after the meeting, believe the proposed changes violate the National Agreement (including this Article), they may then submit the issue to arbitration in accordance with the arbitration procedure within sixty (60) days after receipt of the notice of proposed change. Copies of those parts of all new handbooks, manuals, and regulations that directly relate to wages, hours or working conditions, as they apply to employees covered by this Agreement, shall be furnished the Unions upon issuance.

Article 35
Employee Assistance Program

Section 1. Programs

The Employer and the Unions express strong support for programs of self-help. The Employer shall provide and maintain a program which shall encompass the education, identification, referral, guidance and follow-up of those employees afflicted by the disease of alcoholism and/or drug abuse. When an employee is referred to the EAP by the

Employer, the EAP staff will have a reasonable period of time to evaluate the employee's progress in the program. This program of labor-management cooperation shall support the continuation of the EAP at the current level. In addition, the Employer will give full consideration to expansion of the EAP where warranted.

An employee's voluntary participation in such programs will be considered favorably in disciplinary action proceedings.

Section 2. Joint Committee

The existing program and new programs may be the subject of discussion at the National Joint Labor-Management Safety Committee meetings pursuant to Article 14, Section 3.A.

In offices having an EAP, the status and progress of the program, including improving methods for identifying alcoholism and drug abuse in its earliest stages and encouraging employees to obtain treatment without delay, will be proper agenda items for discussion at the local regularly scheduled Joint Labor-Management Committee meetings as provided for in Article 17, Section 5. Such discussion shall not breach the confidentiality of EAP participants.

POSITION OF THE UNION

The matter is arbitrable because the Postal Service never timely challenged arbitrability during the contractual grievance meetings in this matter. Binding arbitral process disqualifies from consideration by the Arbitrator of any and all evidence and/or arguments not earlier presented during the processing of the grievance through the specified steps.

The elimination of the EAP office and position in the Eau Claire Post Office covering Sectional Facilities 546, 547, and 548 violates several provisions of the Agreement, including that part of Article 35, Section 1 which states: "The program of labor-management cooperation shall support the continuation of the EAP at the current level..." The Service's argument that it has met this requirement by adding a person to the St. Paul EAP staff concurrent with the shutting down of the Eau Claire EAP office cannot be supported by the facts. The case load data show a decline from 75 for four years to 22 for two years in the number of client contacts. Adjusted for the difference in time this amounts to a 41% decline in employee utilization of the EAP in the sectors formerly served by Eau Claire EAP Program Specialist Stratton.

This decline is particularly significant because it comes at a time when the EAP Program has been expanded in scope to cover drug abuse and family problems. It cannot be said that the EAP out of the St. Paul Management Sectional Center has been continued "at the current level" in the face of data showing such a decline in utilization which strongly supports the Union's position that the "level" of EAP services must include the accessibility and convenience of such services.

Clearly, these services are directly a matter of terms and conditions of employment. Thus, their unilateral elimination violates Article 35, Section 2 which provides that the "status and progress [of the EAP] program will be proper agenda items for...the Joint Labor Management Committee meetings, as provided for in Article 17, Section 5..." Such unilateral action by the Service also violates Article 5 which unambiguously prohibits such unilateral action.

POSITION OF THE SERVICE

The staffing of an EAP position is solely a management function and is not subject to the formal grievance procedure. Management's staffing of an EAP position is not an issue of wages, hours, or working conditions, and is therefore unarbitrable. The union, in fact, has no jurisdiction in management's decisions of EAS staffing.

Article 35 of the National Agreement requires that the Agency "provide and maintain a program which shall encompass the education, identification, referral, guidance and follow-up of those employees afflicted by the disease of alcoholism and/or drug abuse." It states further, "This program of labor-management cooperation shall support the continuation of the EAP at the current level." In Section 2 of Article 35, it states "In offices having an EAP...", and it continues from there.

It should be noted that the Agency did not eliminate the EAP program from Eau Claire or any other office. All it did was transfer the Eau Claire files to the new MSC, at St. Paul, which took over the responsibility of the EAP function for Eau Claire, just ninety minutes away. The Agency has that right, if one would only read the National Agreement, which as much as states that there is no requirement that every office have an EAP. Management has not reduced the level of EAP available to any employee, in Eau Claire or elsewhere. It has simply provided the facilities and housed its EAP staff in the St. Paul MSC facility.

Since this is a contractual grievance, the union bears the burden of proving a violation of the National Agreement. However, there is no violation. Whether the Arbitrator wishes to determine the issue on the question of arbitrability or on the question of merits, there is no violation.

DISCUSSION AND OPINION

On the Motion to Dismiss for Want of Arbitrability: The grounds upon which the Service mounts its challenge to arbitrability are that it enjoys the exclusive and unfettered right to consolidate its operations with the corollary right to determine what managerial positions shall be created or abolished. Inasmuch as the Eau Claire based EAP position was at an EAS (management) level and was eliminated as part of a national consolidation program, the Service insists that the grievance to restore the subject EAP position should be deemed non-arbitrable.

The key to determining the arbitrability issue is to be found in the Union's assertion that the elimination of the EAP position in the Eau Claire Post Office adversely affects the terms and conditions of employment for its members throughout Sectional Center Facilities areas 546, 547, and 548. Arguably, the Union's position may be correct; arguably it may be incorrect; unarguably the subject matter of what constitutes terms and conditions of employment and what procedures must be followed to modify these are addressed by several provisions of the Agreement.

The fact that the Agreement speaks to the subject matter of the grievance means that the U.S. Supreme Court's line of decisions from United Steelworkers of America v. Warrior and Gulf Navigation Co.¹ through A.T.&T. Technologies, Inc. v. Communication Workers of America² govern the outcome of the Service's motion to dismiss in the instant matter. In Warrior and Gulf the collective bargaining agreement exempted from arbitration "matters which are strictly a function of management." The grievance in Warrior challenged a subcontracting of what it claimed to be bargaining unit work secured through certain provisions of the cba.

Justice William O. Douglas wrote the decision establishing the doctrine of the presumption of substantive arbitrability by stating that:

"An order to arbitrate the particular grievance should not be deemed unless it may be said with positive assurance that the arbitration clause is not susceptible to an interpretation that covers the asserted disputes. Doubts should be resolved in favor of coverage."³

¹363 U.S. 574, 80 S. Ct. 1347, 46 LRRM 2416 (1960).

²475 U.S. 643, 106 S. Ct. 1415, 121 LRRM 3329 (1986).

³363 U.S. at 582-83.

In the instant case, there can be found no express provision excluding the subject matter of this grievance from arbitration. This latter test was also set forth in Warrior and Gulf as an exclusionary standard where a cba might so specify.⁴

The only distinction to be found in the most recent U.S. Supreme Court decision on point, A.T.&T. Technologies, is a slight broadening of the base for excluding a particular subject matter from arbitration. Where Warrior & Gulf created an almost un rebuttable presumption of substantive arbitrability, once the subject matter is mentioned in a cba and that cba contains no clearly stated exclusion, A.T.&T. Technologies permits the admission of other "forceful evidence" that the parties never agreed to arbitrate the subject matter. Under the facts of the present case, the Service's arbitrability challenge meets neither the Warrior and Gulf nor the A.T.&T. Technologies standards for excluding the instant grievance from arbitrable review.

In the interest of arbitral economy I need not extensively review the Union's additional arguments and citations for denying the Service's arbitrability challenge. In short, the Union argues that arbitral precedent in similar cases, rising to the level of stare decisis under the parties' National Agreement, stands for the proposition that the Service may not challenge arbitrability at the hearing if it failed to earlier do so during the contractually defined grievance procedure steps.

In this latter regard it suffices to note that the Union's case citations on point -- standing alone and apart from the lessons of the U.S. Supreme Court -- fully support the conclusion that the grievance is arbitrable in view of the undisputed showing that the Service never asserted its non arbitrability defense until the hearing of this grievance.

Based on the foregoing findings and conclusions, therefore, the Service's motion to dismiss this grievance for want of arbitrability is, hereby, denied.

The Case On the Merits. With no material facts remaining in dispute, this case turns on a correct interpretation of applicable contractual provisions. The first of these governing provision, Article 5, PROHIBITION OF UNILATERAL ACTION, states that:

"The Employer will not take any actions affecting...terms and conditions of employment as defined in Section 8(d) of the National Labor Relations Act which violate the terms of this Agreement..."

The threshold question posed by Article 5 under the facts of this case is whether or not maintenance of the EAP position in the Eau Claire Post Office

⁴Id. at 585.

constitutes a "term and condition" of employment for bargaining unit employees in Sectional Centers 546, 547, 548. Section 8(d) of the NLRA does not, in fact, contain any definition of what constitutes a term and condition of employment. Such definitions appear in NLRB tribunal rulings and court decisions on what constitutes mandatory issues for bargaining.

Once an issue or matter has been bargained over and becomes part of a collective bargaining agreement, the question of whether or not it is a term and condition of employment is moot -- the fact that the subject matter is governed by a provision in the cba automatically renders that subject matter a term or condition of employment that neither party may unilaterally abrogate or ignore.

It is undisputed that the subject matter of the EAP has been extensively bargained over since its first appearance in the parties' National Agreement of 1975-1978, when the predecessor provision was entitled Article XXXV Alcohol and Drug Recovery Programs. The subject matter has not only remained firmly ensconced in the Agreement but has been expanded to now cover drug abuse without the earlier limitation to "non-hard core drugs," and has been retitled Article 35 Employee Assistance Program in the 1987-1990 Agreement under which the instant grievance arose.

The finding that the elimination of the EAP position in the Eau Claire Post Office involved a term and condition of employment is not tantamount to concluding that the Postal Service violated Article 5, however. Article 5 prohibits the Postal Service only from taking such unilateral action as "violate the terms of this Agreement..." In effect, all that Article 5 does is to further set the stage for the contractual analysis to determine whether the elimination of the subject position actually violates specific terms found elsewhere in the Agreement. In sum, Article 5 appears to have the limited purpose of alerting management to carefully consider the Agreement before initiating any substantial changes which might adversely affect negotiated wages, hours, terms and conditions of employment. Article 5 standing alone certainly contains no substantive or procedural grounds directly relevant to the instant grievance.

Neither does Article 3, Management Rights as relied on in part by the Postal Service contain any substantive or procedural grounds directly relevant to the grievance. It cannot be said that the Union's request that the subject position be restored interferes with the Postal Service's right to manage its operations, consolidate its offices, change its organizational structure and designations, determine its EAS positions, or any other right set forth in Article 3 as limited by the conspicuous caveat "subject to the provisions of this Agreement..." Thus, if a violation of the Agreement can be found and that violation can only be cured by directing restoration of the EAP position in question, such remedy cannot be denied on the putative management rights asserted here by the Postal Service.

While both parties cite additional contractual grounds, careful review of the Agreement establishes that the provision which truly controls the outcome of this case is that part of Article 35, Employee Assistance Program that provides:

This program of labor-management cooperation shall support the continuation of the EAP at the current level.

While not a model of clarity, the most sensible reading of this provision is that the Postal Service promises to maintain the level of EAP service it provided as of the signing of the Agreement on July 21, 1987. The dispositive issue, therefore, is whether the Postal Service in fact continued the EAP in the St. Paul Management Sectional Center after the consolidation in September of 1989 at the "current level."

The Postal Service argues that it continued the current level of service by means of certain personnel changes and improvements in telephonic communications during and since the 1989 downgrading of the St. Paul Division to an MSC. Specifically, the Postal Service shifted its EAP staffing pattern from one full time professional and one half time specialist in the St. Paul headquarters office, plus the part-time EAP specialist in Eau Claire to two full-time professionals and one part-time specialist, all of whom are now working out of St. Paul. Thus, argues the Postal Service the full time equivalency (FTE) of two EAP professionals plus one part-time specialist represents the same level of service as it provided before the elimination of the Eau Claire position.

Further, argues the Postal Service, it now provides a call-forwarding linkage in its telephone system by which employees in need of EAP services can be transferred directly to the health services unit. This makes possible, the Service claims, ready follow-up through visitations of its EAP staff to Sectors 546, 547, and 548 fulfilling thereby its obligation of continuing the current level of EAP service.

While these arguments have some facial logic, the Union presents the far more persuasive case as to what the effect of the elimination of the Eau Claire position has had on the level of EAP services. The Union's statistical evidence shows that the level of EAP services since the elimination of the subject position has dropped dramatically as measured by the most significant indicia available -- the number of direct contacts with employees seeking help for chemical dependency problems in Sectors 546, 547 and 548 and even more importantly by the number of needful employees who actually enter treatment programs.

In the latter category of troubled employees who enter chemical dependency treatment programs through referral by the Postal Service's EAP agents, the number has dropped some 40 percent. Reasonable expectations would have the number of employees in the 546, 547 and 548 sectors actually increase due to the expansion of hard drug coverage under the 1987-1990 Agreement. Thus, the decline of some 40

percent in effective utilization of the EAP program at a time its eligibility standard was liberalized can only be read to mean that the elimination of the Eau Claire EAP position failed to continue the program at the "current level" provided at the beginning of the 1987-1990 Agreement.

This conclusion should be unsurprising to anyone reasonably conversant with the problems of chemical dependency. As I disclosed to the parties at the hearing, I was privileged to serve as a member of the board of directors for two terms at St. Mary's Extended Care Center, a pioneering program of international renown in the field of chemical dependency treatment. In order to meet my responsibilities as a member of the board of directors, I read extensively in the field of this disease, and attended several educational conferences on the subject. Further, I personally went through chemical dependency treatment programs as a "concerned other" on two occasions -- once for a family member and once for a friend.

On the basis of this extensive learning experiences, I take arbitral notice that the removal of the Eau Claire position to an FTE in St. Paul cannot be treated as a simple linear mathematical proposition to support the argument that the same level of EAP services has been continued. The reality which defeats this argument is that chemical dependency is a disease characterized by denial. This means that its victims seek every excuse to resist admitting they are chemically dependent. To admit dependency requires that they forsake forevermore their drugs of choice.

The Postal Service cannot successfully argue that needful employees in western Wisconsin have not suffered a reduction in the level of EAP services in the face of these realities. Simply stated, chemically dependent lettercarriers in Sectors 546, 547, and 548 are far less likely to seek out referral to treatment if they must travel the extra three to five hours round trip to St. Paul in order to secure EAP assistance. Neither are they as likely to reach out for help from the Postal Service EAP if it means waiting for a St. Paul based counselor to arrange a visit to their residence.

Competent research shows that the decision to do something about one's abuse of chemicals tends to be highly spontaneous and responsive to immediate crises. Alcoholics and other chemical abusers turn for help usually when they perceive they are in trouble such as after a driving-while-intoxicated (DWI) citation, a family altercation, a disciplinary episode at work, or a health crisis related to their abuse of chemicals. Where help is not readily available the victims of addiction tend to revert to denial promptly after the immediate press of the crisis passes and to thus quickly revert to the same abuse patterns which gave rise to the crises in the first place.

On the basis of the competent research that serves to explain why a declining number of needful postal workers would avail themselves of EAP services once these were removed to St. Paul from the Eau Claire office and the statistical data

establishing that such a predictable decline reached the substantial level of 40 percent, it must be concluded that the "current level" of EAP services promised in Article 35 was not met by the Postal Service.

This review ought not close without commenting on the Postal Service's argument that it had the right to discontinue the Eau Claire position because it was "unauthorized" and "ad hoc." The short answer to this argument was provided by the Postal Service in answer to my question on point at the hearing of this matter. I asked: "Does the Postal Service assert that the EAP job in Eau Claire was somehow illegal or contrary to regulations?" The answer was "No." It follows that if not illegal or contrary to regulations, the Eau Claire EAP position was properly established under the discretionary authority of the Eau Claire Post Office Management.

It would necessarily follow that if the superior authority of management in the St. Paul headquarters disagreed with the establishment of an EAP position in Eau Claire, they could have shut down this appointment at its very outset -- if indeed, appropriate St. Paul Postal Service management knew of this appointment. In this regard, I note the undisputed testimony that St. Paul Manager of Safety and Health Donna Moore knew full well about the appointment and continuing service by the EAP Program Specialist (ad hoc) Stratton and that she made no effort to timely challenge his appointment to perform those duties or to discontinue those services anytime up until the consolidation.

In light of this failure by Donna Moore, or by Warren Anderson who heads the St. Paul EAP function or, indeed any other management person in the St. Paul headquarters to timely challenge Stratton's appointment, the Postal Service cannot now be heard to argue that it has the authority to discontinue that position on the grounds that it was "unauthorized."

All that remains, therefore, is the matter of appropriate remedy. I am not satisfied that the parties provided me adequate evidence and argument upon which to fashion an appropriate remedy. I, therefore, remand the remedy issue for further negotiation with the guideline that I am not disposed to award a full-time EAP position in the Eau Claire Post Office in light of the evidence that except for a brief period, the job had not been more than a half-time position in the past.

DECISION

1. For all the foregoing reasons, the grievance is hereby sustained.
2. The remedy is hereby remanded to the parties for further bargaining.
3. If the parties are unable to agree upon the remedy, I retain jurisdiction for sixty calendar days from the issuance of this decision for the sole purpose of determining the remedy.

2/2/92
Date

John J. Flagler
John J. Flagler, Arbitrator