

## NALC-USPS Regular Arbitration Panel

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In the Matter of the Arbitration

Between

Case No. B11N-4B-C 13122250

The National Association of Letter Carriers

1934713DR

And

The United States Postal Service

DRT # 14-263736

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AUG - 9 2013

Before: Marilyn H. Zuckerman, Esq., Arbitrator

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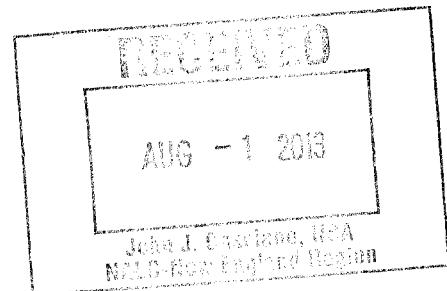
Appearances:

For the Union: Vincent Mase

For the Service: Vernon N. Tyler, Jr.

Date of Hearing: July 16, 2013

Place of Hearing: New Haven, CT

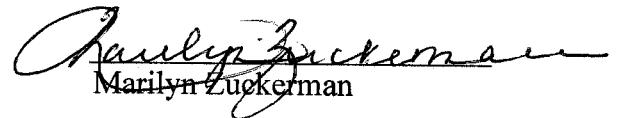
AWARD

By not offering the Grievant, Ken O'Brien, his retreat rights to a Full-Time Regular position in the Deep River CT Post Office, the Service violated Article 12 of the National Agreement. The Arbitrator need not decide whether the Service also violated Article 7 or 19 of the Agreement. The Arbitrator does find that the Service did not violate Article 15 by not settling the present grievant at the Informal or Formal A. Local management does not have authority over which PTF's become Regular or which Full-Time Carriers are offered retreat rights. These are decisions made at the District or Regional level.

The remedy to the present violation of Article 12 is that the Service shall notify the Grievant, Ken O'Brien, of an opportunity to return to a Full-Time Regular position in the Deep River CT Post Office pursuant to his retreat rights if he so desires. The notification

should contain a response date. The request for a punitive remedy for the alleged violation of Article 15 is denied because the Arbitrator does not find a violation of Article 15 or that there has been a repeat offense in the Deep River Post Office.

August 1, 2013



Marilyn Zuckerman

#### BACKGROUND

This case was submitted to the Arbitrator at the hearing based on the advocates' explanation of the Joint File and their oral arguments as to their respective positions. No witnesses were called and no additional evidence was submitted.

The Joint File contains certain undisputed facts (p. 12).

1. The Grievant, Ken O'Brien, a Full-Time Letter Carrier, was excessed on April 23, 2011 from the Deep River, CT Post Office.
2. The Grievant signed retreat rights back to the Deep River Post Office.
3. The Grievant is now a Full-Time Letter Carrier employed at the Waterford, CT Post Office.
4. Jonathan Wilder was a Part-Time Flexible Carrier prior to February 9, 2013 at the Deep River Post Office.
5. Jonathan Wilder became a Full-Time Unassigned Regular Carrier effective February 9, 2013 at the Deep River Post Office after the signing on October 9, 2012 of a Memorandum of Understanding in Headquarters which allowed for the filling of full-time positions. (See pp. 66 and 67 of the Joint File.) See also the letter dated February 13, 2013 from the Postmaster in the Deep River Office to Wilder making him an Unassigned Regular effective February 9 (p. 26 of the Joint File).

6. As of February 25, 2013, there are two full-time routes and an auxiliary route in the Deep River Post Office.
7. As of February 25, 2013, there are three full-time carriers and one part-time flexible carrier in the office.
8. The Unassigned Regular is still working 8 hours a day, 40 hours per week in the Deep River Office.

The Service maintains that local management in the Deep River Post Office has no part in the decision making process regarding which PTFs become regulars at any particular time (p. 14 of the Joint File). The Service also maintains that local management does not make the decision to write retreat letters. Local management is directed by human resources and labor relations as to when such a letter can be written (p. 15 of the Joint File). These are decisions made at the Regional level.

#### STATEMENT OF THE ISSUE

At arbitration, the parties could not agree on a Statement of the Issue and left it for the Arbitrator to frame.

The Service stated the issue as written by the B Team: Did Management violate the National Agreement, Articles 7, 12 and 19 when they did not notify the Grievant of his retreat rights to the Deep River Post Office and if so, what is the proper remedy?

The Union stated the issue as written by the B Team, but with the addition of Article 15 as one of the contract Articles allegedly violated.

The Arbitrator adopts the issue as stated by the Union: Did Management violate the National Agreement, Articles 7, 12, 15 and 19 when they did not notify the Grievant of his retreat rights to the Deep River Post Office and if so, what is the proper remedy?

## POSITIONS OF THE PARTIES

The Union. The Union argues that Management determined after Ken O'Brien was excessed on April 23, 2011 and before February 9, 2013 that there were 8 hours of work available every day in the Deep River Post Office. Effective February 9, 2013, PTF Carrier Jonathan Wilder was converted to full-time status guaranteeing him 8 hours a day, 40 hours a week in that office. Management did not contact the Grievant, O'Brien, and give him an opportunity to enact his retreat rights and return to the Deep River Post Office, instead leaving him in the Waterford, CT Post Office. The Union argues that the language of Article 12.5.C.5.b (6) of the National Agreement is clear that the Service is obligated to provide the Grievant with the opportunity to retreat to his former position as a Full-Time Letter Carrier in the Deep River Post Office. Article 12.5.C.5 b (6) provides as follows:

- (6) Employees involuntarily reassigned under b(1) and (2) above, other than senior employees who elect to be reassigned in place of junior employees, shall be entitled at the time of such reassignment to file a written request to be returned to the first vacancy in the level, in the craft or occupational group in the installation from which reassigned, and such request shall be honored so long as the employee does not withdraw it or decline to accept an opportunity to return in accordance with such request.

The Union argues that while the Service defends the present grievance on the basis that no "vacancy" exists and there was no reason to offer the Grievant retreat rights, there are eight hours of letter carrier work available each and every day in the Deep River Post Office as evidenced by the fact that Letter Carrier Jonathan Wilder is performing that work. His work includes the existence of an auxiliary route which must be performed six days per week. The Union maintains that when the Service combined this route with other duties for him, Management should have created a full-time position that should

have been put up for bid prior to converting Wilder to full-time status. Under Article 7.3.C of the National Agreement,

A part-time flexible employee working eight (8) hours within ten (10) on the same five (5) days each week and the same assignment over a six month period will demonstrate the need for converting the assignment to a full-time position.

The Union argues that the workload for Wilder called for the creation of a full-time assignment or position to be created. Since there was full-time work available, the Grievant should have been offered his retreat rights before Wilder was converted from PTF to Unassigned Full-Time Regular status. Even if Wilder was unassigned and did not have a bid route, he was still full-time and so the Grievant should have been given the opportunity to return to work in Deep River.

The Union maintains that the Service is circumventing the provisions of Article 12 in the present case by not allowing a senior full-time employee to retreat. Management could always gather up parts of work from different jobs in an office, make it eight hours and then claim that there was no vacancy because the employee was not assigned to a particular route. This would be an injustice and a continuing violation of Article 12.

The Union also argues that Management violated Article 15 of the National Agreement by taking the position that it could not settle the present grievance at the Informal or Formal A with Postmaster Kelly in Deep River. She maintained that this was not her responsibility but rather the Northeast Region's. ( See p. 11 of the Joint File.)

The Union concludes that the Service violated the National Agreement at Articles 7, 12, 15 and 19 when the Grievant was not offered the chance to retreat back to the Deep River Post Office. The requested remedy is that the Grievant be notified of his right to return to Deep River if he so chooses and that the notification contain a response date.

The Union also requests a remedy for the alleged violation of Article 15 in the form of a \$250. payment to the Informal A Steward, Carol Armstrong, to inhibit future violations.

The Union asks for a strong cease and desist order alleging that this is a repeat offense in the Deep River Post Office.

The Service. Management argues that the Union has not met its burden of proof in this contract case. According to the Service, the Union has not cited a single contract provision which requires Management to allow a carrier to retreat into an installation that does not have a vacant position. The Service argues that the National Agreement at Article 12.5.C.5.b (6) requires the existence of a vacancy as follows:

Employees involuntarily reassigned under b (1) and (2) above, other than senior employees who elect to be reassigned in place of junior employees shall be entitled at the time of such reassignment to file a written request to be returned to the first vacancy in the level, in the craft or occupational group in the installation from which reassigned, and such request shall be honored so long as the employee does not withdraw it or decline to accept an opportunity to return in accordance with such request.

The Service maintains that there was no vacancy in the losing installation when Wilder was converted from a Part-Time Flexible to an Unassigned Regular. Wilder was converted to a Full-Time Unassigned Regular Position due to an MOU from Headquarters. He was not converted due to any maximization grievance and according to the Service, the Deep River Post Office cannot support another full-time position.

The Service argues that the Union is attempting to redefine what a vacancy is. The Union argues that another position is needed based on clock rings and staffing. The Union maintains that the TACS rings in the Joint File demonstrate that three full-time carriers are being used in Deep River and one part-time carrier. The Service responds that it is undisputed that as of February 25, 2013, there were two full-time routes and an

auxiliary route in the Deep River Post Office. The Service maintains that the Unassigned Regular does not hold a duty assignment which equates to a vacancy.

The Service argues that the Union has not established by a preponderance of the evidence that Management must allow carriers to retreat into Unassigned Regular status. The Service also argues that the Union's position would violate Article 41 of the National Agreement which provides that vacant city letter carrier jobs must be posted. The Service maintains that involuntarily reassigned employees are not permitted to bid on vacancies in the losing installation. Such employees must exercise retreat rights when they are excessed and these rights apply to residual vacancies that become available in the losing installation.

The Service maintains that the National Agreement specifically requires a vacancy to trigger retreat rights under Article 12 and that allowing carriers to retreat as Unassigned Regulars would render Article 7 meaningless. The Service argues that it has not violated Article 15 of the National Agreement in the present case because local management does not have the authority to decide which PTFs become regular or which Full-Time Carriers are offered retreat rights. These are decisions made at the District or Regional level. This is not a discipline case where local management would have the authority to settle.

Therefore, the Service concludes that it did not violate Articles 7, 12, 15 or 19 of the National Agreement in the present case and that the grievance should be denied.

#### DISCUSSION AND DECISION

The Arbitrator concludes that the Service violated Article 12 of the National Agreement by not offering the Grievant, Ken O'Brien, his retreat rights to the Deep River CT Post Office when the Unassigned Regular position was created in February 2013 and

Part-Time Flexible employee, Jonathan Wilder, was put into that position. O'Brien was excessed on April 23, 2011 and signed his retreat rights well before the Unassigned Regular position was created in the Deep River Post Office. The National MOU which allowed for the filling of Full-Time Regular positions did not speak to retreat rights. (See pp. 66 and 67 of the Joint File.) These are governed by Article 12 which provides at 12.5.C.5.b (6) that:

- (6) Employees involuntarily reassigned under b (1) and (2) above, other than senior employees who elect to be reassigned in place of junior employees, shall be entitled at the time of such reassignment to file a written request to be returned to the first vacancy in the level, in the craft or occupational group in the installation from which reassigned, and such request shall be honored so long as the employee does not withdraw it or decline to accept an opportunity to return in accordance with such request.

The Service argues that a Full-Time Unassigned Regular position does not equate to a vacancy and that only a full-time position intended for a bid route constitutes a vacancy.

The National Agreement does not define the term vacancy. In the absence of a limiting definition in the National Agreement, the Arbitrator gives a common sense definition to the term vacancy. That is, a vacancy is a position that is not filled. In the case of a full-time position, it is a full-time job which is not filled. Even though the Full-Time Unassigned Regular position in the present case was not created for a bid route, it was still a Full-Time position which was not filled until it was given to Part-Time Flexible, Jonathan Wilder, in February 2013. The Agreement does not say that a vacancy has to be an opening in a bid route. In the absence of this limitation or evidence of clear past practice, the Arbitrator concludes that a vacancy is a position which is not filled. This would include an Unassigned Regular Full-Time Position. Because this position was created in the Deep River CT Post Office long after the Grievant, a Full-Time Regular,

was excessed from that office and signed his retreat rights, he should have been offered the Unassigned Full-Time Regular position before it was offered to Part-Time Flexible, Jonathan Wilder.

By not offering the Grievant his retreat rights, the Service violated Article 12 of the National Agreement. Therefore, the Arbitrator need not decide whether the Service also violated Article 7 or 19 of the Agreement. The Arbitrator does find that the Service did not violate Article 15 by not settling the present grievance at the Informal or Formal A. Local management does not have authority over which PTF's become regular or which Full-Time Carriers are offered retreat rights. These are decisions made at the District or Regional level. It is not as though this were a discipline case where local management could settle at the lowest possible step.

Therefore the remedy to the present violation of Article 12 is that the Service shall notify the Grievant, Ken O'Brien, of an opportunity to return to a Full-Time Regular position in the Deep River CT Post Office pursuant to his retreat rights if he so desires. The notification should contain a response date. The request for a punitive remedy for the alleged violation of Article 15 is denied because the Arbitrator does not find a violation of Article 15 or that there has been a repeat offense in the Deep River Post Office.

August 1, 2013



Marilyn Zuckerman

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