C #10180

REGULAR ARBITRATION PANEL

In the Matter of the Arbitration

between

UNITED STATES POSTAL SERVICE

and

NATIONAL ASSOCIATION OF LETTER CARRIERS

GRIEVANT: M. Wheeler

POST OFFICE: Tucson, AZ

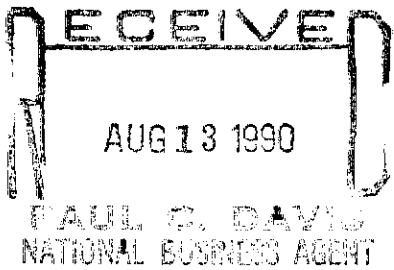
CASE NO: W7N-5S-C 20674
GTS #004315

BEFORE: Thomas F. Levak, ARBITRATOR

APPEARANCES:

For the U. S. Postal Service: Joseph Houtari

For the Union: L. A. Sant



Place of Hearing: Tuczon, AZ

Date of the Hearing: June 14, 1990

AWARD: Service did not violate the National Agreement when the Grievant's demand for a 3-way mutual exchange was denied. The grievance is denied and dismissed.

Date of Award: August 8, 1990

Arbitrator

BEFORE THOMAS F. LEVAK, ARBITRATOR

REGULAR WESTERN REGIONAL PANEL

In the Matter of the Arbitration Between:

U. S. POSTAL SERVICE
THE "SERVICE"

(Tucson, AZ)

and

NATIONAL ASSOCIATION OF LETTER CARRIERS, AFL-CIO
THE "UNION"

(M. Wheeler, Grievant)

W7N-5S-C 20674

DISPUTE AND GRIEVANCE INVOLVING MUTUAL EXCHANGE

ARBITRATOR'S OPINION AND AWARD

GTS #004315

This matter came for hearing before the Arbitrator at 9:00 a.m., June 14, 1990 at the offices of the Service, Tucson, Arizona. The Union was represented by L. A. Sant and the Service was represented by Joseph Houtari. The Grievant, Mark Wheeler, testified and appeared throughout the proceedings. Testimony and evidence were received. Post-hearing briefs were received by the Arbitrator on July 17, 1990. Based upon the evidence and the arguments of the parties, the Arbitrator decides and awards as follows.

OPINION

I. THE ISSUE.

This case concerns an allegation by the Union that Tucson management violated the National Agreement when it refused to permit a 3-way mutual exchange in which the Grievant would have transferred to Austin, Texas, an Austin, Texas Letter Carrier, Calvin Gordon, would have transferred to San Diego, California, and a San Diego, California Letter Carrier, Stuart Laswell, would have transferred from San Diego to Tucson.

The parties' failed to agree upon a stipulated issue. Accordingly, the Arbitrator frames the issue as follows:

> Did the Service violate the National Agreement in denying the 3-way mututal exchange? If so, what is the appropriate remedy?

II. THE NATIONAL AGREEMENT.

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:

B. To hire, promote, transfer, assign, and retain employees in positions within the Postal Service***.

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* * *

Article 12 - Principles of Seniority, Posting and Reassignments

Section 6. Transfers

A. Installation heads will consider requests for transfers submitted by employees from other installations.

B. Proving a written request for a voluntary transfer has been submitted, a written acknowledgment shall be given in a timely manner.

Memo Re: Transfers (Page 192 of the National Agreement)

* * *

Article 41 - Letter Carrier Craft

Section 2.E Change in Which Seniorty is Modified

When mutual exchanges are made between letter carriers from one installation to another, the carriers will retain their seniority or shall take the seniority of the other exchange, whichever is the lesser.

III. APPLICABLE HANDBOOK AND MANUAL.

512.4 Mutual Exchanges. Career employees may exchange positions (subject, when necessary, to the provisions of the appropriate collective-bargaining agreement) if the exchange of positions is approved by the officials in charge of the installations involved. Part-time flexible employees are not permitted to exchange positions with full-

time employees, nor bargaining-unit employees with nonbargaining-unit employees, nor nonsupervisory employees with supervisory employees. Mutual exchanges must be between positions at the same grade. An exchange of positions does not necessarily mean that the employees involved take over the duty assignments of the position.

Note: A regular rural carrier may exchange only with another regular rural carrier at a different installation.

[See also, ELM Section 351.61.]

IV. FINDINGS OF FACT.

Background.

This case concerns the Tucson, Arizona main office of the Service. The Grievant has served as a Letter Carrier for the Service since September 1, 1981. He was initially employed in the state of Missouri as a PTF Carrier and advanced to full-time regular status. In 1984, he voluntarily transferred to Tucson and began again as a PTF. He again advanced to full-time regular status, and has a craft seriority date of July 21, 1984. He has never been disciplined, possesses an excellent sick leave usage record and in 1989 received a quality step increase.

In early 1989, the Grievant decided that he wished to transfer from Tucson to Austin, Texas. Because of his desire for the transfer, he was willing to begin again as a PTF in Austin. He travelled to Austin and made a formal request for transfer as a PTF to the Austin office. His request was approved by Austin management.

Also in early 1989, San Diego, California regular Letter Carrier Stuart Laswell made a formal request to Tucson management to transfer to Tucson as a PTF. The Tucson office was not hiring at the time, but it processed Laswell's request, and he was placed in a waiting list pool as a prospective transferee.

At or about the same time, Austin, Texas regular Letter Carrier Calvin Gordon made a request for transfer to San Diego as a PTF. He too was processed and he was placed in the San Diego pool as a prospective transferee.

The Facts Giving Rise to the Grievance.

In May 1989, Laswell apparently analyzed the transfer request ads contained in the Postal Record, published by the Union, and subsequently contacted both the Grievant and Gordon, suggesting that they submit mutual exchange requests. On May 8, 1989, Laswell made a request to the Supervisor of Employment and

Placement at Tucson, Carolyn Orr, requesting a 3-way mutual exchange. On May 15, 1989, Orr denied the request, noting: first, that due to budgetary restraints, Tucson was under a complement cap and was not replacing losses; and second, that her records did not reflect that a Level 5 Tucson Carrier had applied for or had been approved for transfer to San Diego. There is no evidence that Orr's denial was grieved.

Nothing more apparantly transpired until November 11, 1989, when the Grievant made a request for a 3-way mutual exchange to Orr. At the time the Grievant submitted his request for the 3-way exchange, he withdrew his request for a direct transfer to Austin as a PTF.

On November 28, 1989, Orr denied the Grievant's request. Her written response provided:

> Current budgetary constraints require losses to stay within budget. For this reason, City Operations has advised this office that they do not plan on hiring or replacing losses through 1990.
>
> For this reason, if you apply and are accepted for transfer to Austin TX, your loss will not be replaced. If we were hiring to replace losses, we would have to start with the first applicant approved for transfer on our chronological waiting list. Mr. Laswell is third on that list.

On July 5, 1989, Tucson Postmaster Arnold Elias wrote a letter of further explanation to Tucson Branch 704 President Paul Winger, as follows:

> I have asked my staff to review the matter of mutual exchanges between three letter carriers.
>
> We currently are NOT considering any requests for transfers or mutual exchanges due to budgetary constraints. As you know, there are a large number of unassigned full-time regular City Letter Carriers. Unassigned full-time regular employees are guaranteed eight hours of work or pay. This limits management's flexibility in human resource utilization. This is further hampered by the fact that Part-Time Flexible City Letter Carriers are permitted to "opt" to vacant routes, and thus, work the hours necessary to carry a particular route. It is intended to reduce the number of unassigned regular employees through attrition of the regular work force.

I understand Mr. Mark Wheeler is desirous of an exchange with two other City Letter Carriers in order to go to Austin, TX. However, the employee who would ultimately replace Mr. Wheeler, Stuart Laswell of San Diego, CA, would be placed on the Tucson roles as a senior Part-Time Flexible. As I mentioned above, such an arrangement is contrary to the needs of the Tucson Divisison in these times of difficult complement and budgetary management. It is clear that mutual exchanges are discretionary and must be in the interest of both installations.

Therefore, Mr. Wheeler may transfer to Austin, TX if local management there is agreeable. Mr. Laswell has requested and has been approved for transfer to Tucson. I hasten to mention he is currently third on a list of employees approved for transfer.

Should the needs of the Division change and it is necessary to increase the complement, Mr. Laswell's request will be given consideration.

Steps 1 through 3

The Union subsequently attempted to resolve the matter through the UMPS process, and when the matter could not be so resolved, initiated a Step 1 grievance on January 22, 1990. The Union's grievance argued that Postmaster Elias' denial based upon budgetary constrains amounted to a "blanket policy" in violation of the National Agreement Memorandum of Understanding which requires that installation heads will afford full consideration to all reassignment requests, and also argued that a blanket policy against mutual trades had existed at Tucson for the past 30 years. The Service's Step 2 denial was grounded in the assertion that the National Agreement permits only 2-way mutual trades, not 3-way mutual trades. During the Step 2 discussions, the Service's Step 2 designee also informed the Union's Step 2 designee that he was relying upon minutes of negotiating meetings at the National level which demonstrated the parties' mutual intent: first, that only 2-way trades were permissible; and second, that transfers were only required during the hiring process.

In December 1989, Laswell received a letter of warning for failing to deliver the mail to certain delivery sites. A grievance was filed to protest the warning letter. In early 1990, Orr discovered the warning letter in Laswell's OPF, and on March 22, 1990, advised Laswell that because of the offense, his request for transfer to Tucson was denied. There is no evidence that Orr's action was grieved.

Actually, on March 21, 1990, Laswell's warning letter

grievance was settled with San Diego management agreeing to rescind the warning letter. However, there is no evidence in the record that Tucson management was ever notified of that settlement prior to the date of the arbitration hearing in the instant case.

The Union's Step 2 appeal in this case was discussed on March 26 and 27, 1990, and on April 2, 1990, Tucson management issued a Step 3 denial which provided: first, that the National Agreement sanctions only a 2-way mutual trade, not a 3-way trade; second, that Laswell had disqualified himself for transfer by receiving a warning letter; and third, that Tucson already had an excess of unassigned regular Carriers, and a trade would have required it to have taken Laswell as an unassigned regular, which, while having kept the complement the same, would not have reduced the overstaffed regular Carrier level.

Evidence Concerning the So-Called Blanket Policy.

At the arbitration hearing, Union witnesses conceded they had no evidence of a long-term denial of mutual trades. The testimony of management's witnesses established beyond any doubt that the Grievant's request is the first request for mutual trade that Tucson management has ever received.

Evidence Concerning Bargaining History.

This case is unique in the experience of the Arbitrator because it is the first NALC or APWU case in which any party has offered minutes of national negotiations into evidence as evidence of the parties' bargaining history. In this case, the Arbitrator received into evidence from the Service the minutes of the May 23 and July 24, 1984 negotiating sessions.

What is clear from the face of those minutes is that they involve only National Agreement Article 12.1.A, and were not concerned with Article 41 and EL-311 Section 512.4. What is also clear from those minutes is that the parties were concerned only with transfer requests made at the time an office is in a hiring mode, and were aimed at making certain that prior to hiring from entrance registers installation heads would give full consideration to transfer requests.

V. UNION CONTENTIONS.

First, any Service argument that there would be a problem of establishing employees' seniority lacks merit because any of the three employees would simply retain his seniority or accept the seniority of the employee who left, whichever is the lesser.

Second, whether the Tucson office was in a legitimate position to reduce the overall employee complement is not an issue since efficiency is not a proper defense for a contract violation. The complement at the Tucson office of full-time

regular Carriers would have remained exactly the same.

Third, the reference to mutual exchanges in the National Agreement and applicable Handbooks refer, consistent with any dictionary definition, to two or more exchanges. Nothing within the bargaining history is inconsistent with that.

Fourth, the Union reasserts its argument that the negotiating minutes were not produced during the grievance procedure, so should be given no consideration by the Arbitrator.

Fifth, while Handbook and Manual language is permissive, it is well-established that managerial action must not be arbitrary and capricious. In this case, San Diego and Austin management acted in a reasonable manner. Tucson management did not.

Sixth, a letter of warning issued to Laswell was disposed of and is not an issue in this case.

Finally, each of the three employees meets or exceeds any realistic requirement to be considered for a mutual trade. Accordingly, the grievance should be sustained.

VI. SERVICE CONTENTIONS.

First, the Union is not entitled to rely upon the Memorandum of Understanding. Transfers and mutual trades were not intended to be interchanged. The Memorandum of Understanding is premised on the fact that the office in question would be in a hiring mode, which the Tucson office was not.

Second, the Grievant received the consideration required by Article 12 when he made the request for a transfer to Austin. On his own volition he backed out of that transfer request and submitted a request for a 3-way mutual trade.

Third, paragraph D of the Memorandum of Understanding, in addressing responses to transfer requests, clearly states "where vacancies exist." In this case, there were no vacancies at Tucson.

Fourth, the language of Article 41 and the Union's own transfer requests rule contained in the Postal Record, as well as the bargaining history, established that mutual exchanges are between two offices, not three or more.

VII. ARBITRATOR'S CONCLUSION.

The Arbitrator concludes that the Union has failed to establish by a preponderance of the evidence that the Service violated the National Agreement. Accordingly, the grievance will be denied and dismissed. The following is the reasoning of the Arbitrator.

First, this case does not involve National Agreement Article 12.6 or the Article 12.6 Memorandum of Understanding set forth at pages 184-87 of the National Agreement. On its face, the Memorandum of Understanding concerns only those situations where an installation is in a hiring mode: ony when in such a mode must full consideration must be given to transfer requests before hiring from entrance registers.

The plain meaning of the Memorandum of Understanding is further bolstered by the bargaining history evidence submitted by the Service. During the relevant negotiation sessions the parties were concerned solely with the preference to be given transfer requests during a hiring situation. At no time in the instant case was the Tucson office in a hiring mode, so the Memorandum of Understanding simply is not applicable to this case. If the Union is to recover, it must do so by showing a violation of National Agreement Article 41 concerning mutual exchanges or a violation of EL-311 Section 512.4 and ELM Section 351.61.

Turning then to Article 41.2.E, it seems clear enough from the face of the language that when the parties negotiated it, they were contemplating only the situation where a mutual exchange is proposed between two installations. The language refers to exchanges "from one installation to another," and refers to seniority of "the other exchangee." It also refers to the "lesser" of the two seniority levels, as opposed to the "least." Further, the only arguably applicable comment by a negotiator is that of William Burris during the May 23, 1984 negotiations when he referred to an exchange between employees at one post office and another.

Candidly, it seems possible that the possibility of a 3 or more office mutual exchange simply did not enter the minds of the negotiators, and that if it had, they might have made some provision for such exchanges. However, the Arbitrator cannot simply infer such a situation, since it is equally easy to infer that the parties intended to limit mutual exchanges to 2 offices. It is feasible that the parties may have considered 3, 4 or even more person exchanges to be too complex or difficult. In any event, the Arbitrator cannot deal in speculation. The controlling factor is that the face of the subject National Agreement language deals only with a 2-way exchange.

In reaching his conclusion concerning Article 41.2.E, the Arbitrator is also mindful of the fact that the parties' dispute concerning the interpretation of that provision could easily have been submitted to National Arbitration as a Step 4 interpretive issue. Accordingly, it is clear to the Arbitrator that his interpretation of the disputed language must be conservative.

One other point: Article 41.2.E and EL-311 Section 512.4 do not themselves set forth a clear substantive right to a mutual exchange; they merely set forth the effects of such an exchange

once the exchange has been considered and approved. (For example, those provisions do not state words to the effect of, "Mutual exchanges between employees in the same grade shall be granted.") Thus the only requirement under those provisions is that due consideration be given such requests. The established rule is that where a "due consideration" provision is at issue, management's determination must stand unless the union can prove that the determination was arbitrary and capricious or was made in bad faith. It seems to the Arbitrator that in the instant case the Union has not met that burden of proof.

Management set forth valid Article 3 economic reasons for denying mutual exchanges during its hiring freeze. Granted, such reasons might have been insufficient if National Agreement and Handbook provisions had set forth a clear substantive right to mutual exchanges upon demand; however, as noted in the last paragraph above, no such clear substantive right exists. Accordingly, management's decision to deny mutual exchange requests - perhaps with the goal of encouraging transfers away from Tucson - cannot be deemed to be an arbitrary and capricious determination.

For all the above reasons, the grievance must be denied and dismissed.

AWARD

The Service did not violate the National Agreement when the Grievant's demand for a 3-way mutual exchange was denied. The grievance is denied and dismissed.

DATED this 8th day of August, 1990,

Thomas F. Levak, Arbitrator.