

NATIONAL ARBITRATION
BEFORE IMPARTIAL ARBITRATOR STEPHEN B. GOLDBERG

In the Matter of Arbitration)

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between)

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U. S. POSTAL SERVICE)

Case No. Q10C-4Q-C 15206043

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POStPlan Staffing Violation: Remedy

and)

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AMERICAN POSTAL WORKERS)

UNION, AFL-CIO)

)

BEFORE: Stephen B. Goldberg, Arbitrator

APPEARANCES:

United States Postal Service: Brian M. Reimer, Labor Counsel; Judith Reeder, Labor Relations Specialist

American Postal Workers Union, AFL-CIO: Melinda K. Holmes, Attorney; Jason R. Veny, Attorney (Murphy Anderson, PLLC)

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

Hearing Date: March 7, 2017

Date of Award: June 7, 2017

Relevant Contract Provisions: Award in POStPlan, Case No. Q11C-4Q-C 12243899
POStPlan MOU, September 22, 2014

Contract Year: 2010-2015

Type of Grievance: Contract Interpretation

SUMMARY OF AWARD

- A. The Postal Service shall make whole all employees who have improperly been denied Clerk Craft work as a result of the Postal Service failure to comply in a timely fashion with the POSTPlan MOU. The number of hours improperly denied Clerk Craft employees shall be determined in the first instance by Postal Service records which, on their face, show PMRs working in Level 4 or Level 6 RMPOs subsequent to December 22, 2014. Those PMR hours which the Postal Service can prove were spent in performing work outside the Clerk Craft jurisdiction, or in performing window work in the unavailability of any trained Clerk Craft employee to perform that work shall be excluded from the calculation of hours improperly denied Clerk Craft employees. . The burden of proving that PMR hours fall within this exclusion shall be upon the Postal Service.

- B. At all Level 18 offices at which Clerk Craft work was performed after the MOU implementation date by PSEs, all Clerk Craft career employees shall be made whole for work denied them as a result of the Postal Service failure to comply in a timely fashion with the POSTPlan MOU. The procedure to be followed in determining the amount of this make-whole remedy shall be the same as that set out in this Award for Clerk Craft employees denied work by the Postal Service failure to comply in a timely fashion with the POSTPlan MOU at RMPO Level 4 and 6 offices.

- C. The matter is remanded to the parties in order that they may determine the number of hours to which Clerk Craft employees are entitled, as well as the appropriate payment to each affected employee. This determination is to take place at the National level, except to the extent the parties agree to utilize local resources and personnel to assist them.

- D. The Arbitrator retains jurisdiction of this matter to resolve any matters of interpretation or application that the parties cannot resolve, including the

hours worked and appropriate payment to affected employees. In the event that the parties have not completed their determination of the amounts to be paid within 90 days of the issuance of this Award, either party may request the Arbitrator to assert his retained jurisdiction.



June 7, 2017

Stephen B. Goldberg, Arbitrator

I. SUMMARY OF RELEVANT EVIDENCE

This dispute grows out of POStPlan¹, in which the Award provided, in part:

1. All clerk craft work in RMPO Level 6 Post Offices is to be performed by career bargaining unit clerks. The parties are to determine a reasonable process for accomplishing the transfer of work from EPMs to career bargaining unit clerks.
2. All clerk craft work in RMPO Level 4 Post Offices is to be performed by bargaining unit Postal Support Employees. PSEs who work in RMPO Level 4 Post Offices will be permitted to perform window work. . .
3. All Level 18 Post Offices that are currently staffed by PSEs with the designation-activity code 81-8 will be staffed with a career employee. . .
8. The Arbitrator shall retain jurisdiction over this matter to resolve any issues of interpretation or application that cannot be resolved by the parties.

On September 22, 2014, subsequent to the issuance of the POSTPlan Decision and Award, the parties entered into the POSTPlan MOU (hereafter the MOU). That MOU provides, in relevant part:

Consistent with Arbitrator Goldberg's Award on POSTtPlan dated September 5, 2014, the parties agree to the following implementation procedures. . .

All Clerk work in Level 6 and Level 4 Remotely Managed Post Offices (RMPO) will be performed by APWU bargaining unit employees.

Level 6 Remotely Managed Post Offices (RMPO):

- I. Level 6 Remotely Managed Post Offices (RMPO) will be staffed with Level 6 Career full-time employees . . .

¹ Case No. Q11C-4Q-C 12243899 (Goldberg, 2014).

The Postal Service will create and fill a minimum of 1,700 duty assignments in Level 6 RMPOs within 90 days of the date of this document. If the number of vacant Level 6 RMPOs exceed 1,700 this greater number of duty assignments will be created and filled within 90 days. . .

Level 4 Remotely Managed Post Offices (RMPO):

IV. Each Level 4 Remotely Managed Post Office (RMPO) will be staffed with one Pay Level 6 Postal Support Employee (PSE). . . Without setting any precedent and solely to implement the provisions of this document, these Pay Level 6 PSEs may perform window duties. . .

Level 18 Post Offices:

VIII. As soon as possible but no later than 90 days from the date of this document, all Level 18 Post offices currently staffed with a PSE designation-activity code 81-8 employee will now be staffed with a career employee. . . In addition, all level 18 post offices will be staffed with career employees to perform bargaining unit work in excess of the 15-hour per week limit imposed on postmasters and supervisors in that office.

The parties agreed the Postal Service deadline for complying with the terms of the MOU would be December 22, 2014.

On October 30, 2014, the parties agreed on a set of Questions and Answers to provide clarification regarding the MOU. One of those Questions and Answers stated that employees currently working window duty assignments who were not qualified to do so would have to pass window training to continue working the job.

As of May 29, 2015, approximately 6 months after the December 22, 2014, MOU compliance date, Postal Service records show that there remained 2,424 Postmaster Reliefs (hereafter PMRs) employed in 5,008 RMPO 4 offices scattered throughout the United States, and 538 PMRs employed in 3,731 RMPO 6 offices, similarly scattered throughout the country. There were also 149 PSEs, seven of whom were 8-18 PSEs, employed in 8,598 EAS-18 offices.

Postal Service employment records also show that PMRs worked thousands of hours per pay period in RMPO Level 4 and Level 6 offices subsequent to the December 22, 2014, compliance date. During the pay period beginning May 30, 2015, PMRs worked nearly 45,000 hours in Level 4 RMPOs, and over 11,000 hours in Level 6 RMPOs. In total, from Pay Period 2 of 2015 through Pay Period 2 of 2017, PMRs were recorded by the Postal Service as having worked a total of 2,327, 302 hours in Level 4 and Level 6 RMPOs.

Rickey Dean, USPS Manager, Contract Administration (APWU), testified that not all the hours worked by PMRs in the Level 4 and 6 RMPOs involved the performance of Clerk Craft work. Some of those hours, he testified, may have consisted of performing the work of letter carriers.

Lynn Pallas-Barber, APWU Assistant Clerk Craft Director, testified that there were so few carriers in the Level 4 and 6 RMPOs that any hours spent by PMRs in doing carrier work would constitute an insignificant percentage of the total hours worked by PMRs in the Level 4 and 6 RMPOs. In the approximately 6,000 Level 4 RMPOs, there were a total of five carriers and 110 rural carriers, and in the approximately 3,700 Level 6 RMPOs, there were a total of 71 carriers and 288 rural carriers.

On June 13, 2015, the Union initiated a Step 4 dispute, asserting that by continuing to employ PMRs to perform Clerk Craft work in Level 4 and Level 6 RMPOs, and by employing PSEs in Level 18 Post Offices after the December 22, 2014, compliance date, the Postal Service was violating both the POSTPlan Arbitration Award and the POSTPlan MOU.

II. DISCUSSION

A. Is This Case Properly Before A National Level Arbitrator?

According to the Postal Service, the instant case does not satisfy the requirements for National level arbitration, and should be dismissed for lack of jurisdiction.² It points out that Article 15.D.1. of the Agreement limits National level arbitration to cases involving “interpretive issues . . . of general application”, and asserts that no such issues are here presented. There is no interpretive issue presented, the Postal Service asserts, because it agrees with the Union that pursuant to the POSTPlan Award and subsequent MOU, the Postal Service was required, subsequent to December 22, 2014, to cease employing PMRs to perform Clerk Craft work in Level 4 and Level 6 RMPOs, and to cease employing PSEs in Level 18 Post Offices. It also agrees with the Union that the appropriate remedy for any violation of these requirements should be a make-whole order benefitting the employees affected by the violation.

The Postal Service admits that there have been violations of the POSTPlan Award and MOU, although likely not as widespread as the Union asserts. For example, some of the hours shown by Postal Service records to have been worked by PMRs may not have consisted of Clerk Craft work, hence would not have violated the POSTPlan Award or MOU. Any disputes between the parties regarding the type of work performed by a PMR would, however, raise factual issues, rather than “interpretive issues . . . of general application”. Hence, the case should be dismissed for lack of National level jurisdiction, leaving the Union free to pursue grievances at the local level.

In support of its position, the Postal Service relies upon Arbitrator Das’ 2010 decision in a case in which the Union alleged that the Postal Service violated Article 1.6.B. on a nation-wide basis by using postmasters or supervisors in small

² The Postal Service requested at the hearing that this matter be bifurcated, with the Arbitrator deciding solely the jurisdictional issue in an initial hearing, and taking evidence on the merits of the Union’s claim in a subsequent hearing only if he first found that the matter was appropriately heard at the National level. That request was denied, and evidence and argument on both the jurisdictional issue and the merits were accepted at the hearing. The jurisdictional issue will be treated first in this Decision.

offices to perform bargaining unit work. Arbitrator Das found no disagreement between the parties on the correct interpretation of Article 1.6.B., and stated that “Merely alleging a nationwide violation and seeking a nationwide remedy does not satisfy the requirement that a Step 4 grievance involve an interpretive issue of general application.”³

Similarly, Arbitrator Snow, in dealing with a challenge to arbitrability at the National level, pointed out that:

An interpretive issue must be distinguished from an issue involving only an application of specific language in the agreement to a particular set of facts. Parties may agree on the meaning of specific language in an agreement and yet dispute the effect of that meaning in a particular case.⁴

Arbitrator Snow concluded, however, that the dispute before him was appropriate for National level arbitration because “its resolution depends on whose interpretation of the language in the parties’ agreement is correct”.⁵

The Union response to the Postal Service contentions is two-fold. First, the Union asserts that although the parties may not disagree on the interpretation of the POSTPlan Award or MOU, the instant case raises the question of the appropriate remedy for the Postal Service’s conceded violation of the POSTPlan Award and MOU. Numerous National Arbitrators, the Union points out, have held that a Union’s demand for an appropriate remedy growing out of a case that was decided in National level arbitration, is itself appropriate for National level arbitration. For example, in a case involving the Postal Service’s conceded failure to staff certain facilities with a sufficient number of full-time regular employees in violation of Article 7, Section 3.A., Arbitrator Mittenthal stated:

National “interpretive issues” can involve a disagreement not only as to the meaning of contract

³ Case No. QO6C-4Q-C 10032106 and Case No. QO6C-4Q-C 10005587(2010) at 33.

⁴ Case No. H7V-1K-C 3169 (1994) at 19.

⁵ *Id* at 25.

language but also as to the remedies available for a violation of contract language. A case in point is H4N-NA-C 21 (4th issue) and H4C-NA-C 27 where the national panel arbitrator held that a dispute over “the appropriate remedy for a [Article 8,] Section 5G2 violation” raised “interpretive issues” under the National Agreement. By the same token, the present dispute over the appropriate remedy for an Article 7, Section 3A violation raises “interpretive issues” under the National Agreement.

To be sure, Arbitrator Das has held that not every case dealing with the issue of an appropriate remedy involves an interpretive issue. See Case No. Q94V-4Q-96044758 (2002). However, in that case, which dealt with the appropriate remedy for the Postal Service’s failure to comply with its Article 32.B. obligation to provide the Union with advance notice and an opportunity to discuss a proposed HCR contract, Arbitrator Das concluded that the dispute about an appropriate remedy did present an interpretive issue of general application. For, he pointed out, the Union asserted that the HCR contract, which had been awarded, must be canceled and the work given to the MVS craft, while the Postal Service asserted that the proper remedy was not to cancel the contract, but to allow the Union to submit the Form 5505 cost comparison to show that the work should remain in house. Similarly, in this case the Union asserts that the remedy must be global in nature, without regard to a factual examination of each claim of violation, while the Postal Service argues for such an examination.

The Union also asserts that the instant dispute is better suited for resolution at the National level than at the local level. Not only would pursuing this matter at the local level involve tens of thousands of grievances, with all the cost and disruption that would involve, but all the information necessary to resolve the matter is contained in national employment records.

Finally, the Union points out that Section 8 of the POSTPlan Award provides:

The Arbitrator shall retain jurisdiction over this matter to resolve any issues of interpretation or application that cannot be resolved by the parties.

Similarly, Article XX of the POSTPlan MOU provides:

Disagreements over interpretation of this document will be promptly assigned to the arbitrator assigned to Q 11C-4Q-C 12243899 (POSTPlan) for expeditious resolution.

In light of the above-quoted provisions of the POSTPlan Award and MOU, I conclude that regardless of whether this case presents an interpretive issue of general application within the meaning of Article 15.D.1., an issue I do not decide, the case is properly to be decided in National level arbitration. Initially, in my capacity as POSTPlan arbitrator, I retained jurisdiction of disputes involving the interpretation or application of the POSTPlan Award. Additionally, in the POSTPlan MOU, the parties reserved disputes over the interpretation of that MOU for decision by the National Arbitrator who had issued the POSTPlan Award. Under both the POSTPlan Award and the terms of the MOU, then, I have jurisdiction to hear and decide this case.

B. What Is the Appropriate Remedy for the Postal Service Violation of the POSTPlan Award and the POSTPlan MOU?

In POSTPlan, I found that the Postal Service had violated the Clerical Work MOU and Article 1.6 by assigning Clerk Craft work in RMPO Level 4 and 6 offices to Evaluated Postmasters and Postmaster Reliefs. Accordingly, I ordered that all Clerk Craft work in Level 4 and 6 RMPOs was to be performed by Clerk Craft employees. In the POSTPlan MOU, the parties agreed on a schedule for compliance with the POSTPlan Award. The deadline for doing so was set at December 22, 2014.

The Postal Service does not deny the existence of widespread violations of the POSTPlan Award after December 22, 2014. Nor does it deny the propriety of a monetary remedy based on the harm sustained by Clerk Craft employees as a result of those violations. The Postal Service asserts, however, that some of the

apparent violations were not so in fact. Some reported PMR hours may have been spent in performing work outside the clerk craft, particularly the work of carriers and rural carriers. Other reported PMR hours may have been necessary because there were no available clerks who had passed the window training required by the October 30, 2014, Questions and Answers. Since these hours, even if worked by PMRs, did not deprive clerks of work to which they were entitled under the Agreement, they should not be considered in determining the amount of the monetary remedy.

Indeed, the Postal Service argues, any remedy that would require the Postal Service to compensate Clerk Craft employees for work performed by PMRs or PSEs that could not have been performed by clerks will require the Postal Service to compensate some employees who have suffered no injury. Such a remedy would be inconsistent with the principle that the goal of a remedial order is to make affected employees whole for injuries sustained by them as a result of an employer's violation of the contract, not to punish the employer for having committed that violation.

The Union, in contrast, asserts that the scope of the violation is such that it calls for a uniform remedy without regard to the alleged exceptions to the apparent violations. For, the Union asserts, the alleged exceptions are too few and too limited to significantly affect the scope of the violation. The Postal Service has engaged in massive violations of the Agreement over many years, and it should not be allowed to escape or delay providing a remedy by asserting that its records may be inaccurate, and requiring the Union to search through thousands of PMR work hours for the very few that may not have involved Clerk Craft work, or in which the performance of Clerk work by PMRs was allegedly justified.

The Union argues that the appropriate remedy is one that will be effective immediately and that will make all employees whole for earnings lost as a result of the violation. These objectives, the Union asserts, are best met by an order that the Postal Service make the bargaining unit whole for all hours worked by PMRs and 81-8 PSEs subsequent to the MOU implementation deadline, without engaging in a time-consuming, expensive, and largely futile effort to find and eliminate

hours worked by PMRs and 81-PSEs that would not otherwise have been worked by clerks.

The arguments raised by each party are legitimate and compelling. In recognition of that fact, the remedy here ordered seeks to take account of the arguments of each through an appropriate balance of competing interests. The Postal Service will be ordered to make whole all employees who have been denied Clerk Craft work as a result of the Postal Service failure to comply in a timely fashion with the POSTPlan MOU. The number of hours improperly denied Clerk Craft employees shall be determined in the first instance by Postal Service records which, on their face, show PMRs working in Level 4 or Level 6 RMPOs subsequent to December 22, 2014. Excluded from the calculation of hours improperly denied Clerk Craft employees are those PMR hours which the Postal Service can prove were spent in performing work outside the Clerk Craft jurisdiction, or in performing window work in the absence of any trained Clerk Craft employee to perform that work.

The burden of proving that PMR hours fall within this exclusion shall be placed upon the Postal Service. In this manner, all injured employees will receive the recovery to which they are entitled, and the Postal Service will have the opportunity, albeit limited in view of both its widespread violations and the lack of any reason to suppose that a substantial number of reported PMR hours did not involve Clerk Craft work, to prove that they did not.⁶

Despite the limited focus at the hearing and in the briefs on Postal Service violations with respect to Level 18 offices, at all such offices where Clerk Craft work was performed after the MOU implementation date by PSEs rather than by clerks, the same remedy will be ordered as for clerks in RMPO Level 4 and 6 offices at which Postal Service records show PMRs to have worked after the implementation date.

⁶ According to the uncontradicted testimony of APWU Assistant Clerk Craft Director Lynn Pallas-Barber, there were a total of 5 carriers and 110 rural carriers in the approximately 6,000 Level 4 RMPOs, and a total of 71 carriers and 288 rural carriers in the 3,700 Level 6 RMPOs.

The matter will be remanded to the parties in order that they may determine the number of hours to which Clerk Craft employees are entitled, as well as the appropriate payment to each affected employee. This determination is to take place at the National level, except to the extent the parties agree to utilize local resources and personnel to assist them.

III. AWARD

A. The Postal Service shall make whole all employees who have improperly been denied Clerk Craft work as a result of the Postal Service failure to comply in a timely fashion with the POSTPlan MOU. The number of hours improperly denied Clerk Craft employees shall be determined in the first instance by Postal Service records which, on their face, show PMRs working in Level 4 or Level 6 RMPOs subsequent to December 22, 2014. Those PMR hours which the Postal Service can prove were spent in performing work outside the Clerk Craft jurisdiction, or in performing window work in the unavailability of any trained Clerk Craft employee to perform that work shall be excluded from the calculation of hours improperly denied Clerk Craft employees. The burden of proving that PMR hours fall within this exclusion shall be upon the Postal Service.

B. At all Level 18 offices at which Clerk Craft work was performed after the MOU implementation date by PSEs, all Clerk Craft career employees shall be made whole for work denied them as a result of the Postal Service failure to comply in a timely fashion with the POSTPlan MOU. The procedure to be followed in determining the amount of this make-whole remedy shall be the same as that set out in this Award for Clerk Craft employees denied work by the Postal Service failure to comply in a timely fashion with the POSTPlan MOU at RMPO Level 4 and 6 offices.

C. The matter is remanded to the parties in order that they may determine the number of hours to which Clerk Craft employees are entitled, as well as the appropriate payment to each affected employee. This determination is to take place at the National level, except to the extent the parties agree to utilize local resources and personnel to assist them.

D. The Arbitrator retains jurisdiction of this matter to resolve any matters of interpretation or application that the parties cannot resolve,

including the hours worked and appropriate payment to affected employees. In the event that the parties have not completed their determination of the amounts to be paid within 90 days of the issuance of this Award, either party may request the Arbitrator to assert his retained jurisdiction.



June 7, 2017

Stephen B. Goldberg, Arbitrator