

C # 3234

ARBITRATION AWARD

July 7, 1980

UNITED STATES POSTAL SERVICE

-and-

Case No. N8-NA-0141

NATIONAL ASSOCIATION OF LETTER CARRIERS

Subject: Authority of the Arbitrator - Maximization of Full-Time Assignments - Remedy

Statement of the Issues: Whether the arbitrator has the authority under the National Agreement to remedy the failure of the parties, through a Joint Committee, to agree on maximization criteria? If so, what is the appropriate remedy?

Contract Provisions Involved: Article VI; Article VII, Section 3; Article XV, Sections 2 and 4; and the Memorandums of Understanding on Maximization and on Jurisdictional Disputes of the July 21, 1978 National Agreement.

<u>Grievance Data:</u>	<u>Date</u>
Grievance Filed:	September 21, 1979
Case Heard:	April 16, 1980
Transcript Received:	April 30, 1980
Briefs Submitted:	June 10, 1980

Statement of the Award: The arbitrator has the authority to remedy the Joint Committee's failure to agree on maximization criteria under the pertinent Memorandum of Understanding. The parties are directed to take the steps described in Part III (Remedy).

BACKGROUND

This case arises from the parties' failure to develop criteria for the establishment of additional full-time duty assignments pursuant to the Memorandum of Understanding on Maximization. The dispute concerns the arbitrator's authority to remedy this failure. NALC urges that the arbitrator has this authority and should exercise it; the Postal Service claims the arbitrator has no such authority.

The regular work force in a postal installation consists of full-time employees and part-time employees. The size of these groups, in relation to one another, has been a continuing source of disagreement between the parties. The National Agreement has provisions which govern this relationship. Article VII, Section 3 requires that any installation with 200 or more man-years of employment be staffed with "90% full-time employees." It states also that the Postal Service "shall maximize the number of full-time employees and minimize the number of part-time employees who have no fixed work schedules..." It contains the following conversion formula: "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."

NALC has apparently been dissatisfied with both this 90% figure and the conversion formula. It believed that full-time employees should constitute even more than 90% of the work force and that many part-time employees should be converted to full-time status. It pressed for such changes. The question of maximizing the number of full-time employees was discussed in the 1978 negotiations. Those discussions resulted in the following Memorandum of Understanding which is incorporated in the 1978 National Agreement:

"The parties hereby commit themselves to the maximization of full-time employees in all installations. Therefore, they agree to establish a National Joint Committee on Maximization. That Committee shall, during the first year of the 1978 National Agreement, develop criteria applicable by craft for the establishment of additional full-time duty assignments with either regular or flexible schedules. To this

end, the Committee shall develop both an approach to combining part-time flexible work hours into full-time duty assignments and a method for determining scheduling needs compatible with the creation of the maximum possible number of such assignments."*

NALC wrote to the Postal Service on February 28, 1979, requesting a meeting of the National Joint Committee. The first meeting was held on March 9. It was attended not just by NALC but by APWU and LIUNA as well, the other unions covered by the National Agreement. The parties agreed to exchange proposals with respect to maximization criteria. NALC submitted its proposal on March 19; the Postal Service sent its ideas to NALC on March 21, outlining the points to be pursued in developing the necessary criteria.

The second meeting was held on March 23. The ideas and proposals, exchanged earlier, were discussed. NALC requested data relating to auxiliary assignments. It was agreed that separate discussions would thereafter take place between the Postal Service and each of the unions. The initial meeting with NALC alone occurred on April 17. The Postal Service suggested "criteria for establishing a data base to determine the need to maximize the number of full-time duty assignments." The next meeting with NALC took place on May 10. NALC presented a list of pending maximization grievances, alleged violations of Article VII, Section 3. It asked that these grievances be handled in a more expeditious manner. It suggested a new set of criteria for the conversion of part-time hours into full-time assignments. It reduced this suggestion to writing, a letter proposal, and sent it to the Postal Service on May 11. In that letter, it also withdrew its previous request for data on auxiliary assignments.

The next meeting on September 12 involved all the unions. However, separate discussions between the Postal Service and NALC were resumed later that day. NALC initiated a Step 4 grievance on September 21, complaining of the failure of the Joint Committee to develop maximization criteria. It nonetheless was willing to engage in further discussion of the problem. The Postal Service replied by letter on October 26, proposing new maximization criteria.

* This Memorandum is dated September 15, 1978.

That proposal was discussed at another meeting on December 3. NALC was apparently prepared to accept such criteria if it was understood that coverage of scheduled and unscheduled absences by part-time employees could qualify the latter for conversion to full-time status. That condition was unacceptable to the Postal Service. The parties thus were unable to reach agreement. They tried once more, on January 4, 1980, but were again unsuccessful. NALC appealed the matter to arbitration on January 9.

It should be noted that the negotiations between the Postal Service and APWU and between the Postal Service and LIUNA were successful. Those negotiations led to written agreements on "experimental" maximization criteria. NALC was unwilling to accept the terms of those agreements.

POSITIONS OF THE PARTIES

NALC argues that the Memorandum of Understanding "mandated" the parties to develop maximization criteria, that the Postal Service and NALC failed to do so, and that this failure means the "Memorandum...has been violated." It believes this is a "breach of contract", the Memorandum being part of the National Agreement, for which the arbitrator should issue an appropriate remedy. It asserts that "a general unrestricted arbitration clause, such as Article XV, confers broad remedial powers on the arbitrator so as to deal with a wide variety of situations."

It insists it is not asking that the National Agreement be "altered, amended or modified" in any way. Rather, its position is that the arbitrator should do what the parties have improperly failed to do in violation of their contractual responsibilities. It claims adoption of the Postal Service view would mean that the Memorandum of Understanding was "a nullity -- an 'agreement' without any practical effect...which Management could violate with impunity." It alleges that the failure to carry out the Memorandum's mandate was "attributable solely to Management's bad faith."

It asks the arbitrator to remedy the claimed violation by either (1) issuing maximization criteria which would adopt NALC's last proposal in the December 1979-January 1980 Joint Committee meetings or (2) ordering the parties to resume negotiations on this matter, setting ground rules (including a deadline) for those negotiations, and reserving the power to formulate criteria in the event the parties are unable to do so.

The Postal Service contends that the arbitrator "lacks authority to remedy the parties' inability to develop maximization criteria." It urges that the arbitrator has only that authority which the parties have granted him under the National Agreement. It notes that the Memorandum of Understanding says nothing whatever about arbitration. It insists the parties nowhere gave the arbitrator the authority to resolve maximization issues which the Joint Committee was unable to resolve. It maintains that "had the parties intended [such] interest arbitration in the event agreement could not be reached, they would have included an arbitration clause in the Memorandum of Understanding."

It emphasizes the presence in the National Agreement of arbitration clauses to deal with the resolution of jurisdictional disputes not disposed of by the Committee on Jurisdiction* and to deal with the resolution of lay-off rules disputes not disposed of by the parties through Article VI negotiations. It believes the absence of such an arbitration clause in the Memorandum on Maximization indicates that the parties did not contemplate arbitration of any Joint Committee impasse.

It relies on Article XV, Section 4D(1) which says "only cases involving interpretive issues under this Agreement or supplements thereto...will be arbitrated at the national level." It asserts that this case, absent an arbitration clause in the Memorandum of Understanding, raises no "interpretive issue" and hence is not arbitrable. It states that NALC's desired remedies would modify the National Agreement contrary to the arbitral limitations in Article XV, Section 4A(6). Finally, it flatly denies that Management members of the Joint Committee were guilty of bad faith in negotiating maximization criteria.

For these reasons, the Postal Service says that this grievance is not a proper subject for arbitration and that the arbitrator has no authority to provide a remedy for the parties' failure to agree on maximization criteria.

* These arrangements are spelled out in the Memorandum on Jurisdictional Disputes.

DISCUSSION AND FINDINGS

The arbitrator's authority is derived from the National Agreement. He is "limited" by Article XV, Section 4A(6) "to the terms and provisions of this Agreement." He is expressly prohibited by this same section from altering, amending or modifying such terms and provisions. He is, when serving on the "national panel", restricted by Article XV, Section 4D(1) to "interpretive issues under this Agreement or supplements thereto of general application..." His function, in short, is the interpretation and application of these various contractual commitments.

The Memorandum of Understanding on Maximization is either a "term" or "provision" of the National Agreement or a "supplement thereto of general application." NALC reads the Memorandum as establishing a firm and fixed obligation; the Postal Service reads the same words quite differently. Thus, the NALC grievance does raise "interpretive issues" with respect to the Memorandum. It follows that the dispute is arbitrable and that I have authority to consider the NALC allegation that the Memorandum has been violated.

The crux of this case is the meaning of the Memorandum, the significance of the failure of the Joint Committee created by the Memorandum to agree on maximization criteria. NALC insists that this failure is a violation of the Memorandum and that the arbitrator must therefore provide a remedy for this violation. The Postal Service disagrees, asserting that the Joint Committee simply deadlocked and that the parties failed to make provision in the Memorandum for resolution of such a deadlock. Its position seems to be that the Memorandum has not been violated and that the arbitrator has no authority to provide any kind of remedy in these circumstances.

The crucial issue, in other words, is whether there has been a contract violation. If a violation of the Memorandum has occurred, as NALC claims, the arbitrator must then formulate an appropriate remedy.* The authority

* The arbitrator may, of course, remand the remedy question to the parties. But he still must be prepared to devise a remedy in the event the parties are unable or unwilling to work out the problem themselves.

to do so is implicit in the terms of the National Agreement. Indeed, the remedy for an alleged violation is a facet of every grievance. The parties specifically stated in the grievance procedure that NALC must designate the "remedy sought" in its appeal to Step 2 and in the discussions at Step 2. As the grievance passes through later steps to arbitration, the "remedy sought" remains an essential ingredient of the dispute. Hence, when the arbitrator considers the grievance and finds merit in a NALC claim, he is free to deal with the remedy question. That must have been contemplated by the parties. The grievance procedure is a system not only for adjudicating rights but also for redressing wrongs.

I - Contract Violation

The Postal Service acknowledges that it was obliged to participate with NALC in a Joint Committee in an attempt to establish maximization criteria. It says it satisfied this procedural obligation. Its view seems to be that, from a substantive standpoint, the Memorandum involved merely a conditional commitment. It believes that Management would only be bound by maximization criteria if the Joint Committee agreed to such criteria. It maintains that because no agreement was reached, the condition was not met and Management was relieved of any duties it may otherwise have had regarding new maximization criteria. It concludes that the Memorandum was not violated and that the arbitrator should leave the parties precisely where he finds them.

This argument is not without a surface appeal. But a careful reading of the Memorandum, in light of its evident purpose and in contrast to the provisions of Article VII, Section 3, indicates that more than a conditional commitment was made in this case.

To begin with, Article VII, Section 3 requires postal installations with 200 or more man-years of employment to operate with 90% full-time employees. It also commits Management to "maximize the number of full-time employees ...in all...installations." The Memorandum repeats this commitment and then goes further. It creates a Joint Committee which "shall...develop criteria applicable by craft for the establishment of additional full-time duty assignments..." These underscored words, it seems to me, represent the real purpose of the parties. They reveal

that the Memorandum was intended as a means of expanding the complement of full-time employees beyond the 90% figure set forth in Article VII, Section 3. The Memorandum must be read with that purpose clearly in mind.

The Postal Services suggests that the parties are bound only by what the Joint Committee agrees to, that no obligation exists in the absence of a Joint Committee agreement. That is too narrow a reading of the Memorandum. The parties committed themselves, in unmistakable terms, to greater maximization. They were uncertain how that agreed upon goal should be achieved. They appear to have recognized that maximization was a technical question which needed far more study. Hence, they placed the problem in the hands of a Joint Committee which was supposed to create the procedure, the maximization criteria, which would enable the parties to realize the greater maximization they had bargained for. The Joint Committee was a means to an end, not an end in itself.

The Memorandum, construed in this way, is certainly not a conditional commitment. It is a firm and definite commitment to greater maximization during the life of the 1978 National Agreement. The parties have no choice in this matter. They were commanded to appoint a Joint Committee which was in turn commanded to produce the necessary maximization criteria. The Memorandum's language is mandatory, the Joint Committee "shall...develop criteria..." and "shall develop...an approach to combining part-time flexible work hours into full-time duty assignments..." The failure of the Joint Committee meant that the purpose of the Memorandum has been defeated, that the parties' commitment to greater maximization has not been carried out.

For these reasons, I find there has been a contract violation. On account of the Joint Committee impasse, the parties are in breach of their Memorandum commitment to greater maximization. It is no less a breach because the parties bear equal responsibility for the impasse.* Most contract violations involve the employer inasmuch as the union is typically the grieving party. Few violations derive from union conduct. But this tradition, from a conceptual point of view, does not prevent the occurrence of a joint violation under the kind of unusual circumstances present here.

* The NALC charge that the Postal Service did not negotiate in good faith in the Joint Committee discussions is not borne out by the evidence.

I I - Other Considerations

In arriving at these conclusions, several Postal Service arguments have been considered and rejected. Those arguments deserve brief comment.

First, it is true that there is no mention of arbitration in the Memorandum of Understanding on Maximization. The Postal Service views this silence as a crucial consideration. However, given the existence of a contract violation (Part I) and given the arbitrator's inherent power to remedy violations, this silence is immaterial.*

Second, it is true that Article VI of the National Agreement specifically grants an arbitrator the right to dispose of "unresolved issues" with respect to lay-off rules and procedures. The Postal Service emphasizes that no such grant of arbitral authority is found in the Memorandum on Maximization. However, Article VI has a very special history. It was not written by the parties. It was written by Arbitrator Healy in an interest arbitration agreed to by the parties in an attempt to resolve a deadlock in the 1978 negotiations. The reference to arbitration in Article VI was a device for Arbitrator Healy to retain jurisdiction over certain phases of the lay-off controversy which he had returned to the parties for additional negotiations.

Third, it is true that the Memorandum on Jurisdictional Disputes expressly permits arbitration of disputes unresolved by the Committee on Jurisdiction. The Postal Service notes that no such provision was made for disputes unresolved by the Joint Committee on Maximization. However, these Committees are entirely different. The Jurisdiction Committee is a dispute-resolution group which anticipates disagreements. It required a special arbitration procedure because of the special problems posed by a dispute involving more than one union. The then

* If the Postal Service had refused to participate in the Joint Committee at all, that refusal would be a violation of the Memorandum. An arbitrator could surely order the Postal Service to participate in the Joint Committee, to do what it had promised to do, notwithstanding the silence of the Memorandum on the matter of arbitration. Thus, alleged violations of the Memorandum can properly become the subject of arbitration proceedings.

existing procedure would not have bound anyone other than the aggrieved union and the Postal Service. The Maximization Committee, on the other hand, anticipated no disagreements. For it was commanded to work out the details necessary to realize the agreed upon goal of greater maximization. It required no special arbitration procedure. It was expected to carry out its function during the first year of the 1978 National Agreement.

None of these arguments call for a different result in this case.

I I I - Remedy

The appropriate remedy raises a different set of problems. Mr. Justice Douglas, speaking for the Supreme Court in the Enterprise Wheel case, observed that the arbitrator must "bring his informed judgment to bear in order to reach a fair solution...[in] formulating remedies."*

NALC asks the arbitrator to impose maximization criteria on the parties, to do what the Joint Committee failed to do. It believes I should adopt the criteria it suggested at the Joint Committee meetings. In my opinion, no such remedy could be justified at this time. There are not enough facts or arguments in the record to make a confident finding as to what would be fair maximization criteria. Fairness is, in any event, a "two-way street." Any remedy must be fair from the standpoint not only of the employees (i.e., providing greater maximization of full-time assignments) but also of Management (i.e., protecting the operational needs set forth in the Memorandum).

The remedy shall be two-fold. First, the Joint Committee is directed to return to the bargaining table and to make a good faith effort to reach agreement on maximization criteria. I cannot assume those negotiations will be fruitless. Indeed, the parties should realize that their failure to agree is likely to result in an imposed solution. That is a new element which should serve to prompt the parties to more sympathetic consideration of one another's needs. Second, should the Joint Committee fail to reach agreement within a period of 60 days from

* United Steelworkers of America v. Enterprise Car & Wheel Co., 363 U.S. 593, 597 (1960).

the date of this award, either party may request a hearing before one of the "national panel" arbitrators. At that hearing, both sides will be given an opportunity to propose criteria and to submit evidence and argument on the question of what criteria should be adopted. The arbitrator will then determine the criteria to apply under the Memorandum.

AWARD

The arbitrator has the authority to remedy the Joint Committee's failure to agree on maximization criteria under the pertinent Memorandum of Understanding. The parties are directed to take the steps described in Part III (Remedy).


Richard Mittenthal, Arbitrator