C#08504

NATIONAL ARBITRATION PANEL

In the Matter of the Arbitration	**GRIEVANT:**	Francisco Evelyn
between	**POST OFFICE:**	Richmond CA
UNITED STATES POSTAL SERVICE	**USPS CASE NO:**	H4N-5C-C 17075
and	**NALC CASE NO:**	
NATIONAL ASSOCIATION OF LETTER CARRIERS, AFL-CIO		

BEFORE: Raymond L. Britton, *Arbitrator*

APPEARANCES:

For the U.S. Postal Service:	Stephen W. Furgeson
For the Union:	Keith E. Secular
Place of Hearing:	USPS Headquarters
Date of Hearing:	July 27, 1988

AWARD:

For the reasons given, the grievance is sustained and the Employer is directed to compensate the Grievant at 22 cents per mile for the difference in mileage between his home and Mira Vista Station and his home and the Richmond Main Office as well as at the appropriate rate of pay for the difference in travel time for the period in question.

Date of Award: November 28, 1988

Raymond L. Britton

ISSUE

Whether management violated the National Agreement by transferring the shop steward, Francisco Evelyn, from the Mira Vista Station to the Richmond Main Office from March 18 through March 22, 1986? If so, what shall the remedy be?

HISTORY OF THE PROCEEDINGS

The parties failed to reach agreement on this matter, and it was submitted to arbitration for resolution. Pursuant to the contractual procedures of the parties, the undersigned was appointed as Arbitrator to hear and decide the matter in dispute.

At the commencement of the Hearing, it was stipulated by the parties that this matter was properly before the Arbitrator for decision and that all steps of the arbitration procedure had been followed and that the Arbitrator had the authority to render the decision in this matter. After the Hearing, it was agreed that the parties would submit Post-Hearing Briefs to the Arbitrator by placing such Briefs in the mails not later than October 3, 1988. Both the Post-Hearing Brief filed by the United States Postal Service (hereinafter referred to as "Employer") and that filed by the National Association of Letter Carriers, AFL-CIO (hereinafter referred to as "Union") were received by the Arbitrator on October 6, 1988.

SUMMARY STATEMENT OF THE CASE

Francisco Evelyn (hereinafter sometimes referred to as "Grievant") is a reserve letter carrier at the Mira Vista Station of the Post Office in Richmond, California. On or about March 20, 1986, a grievance was filed at Step 1, in which the Grievant protested an involuntary transfer. After a Step 1 meeting on that date, the grievance was denied by Supervisor Andrews. Pursuant to Article 15 of the National Agreement, the grievance was appealed on March 26, 1986 to Step 2 of the grievance procedure alleging a violation of, but not limited to, Article 17, Section 3 of the National Agreement, and stating in relevant part as follows (Joint Exhibit No. 2):

> *The grievant is the designated NALC shop steward for the Mira Vista Station. From March 18, 1986 through March 22, 1986 the grievant was involuntarily transferred to the Richmond Main Office.*
>
> *As there was work available at the Mira Vista Station that the grievant was qualified to perform, management was in violation of Article 17, Section 3 of the National Agreement when they involuntarily transferred him to the Main Office.*
>
> *Corrective Action Requested: Branch 1111 NALC requests that the grievant be compensated at 22 cents per mile for the difference in mileage between his home and Mira Vista Station and his home and the Richmond Main Office. The grievant shall*

also be compensated at the appropriate rate of pay for the difference in travel time for the period in question.

On April 9, 1986, a Step 2 meeting was held, and on April 15, 1986, in a letter to Union President Paul Roose, Postmaster Harold D. McCraw denied the grievance, stating in relevant part as follows (Joint Exhibit No. 2):

* * *

It is Management's position that the Grievant will be placed on an 8-hour assignment daily. We will not deny the Grievant the right to handle any Union business which might arise. As this Grievant did not opt on a vacant assignment, Management assigned him to an 8-hour assignment.

Based on the above, this Grievance is denied.

On May 1, 1986, the Union appealed the grievance to Step 3 of the grievance procedure for the following reasons (Joint Exhibit No. 2):

Grievant is the designated NALC shop steward within the Mira Vista station for the Richmond Post Office. From March 18, 1986 through and including March 22, 1986, grievant was involuntarily transferred to the Richmond Main Office. Investigation revealed that grievant was not only involuntarily transferred, but there was work available for grievant within the Mira Vista station. In order to comply with grievant's new assigned station, grievant was forced to drive a farther distance to work each day as well as taking additional time to arrive at work on time each day. As such, management placed grievant in a position that he would not have been in but for management's blatant violation of the National Agreement. Union takes the position that there was simply no justification for management's action (of involuntary transfer) when one takes into consideration there was work available for grievant at Mira Vista. As such, union contends management should be held responsible for extra mileage and additional time spent by grievant in reaching his work designation of Main Office.

* * *

On July 31, 1986, in a letter to National Business Agent Brian Farris, the grievance was denied by Labor Relations Program Analyst Gary L. Connely, who stated in relevant part as follows (Joint Exhibit No. 2):

* * *

The grievant is a reserve letter carrier who also serves as the shop steward at the Mira Vista Station. During the period in question, there were no vacant full-time assignments at the station. Consequently, the grievant was properly, temporarily reassigned to the Main Office.

Based on the foregoing, the fact circumstances in this case do not constitute a contractual violation.

In closing, I note that local management has guaranteed that the grievant will be permitted to handle his shop steward's responsibilities during any period in which he is temporarily reassigned.

In my judgment, this grievance involves an interpretive issue pertaining to the National Agreement or a supplement thereto which may be of general application, and thus may only be appealed to Step 4 in accordance with the provisions of Article 15 of the National Agreement.

On August 5, 1986, the Union appealed the grievance to Step 4, and on November 27, 1987, in a letter to David W. Noble, Assistant to the Union President, the grievance was denied by Saul Arroyo-Acosta of the Grievance & Arbitration Division, who stated in relevant part as follows:

* * *

It is our position that no national interpretive issue involving the terms and conditions of the National Agreement is fairly presented in this case. However, inasmuch as the union did not agree, the following represents the decision of the Postal Service on the particular fact circumstances involved.

It is our position that during the time in question there existed no vacant full-time assignments at the Mira Vista station. It is also noted that the grievant was temporarily reassigned, and not transferred. Additionally, in Arbitrator Bloch's Award of October 1, 1985, which is similar to this case, he ruled that management was not required to create a position, or modify an existing one, to accommodate the grievant's new status which was, itself, the product of a contractual mandate. Furthermore, in the Step 3 response it was noted that management would guarantee that the grievant would be permitted to handle his shop steward's responsibilities during any period in which he was temporarily reassigned.

The facts presented by the union thus far do not establish that a violation occurred. Accordingly, this grievance is denied.

* * *

On April 14, 1987, the Union authorized and requested certification of the case for arbitration.

Provisions of the National Agreement effective July 21, 1984, to remain in full force and effect to and including 12 midnight July 20, 1987, (hereinafter referred to as "National Agreement") (Joint Exhibit No. 1) considered pertinent to this dispute by the parties are as follows:

ARTICLE 17

REPRESENTATION

* * *

Section 3. Rights of Stewards

When it is necessary for a steward to leave his/her work area to investigate and adjust grievances or to investigate a specific problem to determine whether to file a grievance, the steward shall request permission from the immediate supervisor and such request shall not unreasonably be denied.

In the event the duties require the steward leave the work area and enter another area within the installation or post office, the steward must also receive permission from the supervisor from the other area he/she wishes to enter and such request shall not be unreasonably denied.

The steward, chief steward, or other Union representative properly certified in accordance with Section 2 above may request and shall obtain access through the appropriate supervisor to review the documents, files and other records necessary for processing a grievance or determining if a grievance exists and shall have the right to interview the aggrieved employee(s), supervisors and witnesses during working hours. Such requests shall not be unreasonably denied.

While serving as a steward or chief steward, an employee may not be involuntarily transferred to another tour, to another station or branch of the particular post office or to another independent post office or installation unless there is no job for which the employee is qualified on such tour, or in such station or branch, or post office.

If an employee requests a steward or Union representative to be present during the course of an interrogation by the Inspection Service, such request will be granted. All polygraph tests will continue to be on a voluntary basis.

ARTICLE 41

LETTER CARRIER CRAFT

Section 1. Posting

* * *

C. Successful Bidder

* * *

4. *The successful bidder shall work the duty assignment as posted. Unanticipated circumstances may require a temporary change in assignment. This same rule shall apply to T/6 and utility assignments, unless the local agreement provides otherwise.*

* * *

POSITION OF THE PARTIES

The Position of the Union

It is the position of the Union that management may not transfer a steward, temporarily or permanently, unless there is no work that the steward is qualified to do at his or her home station. The Union contends that management should first ascertain whether any vacant jobs are available for the steward and, if not, management must "bump" another employee off of his or her assignment and give that assignment to the steward rather than transfer the steward. By way of remedy for the alleged violation that occurred in this instance, the Union maintains that the Grievant should be compensated for the additional time that he had to spend travelling to the Richmond Post Office as well as compensation for his travel expenses, including a mileage allowance.

The Position of the Employer

The Employer takes the position that Article 17, Section 3 of the National Agreement applies to permanent transfers of union stewards and not temporary assignments of union stewards. The Employer contends that the Union claim that superseniority protection applies goes against the clear understanding and practice of the parties to the National Agreement. The Employer further maintains that its interpretation of Article 17.3 is a long and well-established interpretive position that the Employer has come to rely upon.

OPINION

In the resolution of this matter, the Arbitrator is called upon to determine whether a union steward can be temporarily assigned away from his normal work location, notwithstanding the provisions of Article 17, Section 3 of the National Agreement.

The first argument made by the Employer in support of its position herein is that Article 17.3 applies only to permanent transfers. According to the Employer, the argument by the Union that a steward is protected by "superseniority" goes against the clear understanding and practice of the parties to the National Agreement. The Employer maintains further that the Union is attempting to disavow settlements between the American Postal Workers Union (hereinafter sometimes referred to as "APWU") and the Employer that a steward's temporary assignment away from his normal or permanent work

location is not an involuntary reassignment under Article 17.3 of the National Agreement. Further, the Employer contends that its interpretation is a long and well-established interpretive position between the parties, and one upon which the Employer has come to rely.

With respect to the agreement between the Employer and the APWU, it is pointed out by the Employer that on June 27, 1986, in a Step 4 decision in Case No. H4T-5L-C-4331/6219 (Management Exhibit No. 1), the Employer denied the grievance by the APWU and thereby did not recognize the temporary assignment to another tour as a deprivation of the superseniority rights of the union steward. Less than two weeks later, according to the Employer, the APWU withdrew that appeal from arbitration and did not even attempt to preserve its position by withdrawing the appeal without prejudice. It is further noted by the Employer that in a May 6, 1982 national level settlement with the APWU (Management Exhibit No. 2), the parties agreed that a temporary change of schedule did not constitute an involuntary transfer. In the case at hand, the Employer points out that the facts are less restrictive on union steward representation, since the steward remained on the same tour but in another location, with rights to be released back to the Mira Vista Station to perform steward activities. For the reasons hereinafter given, the Arbitrator is required to disagree with the view of the Employer that Article 17.3 does not apply to a temporary assignment.

That the Employer found it necessary to enter into a settlement agreement with the APWU, it seems to the Arbitrator, merely underscores the parties' uncertainty as to how the language of Article 17.3 should be interpreted. Moreover, inasmuch as the Union was not a party to that settlement agreement, it cannot properly be said that the Union is nonetheless bound thereby. Indeed, as the Union points out, it has not had an opportunity prior to this Hearing to make its position known, since the APWU did not appeal Case No. H4T-5L-C-4331/6219 to arbitration.

The language of Article 17.3 that appears to control the disposition of the Employer's first argument states, in relevant part, that "While serving as a steward or chief steward, an employee may not be involuntarily transferred . . . ." The *transfer* referenced in Article 17.3 is not modified by the word *permanent* or *temporary*, but only by the word *involuntary*. Thus, it is clear that the transfer contemplated within the language of Article 17.3 is any involuntary transfer, regardless of duration. And while the Employer calls the change in work location of the steward a *temporary assignment*, there appears to be no material difference between the use of the word *assignment* rather than *transfer*. Neither word is specifically defined within the National Agreement, and in the absence of an agreement between the parties to give the words a special meaning, it must be assumed that the generally understood definition of the terms applies.

The second argument of the Employer is that a union steward may be transferred when no permanent vacant duty assignment is available at the work location, and that was the situation in the case of the Grievant. According to the Employer, this was precisely what arbitrator Richard Bloch determined must be available in order for stewards to be protected from permanent involuntary transfers. In this connection, the Employer points

out that, in Case No. H1C-3Q-C-29502, dated October 1, 1985 (Management Exhibit No. 3), arbitrator Bloch found that the prohibition of transferring a steward under Article 17 is not absolute, since "[T]he ability of a steward to maintain his or her position is contingent upon the existence of a job on the original tour." According to the Employer, additional support for its view may be found in the regional award by arbitrator Joseph Gentile in Case No. W8C-5D-C-3641, dated April 10, 1983 (Management Exhibit No. 4). Therein, arbitrator Gentile stated that ". . . . the word 'job' in Article 17, Section 3, must mean an 'existing' position or assignment; thus, the Arbitrator would agree with the Employer that there exists no contractual obligation to create or manufacture a 'job' in order to avoid a violation of Article 17, Section 3." Neither, according to the Employer, is there a contractual obligation to displace another full-time carrier with a permanent route assignment in order to keep the steward at the Mira Vista Station during the time no vacant duty assignment was available.

The difficulty with the foregoing position of the Employer, in the considered judgment of the Arbitrator, is that the Employer again appears to be attempting to place words in the National Agreement where no such words exist. The language of Article 17.3 does not address the question of whether a vacant duty assignment is or is not available. It merely states that, with respect to a steward, he may not be involuntarily transferred ". . . . unless there is no job for which the employee is qualified . . . ." In short, Article 17.3 does not say *no vacant job* or *no vacant assignment*; it says *no job*. Thus, the clear meaning of Article 17.3 is that only if there is *no job* for which the steward is qualified may he be involuntarily transferred.

Seemingly, this interpretation does not conflict with the findings of arbitrator Bloch, for therein, arbitrator Bloch concluded only that there was no obligation on the part of the Employer to create a full-time position where none existed. In that case, management was required by the National Agreement to convert the part-time grievant to full-time status. In so doing, it became impossible to permit the grievant to remain in the position of Distribution Clerk, since that was a part-time position. Arbitrator Bloch concluded that management was not required to change the Window Clerk position from a part-time to a full-time job solely to accommodate the grievant-steward. Significantly, in footnote 2 on page 4 of that award, the Employer ". . . . acknowledges . . . . that had there been a full-time Window Clerk position, the Grievant would have been entitled to maintain it despite her machine qualifications and the availability of the position in the mail processing facility." Thus, it appears to the Arbitrator that in that case, the Employer recognized the paramount importance of Article 17.3's prohibition of involuntary transfers of union stewards, a position that it now seeks to disavow.

The Employer next refutes the argument by the Union that arbitrator Bloch is limited to interpreting craft articles. However, it is deemed unnecessary by the Arbitrator that he further address this question herein, since the matter at hand is appropriately resolvable without reliance upon the findings of arbitrator Bloch.

The fourth argument of the Employer is that, by its very nature, the position of reserve letter carrier is not assigned to any one location unless the parties locally agree to do so. According to the Employer, the function of a reserve letter carrier is to replace employees who are otherwise unavailable from day to day to perform their regular duty assignments. Further, the Employer references a national level settlement in Case No. H4N-3U-C-3319 (Management Exhibit No. 6), wherein the parties agreed that a reserve carrier is not guaranteed a permanent duty station but such is determined by the parties based on local past practice. The Employer maintains that the Union did not rebut the Employer's contention that a duty location for a reserve carrier is based upon local practice. Additionally, the Employer contends that, even if permanently assigned to one station, the employee can be temporarily moved to another location due to emergency or to give a reserve carrier a full eight-hour tour. Settlements between the parties are said by the Employer to show that a reserve carrier is generally used at different carrier stations as part of the job assignment, unless otherwise agreed to or established locally, and even those local practices have exceptions when there are emergencies or the reserve carrier must be temporarily assigned to provide eight hours of work. The latter, the Employer argues, is the fact situation made the basis of this grievance. In brief, it is the position of the Employer that the temporary assignment of the reserve carrier to another work location is not actually a transfer or reassignment from a permanent duty station but part of the job requirement of the position.

In the considered judgment of the Arbitrator, however, this position of the Employer does not withstand close scrutiny. For it has already been determined herein that the Employer cannot defend its conduct simply by changing the terminology of the action taken, that is, by saying that a temporary assignment to another work location is not a transfer. The plain meaning of the word transfer is "to convey or shift from one person or place to another," and that is precisely what occurred in this instance--the Grievant was shifted from the Mira Vista Station to the Main Post Office. Further, although the Employer may be correct in its assertion that a reserve carrier is not assigned to any one location, this concept must give way in the situation where the reserve carrier is a union steward. For although the Employer has the right to define the job description of a particular position, once the employee becomes a union steward, the mandate of Article 17.3 takes precedence over that employee's lack of a permanent duty station.

The Employer further argues that even if the Grievant remained at Mira Vista, there is no guarantee that he would have greater access to employees concerning union business, since the steward must serve his route and be away from the station, whether he is at Mira Vista or the Main Post Office. While the Arbitrator agrees that there is no such guarantee, the manner in which the steward allocates his time to handle union business is not deemed to be a controlling factor. For paramount here, is that the steward may not be transferred in violation of Article 17.3 of the National Agreement.

The fifth and final argument of the Employer is that the superseniority clause, as interpreted by the Union, would be unlawful under the National Labor Relations Act as

determined by the National Labor Relations Board. As viewed by the Employer, current NLRB law does not sustain a superseniority clause as requested by the Union (*Dairylea Cooperative, Inc.*, 219 NLRB 656, 658 (1975), *enf'd NLRB v. Milk Drivers and Dairy Employees Local 338*, 531 F.2d 1162 (2d Cir. 1976). That case, the Employer contends, holds that superseniority lawfully extends only to layoff and recall protection, not to temporary assignments. The Employer cites additional cases in which it was determined that shift transfers and overtime or weekend work priority clauses were upheld. However, the Employer contends that none of the exceptions to the *Dairylea* case exist in the matter at hand, because the reserve carrier is still available each day to handle union activities.

After full and careful examination of the Employer's position with respect to the legality of the so-called superseniority clause, no conflict is found by the Arbitrator between the language of Article 17.3 of the National Agreement and the various pronouncements of the NLRB. In this regard, the Arbitrator notes that the generally accepted view of superseniority provisions is expressed with clarity in *Gulton Electro-Voice, Inc.*, 266 NLRB 406 (1983), *enf'd sub nom Local 900, Int'l Union of Electrical, Radio and Machine Workers v. NLRB*, 727 F.2d 1184 (D.C. Cir. 1984), wherein the Board stated that it would find lawful "only those provisions limited to employees who, as agents of the union, must be on the job to accomplish their duties directly related to administering the collective bargaining agreement." Further cases of the Board cited by the Employer do not deter the Arbitrator from his view that the intent of Article 17.3 of the National Agreement falls squarely within the Board's requirement specified in Frankline, Inc., 127 LRRM 1132 (1987), that "superseniority clauses are justifiable only to the extent that stewards will be able to maintain an on the job presence. . . ."

Based on the above findings, it is the conclusion of the Arbitrator that management violated the National Agreement by transferring the shop steward, Francisco Evelyn, from the Mira Vista Station to the Richmond Main Office from March 18 through March 22, 1986.