

C# 09544

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NATIONAL ARBITRATION PANEL

CONTRACT ADMINISTRATION UNIT
N.A.L.C. WASHINGTON, D.C.

In the Matter of the Arbitration)
)
 between)
)
 UNITED STATES POSTAL SERVICE)
)
 -and-)
)
 NATIONAL ASSOCIATION OF LETTER)
 CARRIERS)
)

GRIEVANT:
NALC President Sombrotto
H7N-NA-C-34
CASE NO. H7C-NA-C-34

BEFORE: Richard Mittenthal, Arbitrator

APPEARANCES:

For the Postal Service:

Anthony W. DuComb
Senior Attorney
Office of Labor Law

For the NALC:

Richard N. Gilberg
Attorney (Cohen Weiss
& Simon
Devon Lee Miller
Attorney (NALC Staff)

Place of Hearing:

Washington, D.C.

Date of Hearing:

June 27, 1989

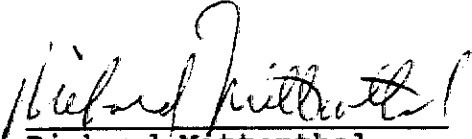
Date of Post-Hearing Briefs:

October 20, 1989

AWARD:

The grievance is granted with the single exception listed below. The Postal Service should furnish NALC with data elements 26 through 34, apart from number 28 (minority code), in an "unscrambled" form pursuant to Article 31, Section 3.

Date of Award: November 8, 1989


Richard Mittenthal
Arbitrator

BACKGROUND

This grievance protests the Postal Service's refusal to comply with NALC's October 27, 1988 request for detailed data on everyone in the letter carrier bargaining unit. That data would enable NALC to identify each named employee by pay grade, occupation code, sex, date of birth, minority code, and so on. NALC insists that this refusal was a violation of Article 31, Section 3 of the 1987 National Agreement. The Postal Service disagrees.

NALC has had a continuing interest in obtaining information on the demographics of the letter carrier work force. It has sought and received a great deal of data from the Postal Service. Indeed, the National Agreement requires Management to cooperate with NALC in providing such information. Article 31, Sections 2 and 3 and the pertinent Memorandum of Understanding read in part:

Section 2. Computer Tapes

The Employer shall, on an accounting period basis, provide each Union at its national headquarters with a computer tape containing information as set forth in the Memorandum of Understanding regarding Article 31.

Section 3. Information

The Employer will make available for inspection by the Unions all relevant information necessary for collective bargaining or the enforcement, administration or interpretation of this Agreement, including information necessary to determine whether to file or to continue the processing of a grievance under this Agreement. Upon the request of the Union, the Employer will furnish such information, provided, however, that the Employer may require the Union to reimburse the USPS for any costs reasonably incurred in obtaining the information.... Nothing herein shall waive any rights the Union...may have to obtain information under the National Labor Relations Act, as amended.

* * * *

Memorandum of Understanding

Re: Bargaining Information. Pursuant to the provisions of Article 31..., as soon as practicable

after the ratification of the 1987 National Agreement..., the Employer shall, on an accounting period basis, provide the Union with a computer tape containing the following information on those in their respective bargaining units:

- | | |
|----------------------|--------------------------|
| 1. SSN | 14. Rate Schedule |
| 2. Last Name | 15. Nature of Action |
| 3. First Name (Full) | 16. Effective Date |
| 4. Middle Initial | 17. Pay Grade |
| 5. Address | 18. Pay Step |
| 6. City | 19. Health Benefit Plan |
| 7. State | 20. Designation Activity |
| 8. ZIP Code | 21. Enter on Duty Date |
| 9. Post Office Name | 22. Retire on Date |
| 10. P O State | 23. Layoff |
| 11. P O ZIP | 24. Occupation Code |
| 12. P O Finance No. | 25. Pay Location |
| 13. P O CAG | |

As a result of the Joint Bargaining Committee's request to have the full first name included, each Union will pay 50 percent of the actual systems and programming cost associated with this change, not to exceed a total cost of \$10,000. Subsequently, the Postal Service will provide the Unions with the information above without charge. (Emphasis added)

NALC President Sombrotto wrote the Postal Service on October 27, 1988, requesting "the attached listing of data elements for all currently active city letter carriers" and asserting that "this information is necessary both for collective bargaining and for contract administration." The "attached listing" referred to 34 different data elements. Numbers 1 through 25 were the same as those found in the Memorandum of Understanding quoted above. Numbers 26 through 34 were additional elements nowhere mentioned in the Memorandum:

- | | |
|-----------------------------|-----------------------------|
| 26. Sex | 31. Life Insurance Code |
| 27. Date of Birth | 32. TSP Status Code |
| 28. Minority Code | 33. TSP Deduction - Percent |
| 29. Handicap Code | 34. TSP Deduction - Amount |
| 30. Veteran Preference Code | |

NALC did not explain in Sombrotto's letter or at the arbitration hearing its precise purpose in seeking this data. It insists it has no obligation to do so under Article 31, Section 3. Nevertheless, a reading of the Postal Service's

Step 4 answer in this case along with Arbitrator N. Bernstein's prior award on this subject clearly shows what NALC had in mind. NALC believes this information "will enable it to determine the special needs of selected subgroups so it could bargain effectively on behalf of its members"; it believes further that such information will be used "to conduct telephone surveys" and that this is, in its opinion, preferable to written surveys as a "method of gathering information."

The Postal Service rejected NALC's request. Given this disagreement, Sombrotto filed a grievance in Step 4 on December 21, 1988. He alleged that the Postal Service "refusal" to provide the "requested...information" was a violation of Articles 5 and 31 of the National Agreement. A Step 4 meeting did not resolve the dispute and Sombrotto appealed the case to arbitration on March 27, 1989.

The Postal Service emphasizes that NALC has been given, pursuant to its request, all of the data elements mentioned above, 1 through 34. It notes that numbers 9 through 34 have been sent to NALC on a "scrambled" basis so that this information cannot be related to specific employees by name or social security number. It notes also that NALC receives numbers 1 through 25 on an accounting period basis and numbers 26 through 34 on a periodic basis, apparently once a year. It has, moreover, proposed to NALC that some neutral third party be given data elements 9 through 34 in an "unscrambled" form and that NALC then make arrangements with this third party to conduct whatever surveys NALC wishes to accomplish. It contends that this would be a reasonable accommodation between NALC's rights under Article 31, Section 3 and Management's obligation to maintain the confidentiality of much of this information. It stresses that this same type of third-party information sharing has been successfully negotiated with APWU as a means of resolving an APWU claim under Article 31, Section 3.

NALC, however, has refused to modify its request. It says it has a right under the National Agreement to receive data elements 9 through 34 in an "unscrambled" form, thus identifying each named individual by age, sex, minority status, handicap status, and so on. It insists it has a right to such "unscrambled" data directly, without any third-party information sharing. It is unwilling to settle for anything less. It believes Arbitrator Bernstein's earlier award plainly establishes this right.

The Postal Service resists this grievance on three different grounds. First, it states that NALC has "failed to

even attempt to demonstrate that the information requested is either relevant or necessary for collective bargaining and/or contract administration." Its position, in short, is that NALC has not made a proper showing of "relevancy" or "necessity" under Article 31, Section 3. Second, it contends that Management "has raised legitimate objections to the release of privileged information." Its position here is that the Postal Service must honor the privacy requirements of other federal agencies for whom it gathers confidential information. Third, it maintains that NALC has "refused to bargain over a facially reasonable accommodation [i.e., third-party information sharing] which would provide an alternative method of production [of the desired information]." Other arguments made in Step 4 have apparently been dropped.

DISCUSSION AND FINDINGS

Some preliminary comments are in order. The Postal Service brief reveals that it has no objection to supplying NALC with data elements 1 through 25 on an "unscrambled" basis. Its claim is that data elements 26 through 34 can be supplied also but only on a "scrambled" basis because they involve personal matters - age, sex, and group status (minority, handicap, veteran's preference, etc.) - which should remain confidential "as a matter of public policy." It is nevertheless willing to provide this confidential data on an "unscrambled" basis to a third party who can use such data as directed by NALC while at the same time maintaining its confidentiality.

Thus, the dispute is much narrower than it appeared on first impression. The Postal Service is furnishing the requested information to NALC but not in the form NALC demands. The Postal Service is willing to furnish the requested information to NALC in the form it wishes but only through a procedure, third-party information sharing, which NALC rejects. The issue is whether NALC has a right under Article 31, Section 3 to insist on the requested information, data elements 26 through 34, in an "unscrambled" form without the use of any third-party.

The answer to this question depends on a variety of factors - Arbitrator Bernstein's award on essentially the same issue in H4N-NA-C-17 decided August 3, 1988; the meaning of Article 31, Section 3; and any pertinent federal law or regulation, the so-called "public policy" with respect to confidential information.

I - Arbitration Precedent

In the Bernstein award, a national level case, NALC had requested individual employee data which it alleged was "necessary for both collective bargaining and contract administration." Its request sought a list of all city carriers by name and by sex, date of birth (i.e., age), minority code, handicap code, and veteran's preference code. These matters are referred to in the present case as data elements 26 through 30. NALC insisted that this data was needed on an "ongoing" basis and asked that it be furnished "quarterly." The Postal Service denied the request. That dispute arose under the 1981 National Agreement. Article 31 was then much the same as it is today except that Section 2 called for the Postal Service to provide computer tapes just twice a year with regard to far more limited information - "name, full address, and social security number; craft designation; health benefits enrollment code number; post office name, finance number and class."¹ There was then no Memorandum of Understanding.

Arbitrator Bernstein held that Article 31, Section 2 required Management to furnish "on a regular, ongoing basis" nothing more than the data quoted immediately above, that NALC was asking for further data "on a regular, ongoing basis", and that NALC therefore was improperly "attempt[ing] to expand the scope of..." Article 31, Section 2 through arbitration. His ruling stressed, in other words, that NALC had couched its request in an inappropriate manner. NALC had sought information it could not have "on a regular, ongoing basis."

Bernstein went on to say, by way of *dicta*, that if NALC requested this same information "on an infrequent basis", its request would have been justified and Management would have had to provide such information. He explained his point as follows:

This leaves only the question of whether the Union is entitled to the disputed data on an infrequent basis, upon a showing that it is planning to survey particular minority groups and needs the data to contact the relevant [bargaining] unit members. For the reasons set out earlier in this Opinion, the Arbitrator holds that such a showing would satisfy [Article 31, Section 3]...and that

¹ There were other differences as well but they are not relevant to the present case.

such an occasional request would not be an enlargement of [Article 31, Section 2]...

Sombrotto's request on October 27, 1988, roughly three months after receipt of the Bernstein award, was NALC's attempt to get the information which Bernstein said it was entitled to on an "infrequent" or "occasional" basis.² Had the facts of the present case been before Bernstein, he plainly would have held that Management's refusal to furnish this information was a violation of Article 31, Section 3. And the Postal Service specifically noted in the present case that it was not challenging Bernstein's award (except with respect to his EEOC ruling) and was not asking me to overrule Bernstein's interpretation of Article 31.

II - Relevancy of Requested Information

The Postal Service argues that NALC has "failed to even attempt to demonstrate that the information requested is either relevant or necessary for collective bargaining and/or contract administration." It believes that absent such a showing of relevancy or necessity, there can be no violation of Article 31, Section 3.

It is true that NALC did not relate at the arbitration hearing how it intended to use the information it sought. But NALC had earlier set forth what its purpose was. Sombrotto's request on October 27, 1988, stated that this information was necessary "both for collective bargaining and for contract administration." NALC gave more detail in the Step 4 grievance meeting, alleging that such information was to be used for "telephone surveys" of its members. Those surveys, according to the Bernstein award, were to be conducted among "specific subgroups of the bargaining unit - women, blacks, veterans, etc. - to ascertain their particularized needs and desires so that they can properly be represented in the Union's bargaining proposals."

Bernstein held on the basis of much the same facts as are before me:

...This is a sufficient showing to comply with the [Article 31, Section 3] mandate that the data sought must be "relevant information necessary for collective bargaining".

² Sombrotto's request sought certain additional information as well, information not mentioned in the Bernstein award.

...[T]he arbitrator [cannot be made] the judge of the Union's bargaining needs. The decision as to what data is needed to prepare the Union's bargaining proposals is one that only the Union can make. If it asserts that it needs this data for that purpose, and there is no reason to conclude that the assertion is not truthful, that is enough to satisfy the mandate of [Article 31, Section 3]...

NALC has clearly made the requisite showing. It has alleged that what it seeks is necessary "both for collective bargaining and for contract administration." Nothing in the evidence suggests that this assertion is not truthful. In these circumstances, according to the Bernstein award, NALC must be considered to have met whatever burden it has under Article 31, Section 3.

III - Privacy Restraints on Release of Information

The Postal Service argues that it has "legitimate objections to the release of [such] privileged information" as data elements 26 through 34. It insists it must honor the privacy requirements of other federal agencies for whom it gathers confidential data.

Consider, to begin with, the life insurance program administered by OPM (Office of Personnel Management). Employees may elect to join a particular life insurance program and select a particular amount of coverage. These elections are made on an OPM form which contains a "Privacy Act Statement" which reads in part:

...The data you furnish will be used to determine the type of insurance coverage you shall receive. This information may be shared with national, state, local or other charitable or social security administrative agencies to determine and issue benefits under their programs or law enforcement agencies when they are investigating a violation or potential violation of the civil or criminal law...

The Postal Service emphasizes that nothing in this "Statement" says that life insurance data "may be shared" with a union for collective bargaining purposes. But it is equally true that nothing in this "Statement" prohibits this data from being "shared" with a union. The mere reference in the OPM form as to what the Privacy Act "may" permit by way of disclosure does not necessarily constitute a prohibition

against any other type of disclosure. Perhaps OPM never considered the matter in preparing the "Statement" Neither the parties nor the arbitrator knows whether OPM would approve of NALC receiving life insurance data for collective bargaining purposes. At least no such evidence was introduced at the arbitration hearing.

The Postal Service says in its brief that it has "refrain[ed] from raising a Privacy Act defense at this arbitration..." in order to "preserve...its right to a de novo presentation in an appropriate federal court." It has, in short, chosen to ignore Privacy Act considerations in explaining away its own refusal to disclose life insurance data. That being so, it is difficult to understand why it should be allowed to raise Privacy Act considerations in OPM's name. This is particularly true where OPM itself is silent on the matter before me apart, of course, from the "Privacy Act Statement" in the OPM form. But, as I have already observed, this "Statement" does not insulate the Postal Service from NALC's claim in the present case.

For these reasons, the Postal Service cannot be excused from furnishing the requested life insurance data on the basis of privacy or "public policy." The same analysis and the same conclusions apply to TSP data, that is, thrift savings plan code and thrift savings plan deductions (percent and amount).

Consider next the handicap code. The Postal Service, pursuant to the Rehabilitation Act of 1973, collects handicap information and reports it to OPM and other federal agencies in aggregate totals. The Postal Service elicits the necessary information on a Postal Service form which contains a "Privacy Act Statement" which reads in part:

...The information furnished will be used for the purpose of producing statistical reports to show agency progress in hiring, placement, and advancement of disabled individuals, to locate individuals for voluntary participation in surveys, and for affirmative action purposes. All reports will be in the form of aggregate totals and will be used to inform Postal Service management,...[OPM], the Equal Employment Opportunity Commission, the Congress, and the public of the status of programs for the employment of people with disabilities...

The Postal Service itself characterized these words as a "Privacy Act Statement." The contents of that "Statement" are plainly the product of Management's view of Privacy Act constraints. Yet, in its brief, the Postal Service stressed

that it was not raising a Privacy Act defense in this arbitration. It cannot assert and deny the same claim at the same time. I have no choice but to accept the Privacy Act disclaimer and I find, accordingly, that Management cannot be excused from furnishing the requested handicap data on the basis of privacy. For similar reasons, Management cannot escape disclosure of veteran's preference data. Moreover, the Postal Service noted in its brief that "other than the Privacy Act, there appear[s] to be no specific regulatory prohibition to the production of information regarding employee age and sex." Because the Privacy Act is not before me, there is no arguable basis for excusing Management from furnishing the requested age and sex data.

Consider finally minority (race and national origin) data. The Postal Service collects this information because it has been directed to do so by the EEOC, a federal agency. The relevant EEOC regulations, 29 CFR 1613.302(a) and (b), provide:

(a) Each agency shall establish a system which provides statistical employment information by race or national origin.

(b) Data shall be collected only by visual identification and shall be disclosed only in the form of gross statistics. An agency shall not collect or maintain any information of the race or national origin of individual employees except when an automated data processing system is used in accordance with standards and requirements prescribed by the Commission to insure individual privacy and the separation of that information from personnel records. (Emphasis added)

The Postal Service is an "agency" covered by this EEOC regulation. There are two distinct elements in the regulation. One involves collection of minority group statistics; the other involves disclosure of such statistics. The latter states that data "shall be disclosed only in the form of gross statistics." NALC's request calls upon Management to disclose individual statistics. That is plainly forbidden by the EEOC. The parties provided in Article 5 of the National Agreement that the Postal Service "will not take any actions affecting...conditions of employment...which...are...inconsistent with its obligations under federal law." To order the disclosure of each individual's minority status

would require a Management action "inconsistent with its obligations under federal law".³ I shall not order such disclosure.

Arbitrator Bernstein dealt with this same regulation in his award. He held that the regulation should be disregarded for several reasons, only one of which is relevant here:

...[T]he regulation on its face does not apply to an agency which uses an automatic data processing system that is operated "in accordance with standards and requirements prescribed by the Commission." The Service made no showing of what those standards and requirements were, or how they applied to the system it maintains.

This ruling, in my opinion, is incorrect. The regulation on its face does apply to an agency which uses an automatic data processing system that is operated "in accordance with standards and requirements prescribed by the Commission." Absent any evidence to the contrary, the presumption must be that the Postal Service's automatic data processing system does comply with "standards and requirements." The Postal Service is bound by this regulation. In any event, Bernstein referred only to that part of the regulation which concerned data collection. He ignored that part which dealt with data disclosure. It is the disclosure rule which justifies the Postal Service's refusal to divulge individual minority data.

IV - Offer of Individual Data Through Third-Party Sharing

The Postal Service contends that the grievance relies in part on Article 5 of the National Agreement, that implicit in this article is the requirement that the parties have a duty to bargain, and that NALC has refused to bargain with Management over "a facially reasonable accommodation which would provide an alternative method of production" of the requested individual data. It believes this offer to share the individual data with NALC through a neutral third party is perfectly reasonable and that such a third party could perform whatever surveys NALC wished while at the same time preserving the confidentiality of the data.

The difficulty with this argument is that NALC's essential claim is based not on Article 5 but rather on


³ I believe the confidentiality of one's minority status can be viewed as a "condition of employment..."

Article 31, Section 3. And if, as I have already held, NALC has a right to certain data pursuant to Article 31, Section 3 and the earlier Bernstein award, that right cannot be limited by NALC's unwillingness to settle for something less. It may be that the Postal Service's offer of third-party information sharing is reasonable and that NALC's rejection of this offer is unreasonable. However, the arbitrator's function is not to determine the reasonableness of the parties' behavior in attempts to settle a grievance. My function is to determine what rights and duties the parties have under the National Agreement.

I believe the Postal Service had a duty under Article 31, Section 3 to furnish NALC, pursuant to its "infrequent" or "occasional" request, the kind of individual data sought in this case provided only that NALC "asserts that it needs this data for [the]...purpose [of collective bargaining or contract administration] and there is no reason to conclude the assertion is not truthful." These conditions were met and the Postal Service therefore violated Article 31, Section 3 by denying the request.

AWARD

The grievance is granted with the single exception listed below. The Postal Service should furnish NALC with data elements 26 through 34, apart from number 28 (minority code), in an "unscrambled" form pursuant to Article 31, Section 3.


Richard Mittenthal, Arbitrator