C #10147

NATIONAL ARBITRATION PANEL

In the Matter of Arbitration between AMERICAN POSTAL WORKERS UNION and NATIONAL ASSOCIATION OF LETTER CARRIERS and UNITED STATES POSTAL SERVICE	Case Nos.: H7N-4U-C 3766 H7N-2A-C 4340 H7N-2U-C 4618 H7N-5K-C 10423 H4N-5N-C 41526

BEFORE: Professor Carlton J. Snow

APPEARANCES: Mr. L. G. Handy

Mr. Thomas Neill

Mr. Keith Secular

PLACE OF HEARING: Washington, D.C.

DATES OF HEARING: August 11, 1989, November 28, 1989,

December 7, 1989, March 20, 1990

AWARD:

Having carefully considered all evidence submitted by the parties concerning this matter, the arbitrator concludes that the grievances should be sustained in a manner consistent with this report, recognizing the need to remand Case No. H4N-5N-C 41526 for a factual determination and ultimate decision consistent with this award. It is so ordered and awarded.

Date:_____

_____
Carlton J. Snow
Professor of Law

IN THE MATTER OF ARBITRATION)
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BETWEEN)
)
AMERICAN POSTAL WORKERS UNION)
)
AND)
)
NATIONAL ASSOCIATION OF) ANALYSIS AND AWARD
LETTER CARRIERS)
) Carlton J. Snow
AND) Arbitrator
)
UNITED STATES POSTAL SERVICE)
(Case Nos. H7N-4U-C 3766,)
H7N-2A-C 4340, H7N-2U-C 4618,)
H7N-5K-C 10423, and)
H4N-5N-C 41526))

I. INTRODUCTION

This matter came for hearing pursuant to a collective bargaining agreement between the parties effective from July 21, 1987 to November 21, 1990. Case No. H4N-5N-C 41526 arose under the 1984-87 National Agreement, but relevant portions of the agreement are the same in both labor contracts. This was a three party hearing, and the American Postal Workers Union intervened in a dispute involving the United States Postal Service and the National Association of Letter Carriers.

Arbitration hearings occurred on August 11, November 28, and December 7, 1989, as well as on March 20, 1990. All hearings took place in a conference room of the USPS headquarters at 475 L'Enfant Plaza located in Washington,

D.C. Mr. L. G. Handy, Manager of Labor Relations, represented the United States Postal Service. Mr. Keith Secular of the Cohen, Weiss and Simon law firm in New York City represented the National Association of Letter Carriers. Mr. Thomas Neill, Industrial Relations Director, initially represented the American Postal Workers Union, but Mr. Richard Wevodau, Director of the Maintenance Division, assumed Mr. Neill's position at the hearing when he had to leave in order to see a doctor. In subsequent hearings, Mr. Phillip Tabbita, Special Assistant to the President, represented the American Postal Workers Union.

The hearings proceeded in an orderly manner. There was a full opportunity for the parties to submit evidence, to examine and cross-examine witnesses, and to argue the matter. All witnesses testified under oath as administered by the arbitrator. The advocates fully and fairly represented their respective parties. A representative of Diversified Reporting Services, Inc., recorded the proceedings and submitted a transcript of 572 pages.

There were no challenges to the jurisdiction of the arbitrator. The parties elected to submit post-hearing briefs, and the arbitrator officially closed the hearing on June 11, 1990 after receipt of the final brief in the matter.

II. STATEMENT OF THE ISSUE

The parties stipulated that the issues before the arbitrator are as follows:

(1) In Case Nos. H7N-2A-C 4340 (St. George, Utah); No. H7N-2U-C 4618 (Clifton Heights, Pennsylvania); No. H7N-5K-C 10423 (Fairfax, Virginia); and No. H4N-5N-C 41526 (Santa Clara, California), the issue is whether the Employer violated the National Agreement by assigning a former supervisor to a full-time position in the Letter Carrier craft. If so, what should the remedy be?

(2) In Case No. H7N-4U-C 3766 (Laramie, Wyoming), the issue is whether the Employer violated the National Agreement by assigning a former supervisor to a part-time flexible position in the Letter Carrier craft. If so, what should the remedy be?

III. RELEVANT CONTRACTUAL PROVISIONS

ARTICLE 12 - PRINCIPLES OF SENIORITY, POSTING AND REASSIGNMENTS

Section 2. Principles of Seniority

A. Except as specifically provided in this Article, the principles of seniority are established in the craft Articles of this Agreement.

B. An employee who left the bargaining unit on or after July 21, 1973 and returns to the same craft:

1. will begin a new period of seniority if

if the employee returns from a position outside the Postal Service, or

2. will begin a new period of seniority if the employee returns from a non-bargaining unit position within the Postal Service, unless the employee returns within 2 years from the date the employee left the unit.

ARTICLE 41 - LETTER CARRIER CRAFT

Section 1. Posting

A. In the Letter Carrier Craft, vacant craft duty assignments shall be posted as follows:

1. A vacant or newly established duty assignment not under consideration for reversion shall be posted within five working days of the day it becomes vacant or is established.

All city letter carrier craft full-time duty assignments other than letter routes, utility or T-6 swings,m parcel post routes, collection routes, combination routes, official mail messenger service, special carrier assignments and night routers, shall be known as full-time Reserve Letter Carrier duty assignments. The term "unassigned regular" is to be used only in those instances where full-time letter carriers are excess to the needs of the delivery unit and not holding a valid bid assignment.

. . . .

2. Letter carriers temporarily detailed to a supervisory position (204b) may not bid on vacant Letter Carrier Craft duty assignments while so detailed. However, nothing contained herein shall be construed to preclude such temporarily detailed employees from voluntarily terminating a 204b detail and returning to their craft position. Upon return to the craft position, such employees may exercise their right to bid on vacant Letter Carrier Craft duty assignments.

The duty assignment of a full-time carrier detailed to a supervisory position, including a supervisory training program in excess of four months shall be declared vacant and shall be posted for bid in accordance with this Article. Upon return to the craft the carrier will become an

unassigned regular. A letter carrier temporarily detailed to a supervisory position will not be returned to the craft solely to circumvent the provisions of Section 1.A.2.

. . . .

C. Successful Bidder

1. The senior bidder meeting the qualification standards established for that position shall be designated the "successful bidder."

2. Within ten (10) days after the closing date of the posting, the Employer shall post a notice indicating the successful bidder, seniority date and number.

3. The successful bidder must be placed in the new assignment within 15 days except in the month of December.

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.

Section 2. Seniority

A. Coverage

1. This seniority section applies to all regular work force Letter Carrier Craft employees when a guide is necessary for filling assignments and for other purposes and will be so used to the maximum extent possible.

2. Seniority is computed from date of appointment in the Letter Carrier Craft and continues to accrue so long as service is uninterrupted in the Letter Carrier Craft in the same installation, except as otherwise specifically provided.

B. Definitions

. . . .

6. (b) Part-time flexible letter carriers shallbe converted to full-time positions of the same designation and PS salary level in the order of their standing on the part-time flexible roll.

G. Changes in Which a New Period of Seniority is Begun

1. When an employee from another agency transfers to the Letter Carrier Craft.

2. Except as otherwise provided in this Agreement when an employee from another USPS craft is reassigned voluntarily or involuntarily to the Letter Carrier Craft.

3. When a letter carrier transfers from one postal installation to another at the carrier's own request (except as provided in subsection E of this Article).

4. Any former employee of the U.S. Postal Servixce entering the Letter Carrier Craft by reemployment or reinstatement shall begin a new period of seniority, except as provided in subsections D.1 and D.4 above.

5. Any surplus employees from non-processing and non-mail delivery installations, regional offices or the United States Postal Service Headquarters, begin a new period of seniority effective the date of reassignment.

IV. STATEMENT OF FACTS

In this case, the Union has challenged management's reassignment of supervisors to the employment status of full-time, regular or part-time, flexible employes in the Letter Carrier craft. In four of the five grievances in this dispute, the Employer reassigned supervisors to the National Association of Letter Carriers bargaining unit as full-time regular employes; and the NALC has challenged those assignments. The fifth grievance involves a supervisor who was returned to the Letter Carrier craft as a part-time flexible employe, and

the Union has maintained that he should have been returned with full-time, regular status. Supervisors in all five grievances had their paygrade lowered when they returned to the bargaining unit.

One of the cases appealed to the national level arose in Laramie, Wyoming. The grievant left the Letter Carrier craft for less than two years while he worked as a full-time supervisor. He requested a return to the craft, and management reassigned him as a part-time, flexible employe. The grievant argued that the grievant should have been entitled to retain his seniority and that management should have reassigned him to a full-time, regular position. He seeks restoration of his seniority and reassignment to a full-time position as well as a make whole monetary remedy. (See, Joint Exhibit No. 2).

Another of the cases arose in St. George, Utah. Mr. Jerry Turnbeaugh left the Letter Carrier craft and worked as a supervisor for over two years before he requested a reassignment to the craft. The Employer created an unassigned full-time, regular craft position and assigned it to Mr. Turnbeaugh, giving him a new seniority date. The Union contended that the unassigned, regular position should have been made available for bid and that Mr. Turnbeaugh should have been placed on the part-time, flexible seniority list with a new seniority date. (See Joint Exhibit No. 3.

A third case arose in Clifton Heights, Pennsylvania. A former letter carrier became a supervisor, but the Employer

demoted him for disciplinary reasons pursuant to a Merit Systems Protection Board order. Management transferred him to a different postal facility and gave him a full-time, regular carrier position. The Union contended that the Employer should have promoted a part-time, flexible employe from the office of transfer to the regular position in that facility. The requested remedy is that the demoted supervisor be reassigned to the part-time, flexible list in order of seniority. (See, Joint Exhibit No. 4).

A fourth case arose in Fairfax, Virginia and involved a letter carrier in Fairfax who received a promotion to the rank of supervisor in July of 1987 and transferred to a different office. After three months he requested a return to the Letter Carrier craft in Fairfax, Virginia. The Employer reassigned him there as a full-time letter carrier, and his "letter carrier" seniority was restoreed. It is the contention of the Union that the former supervisor should not have received his previous seniority because he had left Fairfax, Virginia and transferred back to the facility from another office. It is the belief of the Union that the former supervisor should be reassigned as a junior, part-time, flexible employe. (See, Joint Exhibit No. 5).

The final case arose in Santa Clara, California. It involved a letter carrier who became a supervisor of another office in July of 1985. In November of 1986, he submitted his resignation to the Employer. There is a factual dispute between the parties with respect to whether or not management

ever accepted the resignation. In January of 1987, the Employer demoted the supervisor and reassigned him as a full-time letter carrier in a different office, giving him credit for his previous seniority in the craft. The Union contended that the former supervisor was not entitled to his prior seniority because he had transferred from another office where he had served as a supervisor and also because he had resigned from the U.S. Postal Service and, subsequently, had been rehired in Santa Clara, California. It is the belief of the Union that the former supervisor should be reassigned to the position of a part-time flexible employe and that any full-time assignment for which he had successfully bid should be reposted., (See, Joint Exhibit No. 6).

V. POSITION OF THE PARTIES

A. The National Association of Letter Carriers

The National Association of Letter Carriers takes the position that management must make assignments to full-time positions in the Letter Carrier craft strictly in compliance with seniority provisions in the National Agreement. A former letter carrier reassigned to that craft from a supervisory position, thus, would be eligible for reassignment as a full-time, regular employe only if the supervisor retains greater craft seniority than any other full-time or part-time flexible carrier who, otherwise, would be entitled to the assignment,

according to the NALC's theory of the case. The National Association of Letter Carriers argues that management fails to honor the seniority provisions in the parties' agreement when it asserts that it has complete discretion to reassign supervisors as either full-time, regular or part-time, flexible employes.

B. The American Postal Workers Union

The American Postal Workers Union intervened in this arbitration proceeding in order to dispute management's position that it has unilateral authority to return supervisory personnel to any craft at any installations in any status. It is the position of the American Postal Workers Union that the full-time or part-time flexible status of a returning supervisor is determined by numerous contractual and manual provisions, which vary from craft to craft. Accordingly, the APWU takes the position that the results of this arbitration proceeding may well determine how returning letter carriers are reassigned but that it does not necessarily decide how members of other crafts are to be reassigned.

C. The Employer

The Employer's first line of argument is that the issues in this case are governed by the concept of res judicata (the matter previously has been decided) because the parties to this proceeding allegedly settled the issue at Step 4 of several grievances in national pre-arbitration settlements. Those settlements, according to management's theory of the case, confirmed the right of management to place supervisors returning to the Letter Carrier craft in any status it sees fit.

Alternatively, it is the position of the Employer that there is no contractual provision restricting its right to determine the status of a supervisor reassigned to the Letter Carrier craft. Management maintains that Article 3 of the National Agreement gives it the exclusive right to determine the "craft" status of a reassigned employe, and the Employer contends that nothing in the agreement has restricted this managerial prerogative. Moreover, management maintains that past practice, supported by the parties' mutual agreement as manifested in negotiated settlements, establishes the Employer's right to determine the "craft" status of a reassigned employe, according to management's theory of the case.

The Employer contends that the Union has attempted to broaden the issue in the arbitration proceeding so that it includes seniority and not merely "status." According to the Employer, the only issue before the arbitrator is whether or not management has a right to determine whether a supervisor

returning to the craft will be returned as a part-time flexible or as a full-time regular employe. Seniority, in the view of the Employer, is a separate issue.

VI. ANALYSIS

A. Nature of the Issue

The parties disagreed strongly about whether or not the dispute is about employment status or seniority. There are three types of employes in the bargaining unit, namely, (1) full-time regular employes, who are assigned five eight-hour days a week; (2) full-time flexible employes, who work flexible hours while they wait for conversion to full-time regular status; and (3) part-time regular employes, who permanently work less than forty hours a week. Part-time regular employes are governed by different seniority and assignment provisions than the other two types of employes and are not part of this dispute. Of concern in this case is the status of part-time flexible employes (hired for future full-time regular work) and full-time regular employes. References to employment "status" in the case have been to part-time flexible employes and full-time regular employes, and not to part-time regular employes.

Seniority, on the other hand, is concerned with "the length of service an individual employee has in a unit." (See, Robert's Dictionary of Industrial Relations, 657 (1986)).

Seniority determines the relative priority of full-time regular employes and part-time flexible employes with respect to a variety of privileges, such as the right to bid on certain positions for full-time regular employes, the order of selection for qualified bidders, and the order of conversion of part-time flexible employes to full-time regular employes. For purposes of this arbitration proceeding, the most important seniority right is concerned with the conversion of part-time flexible employes to full-time regular status. The Employer has not argued that it has a right to disturb provisions on seniority in the parties' National Agreement. Management, however, has contended that its reassignment of supervisors to full-time regular or part-time flexible status has nothing to do with the concept of seniority. It is the belief of the Employer that it has a reserved right in Article 3 of the National Agreement to make such reassignments. The contractual provision states:

> The Employer shall have the exclusive right, subject to the provisions of this Agreement and consistent with applicable laws and regulations:
> (b) to hire, promote, transfer, assign and retain employes in positions within the Postal Service and to suspend, demote, discharge or take other disciplinary action against such employees.

B. Some General Guidelines

The parties have balanced their interests in the way they designed their collective bargaining agreement, and one manifestation of the balancing mechanism is to be found in the way the parties described their rights and obligations in the management's rights clause and the seniority provisions. The importance of disputes implicating such provisions cannot be underestimated. The role of an arbitrator in such cases is to review the language of the parties' agreement in order to construe the way they have ordered their relationship with regard to management rights and seniority.

The parties' agreement is an arbitrator's touchstone, and an arbitration award is "legitimate only so long as it draws its essence from the collective bargaining agreement." (See, United Steelworkers of America v. Enterprise Wheel and Car Corp., 363 U.S. 593 (1960)). The point is that a source of seniority rights is to be found in the parties' collective bargaining agreement. As one arbitrator has observed:

> An employee's seniority as such does not by itself confer any right upon him. Seniority, without more, is merely the service status of a particular employee, in relation to the service status of other employees. (See, General Electric Co., 54 LA 351, 352 (1970)).

In other words, the meaning of seniority must find its explanation in the collective bargaining relationship between the parties. An arbitrator's assumption must be that the parties have decided seniority rights encourage loyalty and stability in the work force and have balanced those values against any lost flexibility as a result of using seniority as a basis

for making employment decisions. An arbitrator is obligated to interpret and, then, to apply such contractual terms in a given case, recognizing that an application of seniority is almost never neutral. As the eminent Ralph Seward observed almost four decades ago:

> In seniority matters, the advantage of one employe is the disadvantage of another. To "stretch" the agreement to be "fair" to Smith is to stretch it to be "unfair" to Jones. Fairness, then, exists when each employe has the relative seniority right he is entitled to under the Agreement--no more and no less. (See, Bethlehem Steel Co., 23 LA 538, 541-42 (1954)).

It is an arbitrator's obligation to understand and implement the bargain of the parties, no more and no less. This is accomplished by interpreting the language of the parties' agreement. If the language of the collective bargaining agreement fails to be clear and unambiguous, it becomes necessary for an arbitrator to seek other sources of the parties' negotiated intent. Settlement agreements between the parties provide one source of such information. Past practices of the parties also may make clear their contractual intent. If the parties have been silent throughout their relationship with regard to the issue in dispute, it is reasonable for an arbitrator to assume that they expected their agreement to be interpreted in light of established arbitral principles. As one scholar has observed, "there is a whole set of implicit relationships not spelled out in the agreement and not confined to any particular employer, which an arbitrator assumes to exist." (See, 2 Ind. Rel. L.J. 97, 104 (1977)). As Professor Archibald Cox has noted, "these

arbitral principles are "drawn out of the institutions of labor relations and shaped by their needs." (See, 69 Harv. L. Rev. 601, 605 (1956)).

It is not uncommon for collective bargaining agreements to be specific about the effect of work outside a bargaining unit on an employe's accumulation of seniority. (See, e.g., Firestone Tire & Rubber Co., 61 LA 136 (1973); and National Cash Register Co., 48 LA 743 (1967)). In the absence of clear and unambiguous language, arbitrators often have scrutinized the practices of the parties to understand their mutual intent. (See, U.S. Steel Corp., 28 LA 740 (1957); and Mississippi Lime Co., 31 LA 869 (1969)). Numerous arbitration decisions have concluded that employes who return to a bargaining unit should be permitted to exercise their retained seniority. (See, e.g., Folger Coffee Co., 60 LA 353 (1953); Alpha Portland Cement Co., 40 LA 495 (1962); Pannier Corp., 41 LA 1228 (1964); and Leesona Corp., 56 LA 668 (1971)).

C. The Impact of Settlement Agreements

The Employer presented a number of negotiated settlement agreements and argued that they constituted binding precedents between the parties, precedents that already had resolved the disputed issue. (See, Exhibit Nos. 1, 2, 3, 5, and 8). The Employer argued that those "Step 4" decisions supported its position in the case and established that management's conduct is consistent with its rights under Article 3 of the parties'

agreement. In other words, the Union allegedly had agreed to settle grievances involving the same set of issues because it recognized the rights of management in Article 3. The Employer argued that those settlement agreements disposed of the issue in this case because they reflect uncoerced, consensual agreements by national representatives of the parties and show management's rights to determine the status of former supervisors who are placed in the crafts by a demotion. As binding precedent, the Employer argued that they must determine the parties' interpretation of their agreement and be dispositive in this dispute. Alternatively, the Employer argued that even if the Step 4 settlement agreements are not automatically dispositive, they at least show how the parties' view their agreement and how it should be interpreted. (See, Tr. I, pp. 20, 85, 100; and Tr. II, p. 62).

In one of the settlement agreements, a grievance had been filed by the National Association of Letter Carriers after management reassigned a former carrier who had served as a supervisor for eight years. (See, Employer's Exhibit No. 1). The employe received the lowest seniority in the postal authority, but management awarded him a position as a full-time regular letter carrier. The Union took the position in the dispute that the former supervisor should have been reassigned to the bargaining unit as the last part-time flexible employe and should have started a new period of seniority, in accordance with Articles 12.2 and 41.2 of the National Agreement. Although this settlement agreement

presented a similar issue as the grievance before the arbitrator in this case, the parties signed an actual agreement which stated:

> After reviewing this matter, we mutually agree that no national interpretive issue is fairly presented in this case. There is no dispute between the parties at Step 4 relative to the meaning and intent of Article 12.2 of the National Agreement. We find no agreement to return an employe to a part-time flexible position under the circumstances described. (See, Employer's Exhibit No. 1, emphasis added).

The parties remanded the grievance to Step 3 for further processing. By the parties' explicit intent not to provide an interpretation of the National Agreement, they made this negotiated settlement agreement nonbinding on the arbitrator in this case. While it is not necessary to decide the effect of the settlement agrement on postal managers and union representatives, it is clear that the parties did not make it binding on the arbitrator.

The same analysis must be applied in another one of the settlement agreements submitted by the Employer. (See, Employer's Exhibit No. 8). In that case, a supervisor had been demoted to the position of a full-time regular clerk and had been assigned to a different office. Management created a full-time regular position for the supervisor, and the Union grieved the fact that a part-time flexible clerk should have been converted prior to making such an assignment. The parties again "mutually agreed that no national interpretive issue is fairly presented in this case" and remanded it to the regional level. (See, Employer's Exhibit No. 8). Accordingly, that decision is not binding on the arbitrator

in this case. The settlement agreement is not binding for another reason as well. It involves the American Postal Workers union, and the National Association of Letter Carriers was not a party to it. Likewise, another of the settlement agreements did not involve the National Association of Letter Carriers. (See, Employer's Exhibit No.5). It would not be rational to impose a binding interpretation of a contractual provision on a party when it had no opportunity to represent itself at the negotiated settlement. Yet another settlement agreement involved the National Association of Letter Carriers, but again it was an agreement to remand the dispute to Step 3 because the parties "mutually agreed that no national interpretive issue was fairly presented in this case." (See, Employer's Exhibit No. 3).

Only one of the negotiated settlement agreements might have precedential value in this dispute. (See, Employer's Exhibit No. 2). In that case, the Union protested when a supervisor was transferred from another office and given a vacant, full-time position in the Letter Carrier craft, despite the availability of a part-time flexible letter carrier for conversion to a full-time regular position. The settlement agreement at Step 4 incorporated a memorandum on transfers prepared during Postmaster General Bolger's administration. (See, Tr. II, p. 39 re: The Bolger Memorandum of April 6, 1979). The arbitrator received evidence to the effect that the Bolger memorandum was devised to provide guidelines for voluntary reassignments and transfers. The

parties incorporated the following verbiage into the agreement:

> Full-time nonbargaining unit employees will be reassigned into full-time positions unless the reassignment is to a vacant bargaining unit position.
>
> All employes reassigned to positions in the bargaining unit will have their seniority established in accordance with the applicable collective bargaining agreement. (See, Employer's Exhibit No. 2).

The Bolger Memorandum gave support to the Union's contention that seniority for reassigned employes is to be determined in accordance with the National Agreement and that such reassignments are to respect the contractual seniority provisions. While the Bolger Memorandum purported only to furnish guidelines, its incorporation into the Settlement Agreement gave it the potential force of a binding precedent. The Settlement Agreement gave the grievant, a part-time flexible employe, the status of a full-time regular employe and placed him in the bid position that previously had been awarded to the reassigned supervisor. The supervisor was not reassigned as a part-time flexible employe, however, but as an "unassigned regular."

The remedial portion of the grievance in this settlement agreement has not been read as permitting reassignment of supervisory personnel in an "unassigned regular" status in all cases. In this grievance, the Union did not ask that the former supervisor be reclassified as a part-time flexible employe in its request for corrective action. More importantly, the record showed that, when the Step 4 negotiated settlement agreement was reached by the parties, the postal facility in question had no part-time flexible employes at

that particular work site. (See, Union's Exhibit No. 13 and Tr. IV, p. 61). In other words, no employe's seniority rights were implicated in the decision to classify the former supervisor as an unassigned regular. The point is that the only aspect of this settlement agreement binding in this case is the statement of principle from the Bolger Memorandum. The remedial section, because it failed adequately to address the same issues as those before the arbitrator in this case, is limited to its own facts and does not decide the issues of whether and under what circumstances a reassigned supervisor may be given full-time regular status when there are part-time flexible employes awaiting conversion. None of the settlement agreements submitted to the arbitrator proved to be instructive in this regard.

D. The Matter of Past Practice

The Employer argued that the precedential value of the negotiated settlement agreements it submitted to the arbitrator, should determine the outcome of this proceeding. There however, was nothing in the settlement agreements that indicated a mutual intent of the parties to supersede the language of their agreement or the Handbook with respect to seniority. (See, Case No. H4C-3W-C 28547, p. 32). Alternatively, the Employer argued that past practice between the parties modified or interpreted the language of the National Agreement to

permit the Employer to reassign former craft members to the craft in a status designated by management. Almost three decades ago, the parties' own Richard Mittenthal set forth the preeminent instruction on the topic of past practice, and nothing since has surpassed its insightfulness and wisdom, although others have borrowed heavily from it. (See, e.g., NYU Fifteenth Annual Conference on Labor, 311 (1962)). Arbitrator Mittenthal set forth the virtually universally accepted tests of a past practice when he asked if it has (1) clarity and consistency; (2) longevity and repetition; (3) acceptability; and (4) mutuality. (See, Mittenthal, "Past Practice and the Administration of Collective Bargaining Agreements," Proceedings of the Fourteenth Annual Meeting, National Academy of Arbitrators, 30, 32-3 (1961)). Evidence submitted by the Employer with respect to the past practice of the parties failed to establish that management's decisions to reassign supervisors to bargaining unit positions met these well-established criteria, and it is clear that the Employer has the burden of establishing the past practice whose existence it has asserted. (See, Case No. W1N-5C-C 23743, p. 11).

Evidence submitted to the arbitrator failed to establish a clear pattern of reassigning former supervisors to full-time regular status. Nor did the evidence clearly establish an enunciated policy to do so. Instead, the data showed that management has acted at its discretion, sometime assigning returning supervisors to full-time regular status and sometimes

to part-time flexible status. (See, Employer's Exhibit No. 9). Nationwide data on reassignment of supervisors from 1981 to 1989 showed that approximately thirty percent of supervisors returning to the craft in a different installation were reassigned as full-time regular employes. But eighty-seven percent of those returning to the same office were reassigned as full-time regular employes. Other data for fourteen selected cities showed that, except in Richmond, Virginia, returning supervisors were overwhelmingly reassigned as full-time regular employes. (See, Employer's Exhibit Nos. 10-20, 42, 43, 44, and 45(A)).

The problem with these data is that they fail consistently to show whether the returning supervisor was out of the craft for more or less than two years. A supervisor who returns to the same installation in the Letter Carrier craft after an absence of less than two years does not forfeit accumulated seniority under Article 41.2 of the parties' agreement. In other words, reassignment of a full-time regular employe would be consistent with the seniority provisions of the agreement. Nor have the data indicated the underpinning for decisions to reassign some supervisors as part-time flexible employes. Moreover, some of the personnel actions on data submitted to the arbitrator might later have been modified. (See, Tr. II, 17). Finally, not all supervisors involved were returned to the Letter Carrier craft. The Maintenance Craft does not have part-time flexible employes, so a return to full-time regular status in that craft would

not indicate a practice of reassigning supervisors as full-time regulars at the expense of eligible part-time bargaining unit employes.

In summary, the data are not clear, consistent evidence of management's past practice of reassigning supervisors to full-time regular status in the Letter Carrier craft. Some of the data are consistent with the National Agreement. Some appear to violate it. Some are irrelevant to this dispute. The point is that management failed to show a clear and consistent practice of reassignment contrary to seniority provisions in the parties' National Agreement. Nor has it shown that such a practice, even if it existed, enjoyed mutual agreement. The existence of a number of grievances from a variety of geographical areas argue against such a position. The evidence failed to establish that the parties modified their agreement by past practice.

E. The Teaching of the Agreement

It is the teaching of the parties' agreement which is paramount in guiding an arbitrator. Although other sources such as negotiated settlement agreements or past practices of the parties might be instructive in the absence of clear contractual guidance, it is the negotiated agreement which is always preeminent. Article 41.2(D)(6)(b) of the parties' agreement states:

> Part-time flexible letter carriers shall be converted to full-time positions of the same designation and PS salary level in the order of their standing on the part-time flexible roll. (See, Joint Exhibit 1(B), p. 109).

Part-time flexible employes have been expressly covered in the seniority clause of the parties' agreement. One of their important seniority rights is the order of conversion to full-time regular status. To argue that status and seniority are separable issues overlooks the fact that reassignment of a supervisor into full-time regular status may cost a part-time flexible employe his or her advancement to full-time regular status. But for the reassigned supervisor, a part-time flexible employe could have converted to a more secure position. Accordingly, the reassignment of a supervisor who has not retained his or her seniority to full-time regular status violates the seniority right of part-time flexible employes waiting to convert. It should be noted that this contractual right is consistent with presumptions applied by arbitrators in the absence of contractual language about the seniority status of individuals returning to a bargaining unit. As one arbitrator has observed, "the great weight of arbitral authority" supports the proposition that an employe who leaves the bargaining unit and returns should not be preferred over an employe with the same or equal seniority who remains in the unit. (See, Folger Coffee Co., 60 LA 353, 355 (1973)).

At the arbitration hearing, Mr. William Henry, Special Assistant to the Assistant Postmaster General for Labor Relations, testified about his understanding of the difference

between status and seniority rights. He stated:

ANSWER: When [a former supervisor] would go back to the craft, he went back at full-time status, but we're obligated by contract to maintain the seniority provisions, which put this individual at the one date junior to the junior part-time flexible employee or substitute employee at that time.

QUESTION: Was there and is there a difference between seniority and status?

ANSWER: Well, yes, there is a difference. If a person is returned to craft as a full-time individual, he has the right to bid. Whereas, a part-time flexible doesn't. Seniority places him in the appropriate order for bidding among full-time employees, if you will. Now, this individual who is placed one day junior to the junior part-time flexible, as each part-time flexible who is on the list above him becomes full-time, he goes ahead of him on the seniority register. So that any given point in time when they're converted to full-time status, they have bidding rights by virtue of their seniority which is senior to this individual. Until that happens, he has a right to bid. But his seniority, not just for bidding but for other purposes under the Agreement, is one day junior to the junior part-time flexible. (See, Tr. II, p. 28).

Management's explanation of the difference between status and seniority, however, did not take into account the impact of part-time flexible seniority for conversion to full-time regular status. Inevitably, reassigning a former supervisor to full-time regular status impedes the advancement a part-time flexible employe could, otherwise, have expected to occur.

The Employer's position, in effect, has been that conversion to full-time regular status is not an automatic right for part-time flexible employes. The National Agreement determines the order in which part-time flexible employes are

converted, but it does not guarantee that they will automatically be converted to the first full-time regular vacancy. Although this is a potentially valid construction of the agreement, Section 522 of the P-11 Handbook narrow this possible construction of the agreement. It states:

> Promotions to positions where full time employees and part-time flexible employees are authorized are usually to part-time flexible positions. A full-time regular position is not normally filled by promotion, reinstatement, reassignment, transfer or appointment if qualified part-time flexible employees of the same designation or occupational code are available for conversion to the position. Part-time flexible employees must be changed to full-time regular positions within the installation in the order specified by any applicable collective bargaining agreement. (See Employer's Exhibit No. 33, emphasis added.)

In other words, the parties' agreement, pursuant to Article 19, makes clear that the norm is to fill full-time regular vacancies from the ranks of part-time flexible employes. This provision does not preclude filling vacancies from other than the ranks of part-time flexible employes. It, however, does establish that the Employer does not have unfettered discretion to determine the status of a reassigned supervisor. The point is that this language in the P-11 Handbook, which has been incorporated into the agreement through Article 19, places the burden on management to establish why it is reassigning a supervisor to full-time regular status, if such reassignment impairs seniority rights of part-time flexible employes. This construction is consistent with the overall contractual framework of protecting important rights of seniority for bargaining unit members. As the

United States Supreme Court has recognized,"more than any other provision of the collection agreement . . . seniority affects the economic security of the individual employee covered by its terms." (See, Franks v. Bowman Transportation Co., Inc., 424 U.S. 747, 766 (1976)).

In view of this interpretation of the parties' agreement and P-11 Handbook, the Employer has failed to justify its decisions to place former supervisors into full-time regular positions in Case Nos. H7N-2A-C 4340 (St. George, Utah); H7N-2U-C 4618 (Clifton Heights, Pennsylvania); H7N-5K-C 10423 (Fairfax, Virginia); and H4N-5N-C 41526 (Santa Clara, California). In the case from St. George, Utah, management reassigned a former carrier who had been a supervisor for more than two years as a full-time regular employe, even though he was placed at the bottom of the seniority list so that converted part-time flexible employes would have senior bidding rights to his after their conversion. In that case, the former supervisor should have been placed on part-time flexible status, and the unassigned regular position created for him should have been filled as a reserve position.

In the Clifton Heights, Pennsylvania case, the former carrier who was demoted to a junior carrier at a different installation was given full-time regular status. Under Article 41 of the National Agreement, transferring to a different installations obliterates accumulated seniority rights regardless of how long the supervisor has been out of the craft. The agreement states that:

> Seniority is computed from date of appointment in the Letter Carrier Craft and continues to accrue so long as service is uninterrupted in the Letter Carrier Craft in the same installation, except as otherwise specifically provided. (See, Joint Exhibit 1(D), p. 108, emphasis added).

In other words, the reassigned supervisor should have been reassigned to a different office, and the senior part-time flexible employe at the Clifton Heights facility should have been promoted to fill the vacancy.

In the Fairfax, Virginia case, Article 41.2(A)(2) also applied. The former carrier should have lost his seniority because he transferred to a different office as a supervisor. He should have been reassigned as a junior part-time flexible employe.

The case from Santa Clara, California presented an unresolved fact. Did the reassigned supervisor's Letter of Resignation ever go into effect, and, consequently, should he have been considered a "rehire?" That particular case needs to be remanded to the parties for consideration of this factual issue, and a determination consistent with this decision should be reached.

In the case from Laramie, Wyoming, the grievant served as a supervisor for less than two years. Then, he returned to the craft. All the time was spent at the same installation. The Employer reassigned him as a part-time flexible employe, but he had not lost his seniority rights and should have been reassigned as a full-time regular worker. He must be made whole for any losses.

AWARD

Having carefully considered all evidence submitted by the parties concerning this matter, the arbitrator concludes that the grievances should be sustained in a manner consistent with this report, recognizing the need to remand Case No. H4N-5N-C 41526 for a factual determination and ultimate decision consistent with this award. It is so ordered and awarded.

Respectfully submitted,

Carlton J. Snow
Professor of Law

Date: August 13, 1990