C#10343

NATIONAL ARBITRATION PANEL

In the Matter of the Arbitration between UNITED STATES POSTAL SERVICE and NATIONAL ASSOCIATION OF LETTER CARRIERS and AMERICAN POSTAL WORKERS UNION Intervenor	GRIEVANT: PRESIDENT, NALC BRANCH 462 CASE NO. H7N-3D-C 22267

BEFORE: Richard Mittenthal, Arbitrator

APPEARANCES:

For the Postal Service:	L. G. Handy Manager, Labor Relations Salt Lake City, Utah
For the NALC:	Richard N. Gilberg Attorney (Cohen Weiss & Simon)
For the APWU:	Darryl J. Anderson Attorney (O'Donnell Schwartz & Anderson)

Place of Hearing: Washington, D.C.

Date of Hearing: July 18, 1990

Date of Post-Hearing Briefs: October 17, 1990

AWARD: The grievance is denied.

Date of Award: October 26, 1990

Richard Mittenthal
Arbitrator

BACKGROUND

This grievance involves an apparent conflict between Management's obligation under Article 7, Section 3 to maintain a staff of no less than 90 percent full-time employees and Management's obligation under Article 12, Section 5 to withhold filling vacancies in full-time positions in order to protect employees who are soon to lose their positions because of technological change. NALC insists that Article 7, Section 3 should take precedence in this situation and that a violation of the 90-10 staffing ratio cannot be excused because of anything in Article 12, Section 5. The Postal Service disagrees. It urges that Management's action in this case served to recognize both obligations and that so long as Management fills the withheld positions within a reasonable time no violation has occurred. APWU has intervened and takes essentially the same position as the Postal Service.

Article 7, Section 3 concerns "Employee Complements." It reads in part:

> A. The Employer shall staff all postal installations which have 200 or more man years of employment in the regular work force as of the date of this Agreement with 90% full-time employees.
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> B. The Employer shall maximize the number of full-time employees and minimize the number of part-time employees who have no fixed work schedules.
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> C. A part-time flexible employee working eight (8) hours within ten (10), on the same five (5) days each week and the same assignment over a six month period will demonstrate the need for converting the assignment to a full-time position...

The "regular work force" in a postal installation consists of full-time employees and part-time employees. There are more than 400 installations which meet the "200 or more man years of employment" standard. Ninety percent of the bargaining unit personnel in each such installation, referring to the total work force in the NALC, APWU and Mail Handlers units, must be full-time employees. Hence, NALC (or APWU) cannot insist that 90 percent of the NALC (or APWU) bargaining unit at a particular installation consist of full-time employees. Management is free to divide up its full-time force in whatever way it sees fit so long as it satisfies the overall 90 percent requirement.

Article 12, Sections 4 and 5 are entitled "Principles of

Reassignments" and "Reassignments", respectively. They read in part:

> Section 4. A. A primary principle in effecting reassignments will be that dislocation and inconvenience to employees in the regular work force shall be kept to a minimum, consistent with the needs of the Service. Reassignments will be made in accordance with this Section and the provisions of Section 5 below...
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> Section 5. A. Basic Principles and Reassignments
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> When it is proposed to:
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> 4. Reassign within an installation employees excess to the needs of a section of that installation;
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> 5. Reduce the number of regular work force employees of an installation other than by attrition; ...
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> B. Principles and Requirements
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> 1. Dislocation and inconvenience to full-time and part-time flexible employees shall be kept to the minimum consistent with the needs of the Service.
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> 2. The Regional Postmasters General shall give full consideration to withholding sufficient full-time and part-time flexible positions within the area for full-time and part-time flexible employees who may be involuntarily reassigned.
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> 3. No employee shall be allowed to displace, or "bump" another employee, properly holding a position or duty assignment.
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> 4. Unions affected shall be notified in advance (as much as six (6) months whenever possible), such notification to be at the regional level, except under A4 above, which shall be at the local level...

This case arose in the Huntsville, Alabama installation which meets the "200 or more man years..." standard.

Huntsville was, in other words, subject to the 90-10 staffing ratio set forth in Article 7, Section 3. Management learned in early January 1989, perhaps sooner, that Huntsville was scheduled to receive a multiposition flat sorting machine (MPFSM) in late May 1989. It notified the affected Unions by letter dated January 18, 1989. That letter stated:

> The Huntsville...Post Office will receive a MPFSM on May 25, 1989. Current staffing will have to be reduced by twenty-five...full-time manual Clerk Craft assignments. At the current attrition rate, it is projected that approximately eight full-time manual Clerks will be lost by the May 25 date.
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> Accordingly, approximately seventeen...full-time manual Clerk Craft assignments will be excess to the needs of...Huntsville... It is not known how many of these seventeen will become [will be able to qualify as] MPFSM Operators; therefore, it is necessary to withhold full-time assignments in the Carrier Craft and Mail Handler Craft within the Huntsville Office. It will also be necessary to withhold vacancies in the Clerk Craft in offices within 100 miles of Huntsville in accordance with the provisions of Article 12.
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> Reassignment and excessing will be in accordance with the provisions of Article 12...

Thereafter, as anticipated, full-time vacancies arose in the Carrier craft. They were not filled. They were withheld by Management because it thought it was required by Article 12, Section 5 to make provision for those clerks who were to be displaced by the introduction of the MPFSM. The failure to fill these vacancies meant a decrease in the number of full-time employees. And, at some point after January 18, 1989, the number of full-time people in relation to part-time people fell below the 90-10 staffing ratio dictated by Article 7, Section 3. Management conceded, for example, that as of May 5, 1989, full-time employees represented 87.9 percent of the regular work force. That was eleven fewer full-time employees than would have been necessary under the 90-10 ratio.

NALC, Branch 462, grieved on May 27, 1989, complaining that Huntsville "is out of compliance with Article 7, Section 3 by at least 11 employees and has been since May 5, 1989." It referred also to a National Memorandum of Understanding (MOU) dated April 4, 1989, which stated in part:

> Any installation with 200 or more man years of employment in the regular work force which fails to maintain the 90/10 staffing ratio in any accounting period, shall immediately convert and compensate the affected part-time employee(s) retroactively to the date which they should have been converted...

NALC urged that Management was required to fill full-time carrier vacancies (i.e., the withheld assignments) with part-time flexible carriers whenever the number of full-time people fell below 90 percent. It asserted that Management could not ignore its duty under Article 7, Section 3, in such circumstances, on the basis of some future anticipated displacement of full-time clerks. Its position seems to be that Management's obligation under Article 7, Section 3 takes precedence over Management's obligation under Article 12, Section 5.

The MPFSM was apparently installed in Huntsville on June 1, 1989. It is not clear from the evidence when clerks began to be displaced on account of the new equipment. However, Management says it started to fill full-time carrier vacancies (i.e., the withheld assignments) in early May 1989 and had made thirteen conversions from part-time flexible clerk to full-time carrier by June 3, 1989. By then, full-time employees represented 90.3 percent of the regular work force.

For purposes of this dispute, the parties appear to assume that at various times between January 18 and late April 1989, the number of full-time employees at Huntsville fell below the 90 percent dictated by Article 7, Section 3. The issue is whether, at such times, Management was required to convert part-time flexible carriers to full-time carrier vacancies in such numbers as to bring the full-time complement back to 90 percent or whether Management was free to withhold such full-time carrier vacancies in order to accommodate clerks who were later to be displaced because of the installation of new equipment.

The Postal Service insists that there has been no violation of the National Agreement. It believes that the full-time carrier vacancies were properly withheld pursuant to Article 12, Sections 4 and 5, that Management filled these vacancies and returned to a 90-10 staffing ratio within a reasonable period, that Management cannot be considered to have violated Article 7, Section 3 in these circumstances, and that this same argument has been upheld by national and regional arbitrators in prior cases. APWU takes much the same position.

DISCUSSION AND FINDINGS

I - Arbitration Precedent

Prior arbitration awards have dealt with the inter-relationship between Article 7, Section 3 and Article 12, Section 5. The Postal Service alleges that these awards concerned the very issue now before me, that they were decided in Management's favor, and that they therefore should dispose of the present grievance. NALC, however, alleges that those awards are distinguishable from the present case.

Consider first Regional Arbitrator Holly's ruling in October 1972. There, a full-time carrier vacancy developed as a result of a retirement. Management conceded that the vacancy had to be filled but withheld the assignment because clerks were later to be displaced from their jobs because of the introduction of Area Mail Processing (AMP). A grievance was filed on behalf of a part-time flexible carrier who would have filled the vacancy at that time had Management chosen to fill it. NALC relied on Article 7, Section 3, specifically, Management's obligation to "maximize the number of full-time employees and minimize the number of part-time employees..." It argued that this maximization clause meant that Management had to fill this vacancy immediately, as soon as it arose. The Postal Service emphasized its obligation under Article 12, Section 5 to withhold full-time assignments for the benefit of clerks who were to be displaced on account of AMP.

Holly denied the grievance. He reasoned that NALC had a right to insist on maximization (i.e., a right to have the full-time vacancy filled) "within a reasonable time period ...", that Management likewise had a right to withhold filling this full-time vacancy in order to protect employees who were soon to be displaced, that such withholding "cannot be extended without limit, else the maximization clause would be rendered meaningless", that any withholding of this kind must be "reasonable", and that Management had indeed behaved "reasonably" under the circumstances of that case. He explained his point in these words:

> ...The acceptance of the Union's contention that the maximization clause necessitates the immediate filling of a vacated full-time position would render the position withholding clause meaningless. It must be presumed that the parties intended to give meaning and substance to Article XII, [Section 5]B,2 of their Agreement. Obviously, their intent was to give Management the right to withhold sufficient full-time regular and part-time

flexible positions within the area for employees who may be involuntarily reassigned. They agreed to this withholding because of their stated desire to minimize dislocations and inconvenience to employees.

* * *

...[T]he parties intended to permit the withholding of positions for the previously indicated purpose. Hence, it is apparent that withholding positions for the purpose of minimizing the dislocations of the AMP program was in keeping with this intent and was reasonable. In other words, when Management knew that the AMP program would result in the displacement of clerks it had the right to withhold vacated positions until the displacement occurred... (Emphasis added)[1]

Consider next National Arbitrator Gamser's ruling (Case No. NC-E-16340) in December 1979. There, full-time carrier vacancies developed through retirements over a twelve-month period. Management conceded that these vacancies had to be filled but withheld the assignments because clerks were later to be displaced from their jobs because of the introduction of a multiposition letter sorting machine (MPLSM). A grievance was filed on behalf of carriers who would have filled the vacancies during this period had Management chosen not to withhold such assignments. NALC relied on Article 7, Section 3, the maximization language cited earlier, and argued that the withholding of these assignments "was improper and for too long a period of time." The Postal Service stressed its obligation under Article 12, Section 5 to withhold full-time assignments for the benefit of clerks who were to be displaced on account of the MPLSM.

Gamser denied the grievance. He recast the Article 7, Section 3 question in different terms. He noted the admission of one NALC witness that the maximization clause "addresses the issue of how many full-time assignments are needed in a particular installation"; he then observed that there was "no dispute between the [parties]...that full-time positions were vacant because of stipulated retirements" and "no dispute about the 'maximization' of regular full-time duty assignments." His conclusion apparently was that Article 7,

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[1] Another award to the same effect was issued by Regional Arbitrator Rotenberg in February 1986, Case No. CIN-4B-C 31758.

Section 3 dealt with the number of full-time assignments rather than the number of actual full-time employees. He reasoned that inasmuch as the number of assignments met the maximization criteria, the only issue to be decided was "whether the Postal Service could delay filling such vacant full-time positions for a period of time in anticipation of an obligation imposed..." by Article 12, Section 5 to provide employment for others who are expected to be displaced.

Gamser went on to rule that, on the facts before him, the withholding of full-time carrier vacancies for twelve months was not a violation of Article 7, Section 3. He relied heavily on the Holly award:

> The findings and conclusions of Arbitrator Holly are basically sound and based upon long accepted principles of contract language construction and interpretation. There is no question that [Article 12, Section 5]...of the National Agreement imposed upon Management an obligation to anticipate dislocations which might occur and to withhold full-time vacancies for the purpose of preserving as many opportunities for regular full-time employees to avoid the dislocation of moving out of the area by bidding into such full-time positions when they were forced out of their regular positions. Such a requirement was agreed to by the parties to several previous national negotiations, regardless of the craft or crafts represented on the union side of the bargaining table, because both labor and management recognized that full-time employees, in this instance, were members of a career work force, with tenure and stability of employment to be protected wherever possible, with rights which superseded those with a less protected career status regardless of craft. That is obviously why the provisions of...[Article XII, Section 5 and its predecessor provisions]...did not impose a restriction upon the Area Postmaster General to withhold vacant full-time positions only for the benefit and protection of employees who are members of the same craft as that in which the vacancy exists. (Emphasis added)

II - Significance of Awards

The fact situations in these earlier awards and the fact situation in the present case are much the same. Full-time carrier vacancies occurred; Management knew that full-time clerks were going to be displaced later due to a technological

or operational change; and Management then withheld these assignments (i.e., did not fill such vacancies) in order to provide job opportunities for those who were to be displaced. NALC grieved, asserting that such carrier vacancies could not be withheld but had to be filled as they occurred. Had the grievances been granted, part-time flexible carriers would have filled these vacancies and clerks who were displaced later would have had few, if any, opportunities to fill full-time jobs in the area in which they worked.

Holly and Gamser held in effect that Management was obliged to fill these full-time vacancies under the maximization language of Article 7, Section 3. Holly held that Management also had the "right" to withhold such vacancies under Article 12, Section 5 in order to protect clerks who were going to be displaced. Gamser went further and held that Management had an "obligation" to withhold such vacancies under Article 12, Section 5 in these circumstances. Both arbitrators resolved this conflict by stating that maximization had to be accomplished within a reasonable time and that Management could delay maximization for a substantial period in order to exercise its withholding "right" or to satisfy its withholding "obligation." Their opinions plainly suggest that Management's obligation to maximize would ordinarily have to be complied with at the time it arose.[2]

NALC does not contend that these awards were in error. Its position instead is that these awards are truly distinguishable and should not be deemed binding on the arbitrator in the present case.

There is one difference here. In the Holly and Gamser cases, NALC relied on the maximization language in Article 7, Section 3, namely, "The Employer shall maximize the number of full-time employees and minimize the number of part-time employees..." NALC did not rely on the 90-10 staffing ratio found in the first sentence of Article 7, Section 3. It could

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[2] Note that Gamser expressed this obligation in terms of the number of full-time assignments rather than full-time employees. That view seems inconsistent with the language of Article 7, Section 3, with my 1988 award in Case Nos. H4C-NA-C 77 and H4N-NA-C 93, and with the parties' 1989 MOU. It is the number of full-time employees in the regular work force which is the basis for determining compliance with Article 7, Section 3. What is important for purposes of this case, however, is that Gamser recognized that the maximization language in this provision places a continuing obligation on Management to maximize full-time assignments.

not then have invoked this staffing ratio in the Holly case. For that dispute arose in Stillwater, Oklahoma, a postal facility which did not have "200 or more man years of employment..." and hence was not subject to the 90-10 staffing requirement. NALC could have invoked 90-10 in the Gamser case. For that dispute arose in Altoona, Pennsylvania, a postal facility which met the "200...man years..." test and hence was subject to the staffing ratio. But, whatever the reason, NALC chose to base its argument there on the maximization language rather than the staffing requirement.

The instant case deals with the Huntsville, Alabama postal facility. It does have "200 or more many years of employment..." and it is covered by the 90-10 staffing requirement. That is the requirement upon which NALC's argument rests. To this extent I am confronted here by something different than what Holly and Gamser were called upon to decide. The critical question concerns the significance, if any, of this distinction.

One other observation seems appropriate at this point. Article 12, Section 5B says that "dislocation...shall be kept to the minimum consistent with the needs of the Service" and that Management "shall give full consideration to withholding sufficient full-time...positions within the area for full-time ...employees who may be involuntarily reassigned." To be required to "give full consideration to..." withholding means that Management must seriously entertain the idea, the pros and cons of withholding, with the object of minimizing "dislocation." To be required to withhold is something quite different. Yet the Gamser award read Article 12, Section 5B to mean that Management is required to withhold. He referred to this as an "obligation" and a "requirement" rather than a "right."

Although Gamser's interpretation is open to question, I note that his ruling was made in 1979. The parties have negotiated several National Agreements between 1979 and May 1989 when the instant grievance was filed. They made no changes, relevant to this dispute, in the language of Article 12, Section 5. They apparently made no effort to nullify or alter the effect of the Holly and Gamser awards. It is fair to presume from this history that the parties accepted Gamser's interpretation of Article 12, Section 5. I must accept that interpretation as well.

III - The Critical Question

The prior discussion shows that the maximization requirement of Article 7, Section 3B must defer to the withholding

obligation of Article 12, Section 5. Maximization, in other words, does not demand the immediate filling of full-time carrier vacancies when Management is at the very same time obliged by Article 12, Section 5 to withhold those vacancies in order to protect clerks who are soon to be displaced because of some technological or operational change. NALC seems to accept this concept as a product of the earlier awards. The issue here is whether the 90-10 staffing requirement of Article 7, Section 3A must likewise defer to the withholding obligation of Article 12, Section 5. I believe it must. The 90-10 staffing requirement is a kind of maximization formula, expressed in concrete terms, for the larger postal facilities. If maximization under Section 3B must temporarily give way to the withholding obligation, as NALC concedes, there is no sound reason why 90-10 staffing under Section 3A should not similarly give way to the withholding obligation. It makes no sense to provide an entirely different measure of withholding protection to employees depending on the size of their postal facility.

Management's obligations to maximize under Article 7, Section 3 and to withhold under Article 12, Section 5 cannot be reconciled if NALC is correct in urging that the 90-10 staffing ratio must always be maintained. Strict compliance with this staffing ratio would leave no room whatever for withholding. For the immediate conversion of employees to full-time status as contemplated by the staffing ratio would mean, as a practical matter, that no withheld carrier jobs would ever be available to displaced clerks. The only way Management could effectively withhold would be to have a staffing ratio in which full-time employees were well in excess of 90 percent of the regular work force. But the parties could hardly have intended to condition Management's ability to meet its Article 12, Section 5 obligations upon its willingness to maintain something more than a 90-10 staffing ratio.

On the other hand, strict compliance with the withholding obligation would leave room for maintenance of the staffing ratio. Vacancies could be withheld in appropriate circumstances for a reasonable period so long as Management was at the 90-10 staffing ratio at the end of this period. Both of Management's obligations could thus be satisfied subject only to a reasonable delay in filling the withheld vacancies. Such a conclusion comes as close as possible to giving full effect to the conflicting requirements of the National Agreement.

The MOU does not compel a different conclusion. Its terms relate to the "remedy" for past and future violations of

Article 7, Section 3A. It did not change the language or purpose of this provision. It did not intend to nullify the effect of the Holly and Gamser awards. At least there is no evidence in the record of any such intention. The MOU would be relevant only at the point at which the arbitrator found a violation of Article 7, Section 3A. For the reasons expressed in this opinion, I do not find a violation.

On the facts before me, Management clearly had good reason to withhold carrier vacancies in order to protect clerks who were going to be displaced because of the introduction of a MPFSM. Management fell below the 90-10 staffing ratio for only a brief period but this occurred only because of Management's attempt to comply with its withholding obligation. The delay in filling the withheld assignments was evidently no more than a month or two. There was no violation of Article 7, Section 3A.

AWARD

The grievance is denied.

Richard Mittenthal, Arbitrator