C-20485

National Arbitration Panel

In the Matter of Arbitration	)	
	)	
between	)	
	)	
United States Postal Service	)	Case No. H7C-NA-C 82
	)	
and	)	
	)	
American Postal Workers Union	)	

Before: Shyam Das

Appearances:

For the Postal Service:	Lori J. Dym, Esquire
For the APWU:	Anton Hajjar, Esquire
Place of Hearing:	Washington, D.C.
Dates of Hearing:	July 29, 1999 October 26, 1999
Date of Award:	March 21, 2000
Relevant Contract Provision:	Article 12.5.C.8
Contract Year:	1987-1990
Type of Grievance:	Contract Interpretation

Award Summary

The issue is whether the phrase "in excess of the part-time flexible quota for the craft", and, more particularly, the term "quota" found in Article 12.5.C.8 has any meaning or is an obsolete relic. The Union contends that the quota language is part of the Agreement, and the Arbitrator is not empowered to ignore it. The Postal Service argues that this language has had no meaning since Postal Reorganization in 1971, when the former statutory staffing quota referred to in the predecessor provision of the 1968 Agreement was rescinded.

The evidence as to bargaining history and the consistent and accepted application of Article 12.5.C.8 since 1971 establishes that the PTF quota language has no current meaning, and has had none since 1971.

Shyam Das, Arbitrator

This National level case involves a grievance filed in 1990 under the 1987 to 1990 National Agreement. The issue is whether the phrase "in excess of the part-time flexible quota for the craft", and, more particularly, the term "quota", found in Article 12.5.C.8 has any meaning or is an obsolete relic.

Section 5 of Article 12 deals with reassignments. Subsection C.8 states as follows:

> 8. Reassignment - Part-time Flexible Employees in Excess of Quota (Other Than Motor Vehicle)
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> Where there are part-time flexible employees in excess of the part-time flexible quota for the craft for whom work is not available, part-time flexibles lowest on the part-time flexible roll equal in number to such excess may at their option be reassigned to the foot of the part-time flexible roll in the same or another craft in another installation.
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> a. An excess employee reassigned to another craft in the same or another installation shall be assigned to the foot of the part-time flexible roll and begin a new period of seniority.
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> b. An excess part-time flexible employee reassigned to the same craft in another installation shall be placed at the foot of the part-time flexible roll. Upon change to full-time from the top of the part-time flexible roll, the employee's seniority for preferred assignments shall include the seniority the employee had in the losing installation augmented by part-time flexible service in the gaining installation.

c. A senior part-time flexible in the same craft or occupational group in the same installation may elect to be reassigned in another installation in the same or another craft and take the seniority, if any, of the senior excess part-time flexible being reassigned, as set forth in a and b, above.

d. The Postal Service will designate, after consultation with the affected Union, vacancies at installations in which excess part-time flexibles may request to be reassigned beginning with vacancies in other crafts in the same installation; then vacancies in the same craft in other installations; and finally vacancies in other crafts in other installations making the designations to minimize relocation hardships to the extent practicable.

e. Part-time flexibles reassigned to another craft in the same installation shall be returned to the first part-time flexible vacancy within the craft and level from which reassigned.

f. Part-time flexibles reassigned to other installations have retreat rights to the next such vacancy according to their standing on the part-time flexible roll in the losing installation but such retreat right does not extend to part-time flexibles who elect to request reassignment in place of the junior part-time flexibles.

g. The right to return is dependent upon a written request made at the time of reassignment from the losing installation and such request shall be

honored unless it is withdrawn or an opportunity to return is declined.

(Emphasis added.)

This case involves the meaning, if any, of the underlined language in the 1987 National Agreement[1].

Prior to the 1971 Postal Reorganization Act (PRA), the scope of collective bargaining between the parties was relatively limited. Many terms and conditions of employment were governed by federal law. Starting in the 1930s, Congress regulated the ratio of "career substitute" to "regular" employees in the various crafts. The statutory quota just prior to PRA was one career substitute to five regular employees. (Former Title 39, §3302.) Article XII of the 1968 collective bargaining agreement, in effect immediately prior to PRA, contained lengthy and complex provisions relating to reassignments, including a subsection (C.8) essentially identical to Article 12.5.C.8, as quoted above, except that: (1) it referred to "career substitute" and "regular employees"; and (2) the words "legal substitute" appeared before the word "quota" in the first sentence of that subsection. The parties agree that the term "legal substitute quota" referred to the 1:5 ratio then mandated by federal law. The law establishing that quota was rescinded in 1971 under PRA.

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[1] The language of Article 12.5.C.8 has continued unchanged in all subsequent National Agreements.

Following PRA, the parties negotiated the 1971-1973 National Agreement. They agreed upon new employee categories, including "part-time flexible" (PTF) and regular "full-time" employees, and agreed that postal installations which have 200 or more man years of employment will be staffed with 90% full-time employees.[2] The parties were eager to conclude an agreement by July 1, 1971 as a contract bar, and they agreed to adopt or carry forward a number of prior regulations and provisions of the 1968 Agreement without substantive change, including Article XII governing reassignments. Under Appendix A of the 1971 Agreement, those continued regulations and provisions that previously had applied to substitute employees were made applicable to PTFs and those that had applied to career annual rate regular employees were made applicable to regular full-time employees.

The parties signed off on a "working text" of the 1971 Agreement, which included the provisions referred to in the preceding paragraph. A jointly agreed to printed version of the 1971 Agreement was never prepared. The Union printed its own version of that Agreement, in which it included the actual text of the provisions of the 1968 Agreement which the parties had agreed to carry over, with the agreed to substitution of employee categories. The Union's printed version of Subsection

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[2] This staffing quota (Article 7.3.A) has been continued up to the present time, as has the provision (Article 8.8) under which PTFs who work in a facility with 200 or more man years of employment per year are guaranteed 4 hours of work per two-week pay period, and PTFs at other facilities are guaranteed 2 hours of work per pay period.

C-8 of Article XII began as follows: "When there are part-time flexibles in a craft for whom work is not available...." This version, in addition to changing "career substitute" to "part-time flexible", completely deleted the reference to the "legal substitute quota", which no longer existed, and made no reference to any quota. Also deleted in this version were two other direct references to the substitute quota previously found in Subsections A.8 and C.1.d.[3]

Dennis Weitzel, who was one of the chief negotiators for the Postal Service in the 1973 negotiations that led to the 1973-1975 National Agreement, testified that there was tremendous pressure to get an agreement by the expiration date of the 1971 Agreement to avoid a possible work stoppage. The focus was on economic issues, and an agreement was reached by that date. No substantive changes were made to Article XII (Reassignments), which had been carried forward from the 1968 to the 1971 Agreement. The text of Article XII was placed in Appendix A of the 1973 Agreement, which stated that there were no substantive changes to Article XII, but that the terminology had been updated. Weitzel testified that the parties did not have any substantive discussion regarding Article XII, but simply substituted designated employee categories, in accordance with Appendix A of the 1971 Agreement. The text of the first

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[3] Dennis Weitzel, who at the time was a Labor Specialist for the Postal Service, testified that then Union Director of Industrial Relations Don Dunn told him that the Union attempted to eliminate obsolete terminology in its printed version of the 1971 Agreement.

paragraph of Subsection C.8 of Article XII in Appendix A of the 1973 Agreement substituted the term "part-time flexible" for "career substitute" and deleted the word "legal", as follows:

> Where there are ~~career substitute~~ *part-time flexible* employees in excess of the ~~legal substitute~~ *part-time flexible* quota for the craft for whom work is not available...."

The text of this provision, now Article 12.5.C.8, has remained unchanged in all subsequent National Agreements.

UNION POSITION

The Union asserts that the narrow issue in this case is whether the "quota" language in Article 12.5.C.8 has any current meaning or is a "mere curiosity" or a "fossil of the dead past". The Union stresses that the actual application of the quota language, if it is found to have some current meaning, is not at issue in this case. In correspondence with the Postal Service preceding this arbitration, the Union did express its position that the quota in Article 12.5.C.8, whatever it is, applies to Management's right to excess PTFs, but that is not the issue in this case.

The Union contends that the quota language is part of the Agreement, and the Arbitrator is not empowered to ignore it. It is a fundamental canon of contract interpretation that no term in a contract is to be considered superfluous. There is no dispute that the word "quota" which was carried over from the

pre-PRA 1968 Agreement came from the old federal statute that mandated a staffing ratio of no more than one career substitute employee to five regular employees. The Union stresses that in 1971 and later the parties did not merely copy the text of Subsection C.8 in Article XII of the 1968 Agreement, but changed the text to reflect the new categories of employees. Moreover, by deleting the word "legal" preceding the word "quota", which was retained, they clearly recognized that the old staffing law no longer was in effect. Therefore, it must be concluded that the parties "borrowed" the quota, which in earlier contracts had been a staffing rule, as a reassignment item.[4]

The Union notes that the PTF quota set forth in Subsection C.8 of Article 12.5 also is directly or indirectly referenced in Subsections A.8, C.1.d, C.2.b and C.6.b. Thus, it is clear this is not an isolated relic that escaped the parties' notice. Moreover, the parties have seen fit to continue to include the PTF quota language in every National Agreement since 1971.[5]

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[4] At the hearing, the Union also seemed to make the argument that even before PRA, the parties had agreed to apply the 1:5 legal staffing quota to the excessing of career substitutes under Article XII, thereby adopting it as an excessing quota, separate and apart from the staffing quota.

[5] The Union also maintains that weight should be given to the fact that in 1990 negotiations the Postal Service proposed to eliminate Section C.8. The Postal Service objected to evidence of this proposal being introduced on the grounds that it was made after this grievance was filed. In any event, the Postal Service's 1990 proposal involved a major revision and streamlining of Article XII, which both parties agree is extremely lengthy and complex. Based on the record as a whole,

The Union maintains that the PTF quota language is important. It is the Union's position that when there is a shortage of work for PTF employees in a particular office, Article 12.5.C.8 allows those PTFs to find opportunities for additional work hours (above the minimum guaranteed hours) in another office where there is room for them within the 1:5 quota, provided the office in which they currently work is staffed with PTFs in excess of the 1:5 quota. Although the Union insists that the language of Subsection C.8 clearly indicates this, it reiterates its position that the application of the quota is not an issue in this arbitration.

The Union argues that the Postal Service's evidence regarding past excessing of PTFs fails to establish a practice inconsistent with the existence of a PTF quota in Article 12.5.C.8. The Union, in this case, does not argue that this provision precludes excessing of PTFs, and there was no evidence, in any event, that shows whether the excessing cited by the Postal Service was or was not within the PTF quota. Moreover, such evidence does not refute the Union's position that Article 12.5.C.8 provides an option to certain PTFs wholly apart from involuntary assignments initiated by the Postal Service.

I find no convincing reason to conclude that this proposal implied that the Postal Service believed that the PTF quota language in Article 12.5.C.8 had any current significance.

POSTAL SERVICE POSITION

The Postal Service contends that the quota language in Article 12.5.C.8 is meaningless. The bargaining history shows that the parties did not intend to give this language any meaning since PRA, and that it ceased to have any meaning when the 1971 Agreement was agreed to. The Postal Service maintains that this obsolete language has remained in the Agreement because the parties had no incentive to eliminate it.

The Postal Service stresses that it has consistently applied Article 12.5.C.8 since 1971 without giving the quota language any meaning, and the Union, which was well aware of how that provision was applied, never protested prior to the filing of this grievance in 1990. As the Postal Service witnesses testified, the Postal Service has excessed PTFs under Subsection C.8 without giving any application to the quota language. When that has occurred, the excessed PTFs have an option to select among other jobs identified by the Postal Service for reassignment. The provisions in (a) through (g) in Subsection C.8 apply to the exercise of that option. Subsection C.8 does not provide PTFs an option to be reassigned or not, but only an option as to how they will be reassigned when excessed by Management.

The Postal Service points out that the Union's initially expressed position that the quota language in Article 12.5.C.8 limits Management's right to excess PTFs is inconsistent not only with past practice, but also with the

staffing criteria set forth in Article 7.3.A. If the Postal Service's right to excess PTFs applied only when the ratio of PTFs to full-time employees exceeded 1:5, which is 16.67%, the Postal Service would be out of compliance with the requirement in Article 7.3.A that it staff larger facilities (200 or more man years of employment) with 90% full-time employees.

The Postal Service insists that there is no support in the Agreement or past practice for the Union's other theory, first espoused (improperly) at the arbitration hearing. As explained by the Union, under that theory Article 12.5.C.8 grants PTFs the option to seek reassignment, with the seniority rights spelled out in that provision, at any location where the ratio of PTFs to full-time employees exceeds 1:5. This theory is inconsistent with the manner in which this provision has been consistently applied, and conflicts with the Craft Articles in Article 37, which are controlling in case of conflict under Article 12.5.B.10. PTFs who seek voluntary reassignment are not entitled to the protections afforded in Article 12.5.C.8, but are covered by the Transfer Memo referenced in Article 12.6. As a practical matter, this theory also would lead to absurd results, since most small offices are largely staffed by PTFs, who -- under this theory -- could all seek reassignment.

FINDINGS

Both parties have invoked arbitral precedent holding that a party may not raise a new issue for the first time at arbitration. In my view, however, the narrow issue to be

decided, as identified by both parties in their post-hearing briefs, was adequately raised by the Union and the Union was adequately apprised of Management's position on that issue prior to arbitration. Moreover, both parties were prepared to, and did, fully address that issue at the arbitration hearing and in their respective post-hearing briefs.

As previously stated, the issue is whether the phrase "in excess of the part-time flexible quota for the craft", and, more particularly, the term "quota" found in Article 12.5.C.8 has any meaning or is an obsolete relic. The Union, in essence, argues that the reference to the PTF quota must refer to the 1:5 ratio -- the pre-PRA legal staffing quota -- since that clearly is what the quota language in this provision referred to prior to PRA, and that language (with the appropriate deletion of the word "legal" and substitution of the new employee categories) was carried over in the 1971 and subsequent National Agreements. The only remaining question, as the Union sees it, is whether this PTF quota language has any current meaning. For the reasons set forth below, I conclude that the evidence establishes that it does not.

The normal presumption is that the parties intend all words used in an agreement to have some meaning and to be given effect. In this case, however, the record provides a convincing historical explanation for how the quota language in Article 12.5.C.8 (and the cited references to that quota in other subsections of Article 12.5) was carried over after PRA without any understanding or expectation by either party of its

continuing application, following rescission of the formerly referenced "legal substitute quota" and adoption of new contract provisions regarding PTF staffing and guaranteed work hours.

Dennis Weitzel credibly testified to the circumstances in which the parties in 1971 and 1973 agreed to carry forward without substantive change the existing provisions relating to reassignments, among other seniority provisions, and how after the 1973 Agreement was reached the parties simply went through those lengthy and complex provisions and changed the employee designations to match the new categories established in 1971. The word "legal" preceding "substitute quota" also was removed in Subsection C.8. Presumably, this was done either because it was considered part of the prior "substitute" employee designation or on the basis that the law establishing the staffing quota had been rescinded. While the parties obviously also could have removed the reference to "quota", they had agreed to adopt Article XII of the 1968 Agreement with "no substantive changes", and deletion of the quota reference reasonably might have been viewed as substantive, and not merely updating of terminology. In any event, there is nothing in the record to suggest that retention of the quota language reflected a belief by either party that it continued to have some specific meaning. Weitzel testified that the Postal Service negotiators considered it to be obsolete. While this was not communicated to the Union, the Union itself had indicated a similar belief that the "quota" was obsolete when it omitted any reference to a quota in its printed version of the 1971 Agreement.

Thereafter, as the Postal Service argues, there was no real incentive in subsequent contract negotiations to eliminate this quota reference, other than as part of a comprehensive revision of Article 12.5, such as the Postal Service proposed (unsuccessfully) in the 1990 negotiations. The record shows that in the almost two decades from 1971 to the filing of the present grievance in 1990, the quota language never has been treated as meaningful in the application of Article 12.5.C.8. The Union argues that the evidence of excessing of PTF employees during this period does not show whether the excessing was within or without the quota. But that evidence does suffice to show that the Postal Service did not apply or follow any quota, let alone the old 1:5 ratio which was incompatible with the 90% staffing requirement adopted in 1971. Moreover, there is evidence that both parties have recognized that the PTF quota language has had no meaning since 1971, and that, although not directly in issue here, it does not apply to the involuntary excessing of PTFs or provide a basis for PTFs to voluntarily excess themselves with the seniority rights provided for in Article 12.5.C.8 -- the two theories advanced by the Union as to how the quota language could be applied.

The Union offered no evidence to contradict the testimony of Postal Service witnesses that Management has involuntarily excessed PTFs under Article 12.5.C.8 without giving any application to the quota language therein, and that the options provided for in that provision have been afforded to excessed PTFs on those occasions. There also is no evidence that Article 12.5.C.8 ever has been applied to provide, or

previously has been considered to provide, an option to PTFs to elect on their own to be excessed under Article 12.5.C.8 based on the ratio of PTFs to full-time employees (quota) at their location.

Evidence of prior statements by top Union representatives provides significant additional support for the Postal Service's position. In an April 9, 1976 letter to Dennis Weitzel, then Director of Contract Analysis for the Postal Service, Emmet Andrews, then Director of Industrial Relations for the APWU, not only concurred with Weitzel's position that there is nothing in the language of Article 12.5.C.8 that precludes the involuntary reassignment of PTFs, but emphasized that employees "do not declare themselves excess", and stated that:

> Once a part-time flexible is declared excess, C8 provides some options which he may exercise if positions are declared available by management.

This statement of position was accepted by Weitzel, and is consistent with the Postal Service's position as to how it consistently has applied Article 12.5.C.8.

The Postal Service also presented its own minutes of a Clerk Craft negotiating session held on June 2, 1987, which indicate that Robert Turnstall, a Clerk Craft APWU official, asked Robert Templeton, the chief Postal Service negotiator in those Clerk Craft negotiations:

> What does "in excess of quota" mean on page 44 [Article 12.5.C.8 of the National Agreement]?

The minutes reflect that Templeton, who was a witness in the present arbitration, responded:

> There is no quota now and has not been since 1971. When the language was negotiated, the quota was one PTF for every five full-time employees.

The minutes indicate that Ken Wilson, then Director of the APWU Clerk Craft, next said "Okay", and the discussion turned to other matters.

Eleanor Williams, who at the time was a Labor Relations Executive in the Central Region, served in June 1989 on a joint Management-Union committee which developed guidelines on the requirements of Article 12. The Union members of the committee included James Williams, then APWU Central Region Coordinator, and two National Business Agents. Eleanor Williams testified that, in a discussion on Article 12.5.C.8, James Williams told her that the quota referred to in that provision was obsolete, and she agreed with him.[6] The jointly developed guidelines include the following "Note" with respect to Article 12.5.C.8:

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[6] APWU Executive Vice President William Burrus, who testified as to the Union's position in the present case, stated that James Williams, a long time Union official, had been his mentor on Article 12.

> The term "quota" comes from previous staffing practices. There is no longer any such quota, of course, and such reassignments are governed by the 90/10 requirements.

While these guidelines were not developed at the National level, they do reflect the understanding of top regional APWU officers responsible for administration of the collective bargaining agreement in their region -- an understanding that is consistent with all other evidence in the record regarding application of Article 12.5.C.8

The Postal Service also presented a document entitled "History Update - Article 12 - Excessing/Reassignment" that Eleanor Williams testified she received from the APWU's James Williams in connection with their participation on the joint regional committee on Article 12. This document indicates that it was authored by James Williams in November 1987. The section addressing Article 12.5.C.8 does not refer to any quota, and it includes the following:

> 1. Who is affected? Management does have the right to excess part-time flexible employees for whom work is not available.
>
> 2. What procedures will management use in excessing PTF clerks? The part-time flexibles lowest on the part-time flexible roll equal in number to such excessed may at their option be reassigned to the foot of the PTF roll in the same on [sic] another craft in

another installation. Although the excessing is involuntary, the selection of craft and installation is voluntary.

In conclusion, on the basis of bargaining history and the evidence as to the consistent and accepted application of Article 12.5.C.8 since 1971, when the prior legally mandated staffing quota was rescinded, I find that the PTF quota language in Article 12.5.C.8 has no current meaning, and has had none since 1971. It is an obsolete relic that cannot now be coaxed back to life or infused with new meaning simply because the words remain in the Agreement.

AWARD

For the reasons set forth in the above Findings, the PTF quota language in Article 12.5.C.8 has no current meaning. That language, and other references in Article 12.5 to such a quota, are obsolete relics.

Shyam Das, Arbitrator