C-22368

NATIONAL ARBITRATION PANEL

In the Matter of Arbitration	)	
	)	
between	)	
	)	
UNITED STATES POSTAL SERVICE	)	Grievance: Separating Casuals
	)	
and	)	Case No.: HOC-NA-C 12
	)	
AMERICAN POSTAL WORKERS UNION	)	
	)	
with	)	
	)	
NATIONAL ASSOCIATION OF LETTER CARRIERS (as Intervenor)	)	

BEFORE: Carlton J. Snow, Professor of Law

APPEARANCES: For the Postal Service: Mr. David Karro

For the APWU: Mr. Darryl Anderson

For the NALC: Ms. Susan Panepento
Mr. Keith Secular

PLACE OF HEARINGS: Washington, D.C.

DATES OF HEARINGS: March 14, 2000
June 7, 2000

POST-HEARING BRIEFS: February 26, 2001

AWARD

Having carefully considered all evidence submitted by the parties concerning this matter, the arbitrator concludes that the language of Article 12.5.C.5.a(2) allows the Employer discretion in separating casuals to the extent that the discretion is exercised in a manner consistent with this report and decision. Based on evidence presented to the arbitrator in this case, the Unions are not entitled to a nationwide remedy. It is ordered and awarded.

Respectfully submitted,

Carlton J. Snow
Professor of Law

Date: July 27, 2001

NATIONAL ARBITRATION PANEL

IN THE MATTER OF ARBITRATION BETWEEN UNITED STATES POSTAL SERVICE AND AMERICAN POSTAL WORKERS UNION WITH NATIONAL ASSOCIATION OF LETTER CARRIERS (as Intervenor) (Grievance: Separating Casuals) (Case No.: HOC-NA-C 12)	)	ANALYSIS AND AWARD Carlton J. Snow Arbitrator

I. INTRODUCTION

This matter came for hearing pursuant to a collective bargaining agreement between the parties effective from November 21, 1990 through November 20, 1994. Hearings took place on March 14 and June 7, 2000 in a conference room of the North Building of the United States Postal Service Headquarters located at L'Enfante Plaza in Washington, D.C.

The hearings proceeded in an orderly manner. The parties had a full opportunity to submit evidence, to examine and cross-examine witnesses, and to argue the matter. All witnesses testified under oath as administered by the arbitrator. Ms. Lisa Sirard and Mr. Peter K. Shonerd of Diversified Reporting Services, Inc. tape-recorded the proceedings and submitted a transcript of 371 pages. The advocates fully and fairly represented their respective parties.

Prior to hearings on the merits, the Employer challenged the procedural and substantive arbitrability of the disputes; and the arbitrator on November 24, 1999 issued an award finding the matter to be procedurally and substantively arbitrable. Consequently, the matter proceeded to hearings on the merit. The parties elected to submit the matter on the basis of evidence presented at the hearings as well as post-hearing briefs, and the arbitrator officially closed the hearing on February 26, 2001 after receipt of the final brief in the matter.

II. STATEMENT OF THE ISSUE

The issue before the arbitrator is as follows:

Does Article 12.5.C.5.a(2) of the agreement between the American Postal Workers Union and the Employer grant the Employer discretion in separating casuals when doing so will minimize the impact on the regular workforce? If there has been a contractual violation, what is an appropriate remedy?

III. RELEVANT CONTRACTUAL PROVISIONS

ARTICLE 12 - PRINCIPLES OF SENIORITY, POSTING AND REASSIGNMENT

Section 5.C.5. Reduction in the Number of Employees in an Installation Other Than by Attrition

a. Reassignments within installation. When for any reason an installation must reduce the number of employees more rapidly than is possible by normal attrition, that installation:

(2) Shall, to the extent possible, minimize the impact on regular workforce employees by separation of all casuals.

IV. STATEMENT OF FACTS

In this case, the Union argued that the Employer is permitting widespread violations of Article 12.5.C.5.a(2) to occur nationwide and that such continuing violations can be prevented by a national level arbitration decision. The dispute between the parties has deep roots. In 1991, Mr. William Burrus, APWU Executive Vice-president, discovered that the APWU's interpretation of language in Article 12.5.C.5.a(2) of the agreement between the APWU and the Employer was not in sync with management's interpretation and application of the labor contract. Consequently, he initiated discussions with Ms. Sherry Cagnoli, Assistant Postmaster General in the Labor Relations Department. On November 6, 1991, they began a correspondence about the matter in an effort to clarify the correct interpretation of the disputed provision.

The dispute went through years of discussions and negotiation. Ultimately, it became a formal grievance which the Employer rejected. When the parties were unable to resolve their differences, the matter proceeded to arbitration.

V. POSITION OF THE PARTIES

A. The Unions

The American Postal Workers Union (and the National Association of Letter Carriers as Intervenor) argue that, although the Employer now says it agrees with the Unions' interpretation of Article 12.5.C.5.a(2), widespread violations of the provision continue to occur throughout the nation. Accordingly, the Unions maintain that they are entitled to have the parties' stipulated understanding of the disputed contractual provision set forth in a national level arbitration award. Such a decision, then, can be used as a benchmark to adjudicate all pending grievances as well as continuing violations and future disputes. Hence, the Unions seek such a national award in this matter.

B. The Employer

The Employer argues that the Unions are not entitled to an interpretive award in this case because the parties do not disagree about the correct interpretation of the disputed contractual provision. The Employer argues that, when the APWU realized the Employer incorrectly understood

the nature of the problem at Step 4, the Union had an obligation to clarify its understanding of the labor contract. The APWU's failure to do so allegedly foreclosed its right to appeal to arbitration under Article 15.3.D of the labor contract.

The Employer also argues that the arbitrator is without authority to act in this matter because the Union is no longer seeking an interpretation of disputed contractual language. It is the belief of the Employer that the APWU, with the agreement of the NALC, is asking that the arbitrator rewrite negotiated language of the labor contract. Since such language allegedly is not the subject of dispute and does not constitute an interpretive issue, the parties' collective bargaining agreement does not authorize the arbitrator to act. Hence, the Employer urges that the grievance be denied.

VI. ANALYSIS

A. Context of the Dispute

The dispute before the arbitrator centers on Article 12.5.C.5.a(2). It states:

> When for any reason an installation must reduce the number of employees more rapidly than is possible by normal attrition, that installation:
>
> (2) Shall, to the extent possible, minimize the impact on regular workforce employees by separation of all casuals. (*See* Joint Exhibit No. 1, p. 52, emphasis added.)

The crux of the dispute revolves around the words "to the extent possible." The Unions argue that this language modifies the phrase "minimize the impact on regular workforce employees." According to the Unions' theory of the case, the Employer is left with no discretion when separating casual employees if such separation minimizes the impact on the regular workforce. On the other hand, the Employer believes that management retains discretion with regard to separating casuals if they are not separated due to operational requirements. Such reasoning led the Unions to conclude the Employer was arguing that the language "to the extent possible" modified the phrase "by separation of all casuals."

On the initial theory that the arbitrator was without jurisdictional authority, the Employer contested the procedural and

substantive arbitrability of the dispute; and hearings on this matter were held on July 13 and September 1, 1999. On November 24, 1999, the arbitrator concluded that there was a contractual basis for proceeding to the merits of the case.

At hearings on the merits, the Employer stated for the first time that it agreed with the Union's interpretation of Article 12.5.C.5.a(2) of the APWU's National Agreement. The parties agreed the language of Article 12.5.C.5.a(2) means:

> All casuals must be removed if it will eliminate the impact on regular workforce employees. The Employer must eliminate all casual employees to the extent that it will minimize the impact on the regular workforce.

With the ambiguity of the disputed language clarified, the Employer reasoned that the grievance was moot and immediately should be dismissed on the merits by the arbitrator. The Unions, on the other hand, argued that the Employer could not avoid an adverse decision by merely conceding the Unions' interpretation of the issue on the merits. The Unions continued to see a need for a decision on the merits because of the fact that the Employer allegedly has not uniformly applied this new interpretation of the agreement for the last eight years. The Employer insisted, however, that management always has applied the stipulated interpretation in its reassignment of excess regular workforce employees

nationwide and that it merely was confused over the years about the Unions' position in the matter.

B. Revisiting Arbitrability

At the hearings on the merits of the case, the Employer, in effect, once again raised issues with regard to the procedural arbitrability of the dispute. The Employer argued once again that it had not been given proper notice with regard to the fundamental issue in dispute and that, therefore, the grievance should be dismissed. Additionally, the Employer argued at the hearings on the merits that the Union did not comply with its obligation under the APWU-USPS agreement to clarify the disputed issue and to attempt to resolve the conflict at the lowest possible level. Those arguments constituted renewed challenges to the procedural arbitrability of the dispute.

The parties devoted two hearings exclusively to the issue of jurisdictional challenges to the arbitrator's authority in this matter. During the earlier hearings, the Employer had every opportunity to present evidence and raise arguments, and in fact did so, in an effort to forestall an

examination of the dispute on the merits. After receiving considerable evidence with regard to jurisdictional challenges and issuing an extensive report on threshold issues, the arbitrator decided in 1999 that the matter was both procedurally and substantively arbitrable. The initial award authorized the parties to proceed to the merits of the case. Since the precise issue of procedural arbitrability has been fully addressed, arguments now raised by the Employer with regard to jurisdictional challenges are precluded by the doctrine of res judicata; and the earlier jurisdictional award must be followed both because it has precedential value and also assures continuity of interpretation. It is binding on this arbitrator and the parties in an absolute sense.

C. A Need for a Decision on the Merits?

Alternatively, the Employer asserted the concept of mootness. According to the Employer, the dispute before the arbitrator is now moot because there no longer exists any controversy between the parties about the appropriate interpretation of the disputed provision in the APWU agreement. In the Employer's view, all the parties now agree with regard to

the meaning of Article 12.5.C.5.a(2). The Employer reasoned that, because management stipulated to the Unions' interpretation of the contractual language under review, the controversy is now moot; and the arbitrator is without any authority to issue a decision on the merits. Such a theory of the case, however, failed to be persuasive.

Arbitral authority under a grievance procedure devolves from a contract between parties. All an arbitrator is empowered to do is read and interpret words of an agreement. As Professor Theodore St. Antoine, past-president of the National Academy of Arbitrators, observed, "The arbitrator is the parties' officially designated 'reader' of the contract." (*See* 30 NAA 30 (1977).) This proposition means that an arbitrator must be subservient to no party but servant of all.

Article 15.1 of the APWU-USPS agreement states that a "grievance" is a disagreement "which involves the interpretation, application of or compliance with the provisions of this agreement." (*See* Joint Exhibit No. 1, p. 75.) Article 15.3.D states that:

> In the event of a dispute between the Union and the Employer as to the interpretation of this Agreement, such dispute may be initiated as a grievance at the Step 4 level by the President of the Union. (*See* Joint Exhibit No. 1, p. 81.)

Article 15.4.D further limits national level arbitration proceedings to "only cases involving interpretive issues" of the parties' negotiated agreement. (*See* Joint Exhibit No. 1, p. 87.)

The Union has pursued this dispute since 1991. During the ensuing decade, there have been numerous attempts to reach a negotiated settlement; but such efforts never came to fruition. Whether their inability to reach agreement with regard to the disputed language was caused by a misunderstanding of the issue or was due to shifts in the Employer's position is unclear from the evidence. What is clear, however, is that representatives of the parties have authority to settle disputes in accordance with Article 15 guidelines.

The fact that the parties did not settle the dispute during the last ten years indicates the existence of some level of a continuing dispute, if only abstractly. It matters little whether the parties were unable to resolve the conflict because they do not entirely agree on the meaning of the language, its application, or the Unions' entitlement to a remedy for alleged violations of the agreement. The fact that the parties were unable to enter into a settlement agreement shows the existence of a substantial dispute. Article 15 of the APWU-USPS agreement as well as authority inherent in NALC's status as an intervenor empower the arbitrator to resolve

contractual disputes inherent in the issues submitted to him. The point is that the Employer's current lack of disagreement with the Unions' contractual interpretation does not trigger the concept of mootness because there remain disputes regarding whether the Employer has applied the disputed provision in accordance with the stipulated agreement.

D. A Nationwide Interpretation?

The parties agreed that Article 12.5.C.5.a(2) means:

> All casuals have to be removed if it will minimize the impact on regular workforce employees. The Employer must eliminate all the casuals to the extent that it will minimize the impact on the regular workforce.

Despite presently agreeing on the interpretation of the disputed provision, the parties continue to disagree with regard to whether the Employer consistently acted in accordance with this interpretation when applying the contractual provision. The Employer insisted that the provision has been and is being applied in accordance with the parties' negotiated intent.

Mr. Brian Gillespie, the Employer's Executive Program Director of the Pacific Area, testified about 1973 contract negotiations when the parties first discussed excessing issues. He recalled the APWU

proposed changes to the National Agreement that included language requiring all casuals to be completely separated from the employee complement before any regular workforce employee could be reassigned. But the Union was unsuccessful in getting such a commitment codified into the National Agreement. The parties, however, agreed to four principles that were drafted into Section 4 of Article 12 in the agreement. They intended for the four principles to overarch the rest of Article 12.

As someone present at the main negotiation table in 1973, Mr. Gillespie offered the following observation about his work on Article 12:

> I think the language commits the Postal Service to look at its workforce and separate a casual if by doing that it will eliminate the need to reassign the full-time employee, because by and large we're only talking reassignments of full-time people. If it doesn't do that, if it doesn't eliminate it, if it merely defers it or doesn't really mitigate it, the Postal Service is entitled to keep the casual. (*See* Tr., June 7, 2000, 68.)

Later in 1975 the Employer issued a Regional Instruction on the subject of reassigning excess craft employees. Although it went out under the signatures of several Postmasters General, Mr. Gillespie actually drafted the Instruction. It explained the Employer's understanding of its obligations under Article 12.5.C.5.a(2). The Employer further codified its understanding in a publication entitled "Reference and Training Guide for Article 12: Reassignment Principles and Requirements," (*See* Employer's

Exhibit No. 1.) Mr. Gillespie insisted that postal officials at Headquarters consistently required managers to follow the policy as described in his testimony.

Mr. Robert Brenker, Headquarters Field Labor Relations Specialist, concurred with Mr. Gillespie's description of the policy and its application. He testified as follows:

> It has been continuously the same policy [as described by Vice-president Burrus] that if we can reduce casuals and save someone from being excessed, we would do it. If we can reduce them [casuals] and create full-time assignments, eight within nine or eight within 10 five days a week, we would do it. (*See* Tr. March 14, 2000, pp. 78-79.)

According to Mr. Brenker, management enjoys administrative discretion if its decisions only defer a regular workforce separation; and, in such circumstances, the Employeer is not required to separate a casual employee. In other words, the Employer understands its obligation to be that of separating a casual worker if doing so will eliminate a need to reassign a regular workforce employee. But if separation of a casual employee will only defer the reassignment of a regular workforce employee, then the Employer maintains that it is not contractually obligated to separate the casual worker.

Ms. Eleanor Williams, Regional Labor Relations Specialist, also testified that managers have found no ambiguity in the meaning and

application of the policy. She testified that the policy requires separation of casual employees if doing so prevents a reassignment of a regular workforce employee. She also stated that, before reassignments are made, the Union is issued an Impact Statement and given an opportunity to object. She insisted that it would be impossible, in view of the Impact Statements, for the Employer to violate Article 12.5.C.5.a(2) without the Unions' immediate knowledge. The parties agreed that Mr. Paul Driscoll, Headquarters Labor Relations Specialist, and Ms. Linda Schumate, Regional Labor Relations Specialist, would have testified in accordance with testimony from Mr. Brenker and Ms. Williams had they been called to do so.

E. A Dissenting Viewpoint

The Union vigorously challenged the Employer's claim of across-the-board conformity with the agreed interpretation of Article 12.5.C.5.a(2) when excessing regular workforce employees. Mr. James Burke, APWU Eastern Region Coordinator, testified that, as recently as April of 2000, the Employer notified the Union it would excess 144 clerks at

a Philadelphia, Pennsylvania installation. While the Employer's Impact Statement demonstrated an intent to excess this large number of regular workforce clerks, the number of clerk casuals, 182, was not being reduced. Additionally, the Union received written notice that 38 clerk positions were to be excessed from the South Jersey Processing and Distribution Center, as well as 465 clerks in the Allegheny area. Management told Union officials that there were no plans to eliminate any casuals from those facilities.

Mr. Leo Persails, APWU Central Region Coordinator, testified that, in April of 2000, management informed him of 78 clerk positions to be excessed from the Cincinnati Processing and Distribution Center. Yet, the Impact Statement indicated no change in the number of clerk casuals or any reduction in the number of clerk casual work hours. Although a March, 2000 Impact Statement covering the Columbus Processing and Distribution Center indicated that 54 clerks were to be excessed, there was no corresponding change in the number of clerk casuals or clerk casual work hours.

Mr. Terry Stapleton, APWU Southern Region Coordinator, testified about an Impact Statement concerning a reduction of regular workforce employees at the Houston Processing and Distribution Center.

This Impact Statement revealed that the number of casuals on the Employer's payroll remained the same as before management excessed regular workforce employees. Likewise, an Impact Statement from a Gulfport, Mississippi installation revealed that the number of casuals or casual hours were not being reduced, despite the fact that 19 regular workforce employees were scheduled to be excessed.

F. A Need for More Evidence

Testimony from the Union stood in stark contrast to the Employer's confident assertion of nationwide compliance with the agreed interpretation of Article 12.5.C.5.a(2). Yet, the Unions' evidence raised suspicions regarding how the Employer is applying the disputed contractual provision. But it did no more than raise suspicions. The Unions had the affirmative of the issue and needed to show by at least a preponderance of the evidence that there is a direct causal connection between the conflicting data and a violation of the parties' labor contract. Facts are stubborn things and must provide the basis for an interpretive decision. Speculation will not

suffice. While the evidence in this case was sufficient to raise suspicions, the Unions did not present evidence that demonstrated a specific contractual violation.

The arbitrator, for example, did not receive evidence that excessed regular workforce positions could have been retained had the Employer eliminated casuals. The parties agreed that the Employer was only obligated to separate casual workers if doing so would yield sufficient hours for a regular workforce clerk, that is, eight hours within nine or ten hours, five days a week. While the Union presented overwhelming evidence suggesting that regular workforce clerks are being separated without a corresponding reduction in casual clerks, the arbitrator received no clearcut evidence demonstrating that the retained casual hours could have resulted in the required configuration and, thus, would have required separation of the casuals in accordance with the parties' mutual interpretation of Article 12. Such evidence is needed not only to establish a contractual violation but also to ascertain damages, if a nationwide remedy were to be fashioned.

The totality of the record submitted to the arbitrator was not sufficient to establish that, while there now is uniformity in the parties' understanding of the disputed provisions, it was violated in this particular case. Nor was there sufficient evidence of harm to ascertain damages.

These are factual issues to be addressed on a case-by-case basis. It also must be established on a case-by-case basis whether or not the Unions should have been on notice of any previous contract violations.

AWARD

Having carefully considered all evidence submitted by the parties concerning this matter, the arbitrator concludes that the language of Article 12.5.C.5.a(2) allows the Employer discretion in separating casuals to the extent that the discretion is exercised in a manner consistent with this report and decision. Based on evidence presented to the arbitrator in this case, the Unions are not entitled to a nationwide remedy. It is ordered and awarded.

Respectfully submitted,

Carlton J. Snow
Professor of Law

Date: July 27, 2001