C-22742

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In the Matter of the National Arbitration Between

UNITED STATES POSTAL SERVICE (USPS)	)	
	)	
and	)	**S1N-3P-C-41285**
	)	**(Cary, NC)**
NATIONAL ASSOCIATION OF LETTER CARRIERS,	)	
AFL-CIO (NALC)	)	**City/Rural**
	)	**Jurisdictional Dispute**
and	)	**(Remedy Phase)**
	)	
NATIONAL RURAL LETTER CARRIERS'	)	
ASSOCIATION (NRLCA)	)	

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Before: Dennis R. Nolan, Arbitrator, School of Law, University of South Carolina, Columbia, SC 29208-0001.

Appearances:

For the Employer: Kevin B. Rachel, Labor Relations Counsel, Washington, DC.

For the NALC: Keith E. Secular, Cohen, Weiss and Simon, New York, NY.

For the NRLCA: William B. Peer, Peer & Gan LLP, Washington, DC.

Place of Hearing: Washington, D.C.

Date of Hearing: April 11, 2001

AWARD: The proper remedy for a wrongful conversion of city deliveries to rural is reconversion of those deliveries and the award of new deliveries established within the line of travel for the challenged deliveries, to be implemented within 60 days. Within 90 days, the Postal Service shall develop and implement a new delivery plan for provision of service beyond the challenged deliveries, applying its standard criteria as if it had not made the erroneous conversion. Either union may file a new grievance if it believes the Postal Service new plan violates controlling authority.

Date of Award: December 3, 2001

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OPINION

I. Statement of the Case

On December 23, 1998, I issued an award on the broad question of principle raised by this grievance, holding that the Postal Service may not, "in light of its contractual commitments . . . unilaterally shift a sizeable number of deliveries from city to rural service in violation of a still-viable established practice." Although the parties used the Cary grievance, along with a similar one from Placerville, California, as an example of the problems raised by city-to-rural conversions, they presented few details. I therefore retained jurisdiction to resolve questions about the appropriate remedy should the parties be unable to agree.

The parties settled the Placerville grievance but not this one. The Cary case was therefore reopened for a hearing on the appropriate remedy. The hearing on the remedy phase of the Cary dispute took place in Washington, D.C. on April 11, 2001. The parties appeared and had full opportunity to testify, to examine and cross-examine witnesses, and to present all pertinent evidence. In addition to the voluminous documentary evidence, the parties submitted substantial post-hearing briefs, the last of which arrived on October 31, 2001.

II. Statement of the Facts

This grievance arose in Cary, North Carolina, a suburb of Raleigh. Following the annexation of a subdivision by the City of Cary and in response to customer requests, the Postal Service in 1984 transferred 244 deliveries (136 city deliveries, which had long been handled by city carriers, and 108 rural deliveries) from the Raleigh Post Office to the Cary Post Office. All 244 deliveries were added to a Cary rural route (represented by the NRLCA) as an extension of that route's territory rather than to a Cary city route (which would have been represented by the NALC). Needless to say, the Postal Service did not bargain with either union before making the change. So far as the record shows, the Postal Service made the switch purely for operational reasons.

NALC members lost 136 deliveries (the union originally thought the number was 132) and gained none in return. The NALC therefore grieved the city-to-rural conversion on August 21, 1984 even though those deliveries would have represented only a fifth to a quarter of any city route. According to the grievance, the NALC's only complaint was the city-to-rural conversion. The only remedies it sought were cessation of the conversion and reconversion of those deliveries, which amount to the same thing. At every step of the grievance procedure the Union reiterated the same complaint and desired remedy. In its 1988 appeal to Step 4, for example, the Union stated the "corrective action requested": "That the 132 stops be removed from Rural delivery and put on city delivery, and that this practice be eliminated by management."

It is notable and critical that the NALC's motivation in filing the grievance was work preservation rather than work acquisition. That limited objective was one reason for sustaining the original grievance. The NRLCA argued vehemently that the grievance was barred by the National

panel's 1994 decision in the Oakton/Vienna case, H7N-NA-C 42. The NALC there had tried to force a rural-to-city conversion, a form of work acquisition. Because the arbitrators in that case merely denied the Union's attempt to gain *additional* deliveries, the Oakton/Vienna decision did not control this work-preservation grievance. As I wrote on page 20 of the decision on the merits, discussing the NRLCA's argument,

> The matter is not so simple. That case simply held that one union could not take over work long performed by members of a second union simply because the work is similar to that performed by the grieving union's members. The arbitrators did not address, and had no need to address, the question of whether and when Management could assign work from one union's jurisdiction to that of another. That remains an open question.

It is also notable and critical that the Union simply sought to regain the converted Cary deliveries. At no point before the remedial portion of this proceeding did the Union seek back pay or any additional deliveries.

III. The Issue

What shall be the remedy for the Postal Service's violation of controlling authority when it converted 136 deliveries in Cary, North Carolina from city to rural delivery in 1984?

IV. The Parties' Positions

A. The NALC's Position

The NALC now seeks, in addition to the 136 deliveries that were the cause of this grievance, "all the additional deliveries which represent the growth and development of this territory." By its estimate, the additional deliveries amount to about a dozen rural routes. The NALC also seeks a "make whole" remedy for affected carriers. The NALC argues that the expanded remedies are permitted and even required by previous arbitration awards. Numerous awards emphasize arbitrators' implicit authority to craft a remedy suited to the nature of the grievance.

The NALC rejects the objections made by the Postal Service and NRLCA. It asserts that the original grievance sought, in addition to the challenged deliveries, elimination of the city-to-rural conversion practice by management — what it describes as an "open-ended remedial demand" that placed management on notice "that in the present grievance NALC would seek the return of future deliveries improperly assigned to rural delivery."

Nor would the remedy the NALC seeks interfere with management's discretion. The NALC's "but for" approach (the argument that the NALC should now receive all deliveries that would have been awarded to city carriers if the Postal Service had not made the initial erroneous

conversion) presents a purely factual dispute. Resolution of that factual dispute is not speculative and could be performed "within the framework of conventional evidentiary principles."

The Union should therefore have a fair opportunity in a subsequent proceeding to prove its claim to the new deliveries. If given that opportunity, the NALC would show that the "natural extension" of the city delivery would have included development southward down Pinney Pines Road, which ultimately became Lochmere Drive, and along side streets such as Pink Acres Road.

B. The Postal Service's Position

The Postal Service makes two objections to the NALC's proposed remedy. The first is that the remedy the NALC now seeks is outside the scope of the original grievance. The second is that the requested remedy is improper under the Agreement and is unsupported by arbitral precedent; in particular, the Postal Service has the first call in assigning new deliveries, subject of course to the grievance procedure. Normally it would make those assignments by the process of extension, after considering many relevant factors. Awarding those deliveries to the NALC under the guise of a remedy for this grievance would usurp the Postal Service's proper discretion. Moreover, a "street-by-street fight" would not be appropriate for a national level arbitration.

C. The NRLCA's Position

The NRLCA's arguments closely track those of the Postal Service, emphasizing the limited nature of the NALC's grievance and requested remedy, the unfairness of allowing it to seek a radically different and greater remedy, and the practical difficulties of trying to resolve those claims in a national level arbitration.

V. Discussion

After all the arguments are in, the remedial issue at this preliminary stage is surprisingly narrow. In fact, the bulk of the effort needed to resolve that issue comes from working through the parties' briefs and the many authorities they cite.

There is no doubt that an arbitrator has great flexibility when crafting a remedy. The NALC understandably places a great deal of weight on Arbitrator Mittenthal's decision in N8-NA-0141 (1980) (NALC Exhibit 64). The dispute in that case involved an "agreement to agree" on criteria for the establishment of full-time duty assignments. The parties could not agree and the NALC asked the arbitrator to set the criteria himself. At pages 6-7 of his opinion, Arbitrator Mittenthal emphasized that an arbitrator's authority is as broad as is required to redress a breach of the agreement. From that language, the NALC draws the conclusion that the remedy in the present case could include the extensions of service it now seeks, as well as reconversion of the deliveries initially at issue. It proposes a "but for" test, under which the arbitrator would hear evidence about how the Postal Service would have awarded new deliveries had it not erroneously made the city-to-rural conversion.

That arbitrators have discretion to fashion equitable remedies is not in doubt. Nor is there any dispute over the general remedial objectives of making injured parties "whole" and restoring the *status quo ante*. The NALC's many citations to that effect are icing on the cake. The real question is *how* the arbitrator should exercise that discretion—that is, just what remedy should the arbitrator craft? Any remedy must solve the grievance and take care of the problem that prompted the grievance. Whether the remedy may or should go further is a much more difficult issue. In this case, it is obvious that the Postal Service must reconvert the challenged 136 deliveries. It is nearly as obvious that "infill"—new deliveries between the sites of those deliveries but along the same line of travel—belongs to city carriers as well, because there is no basis on which the Postal Service could have awarded those deliveries to rural carriers who would have to intermingle with city carriers in order to cover those locations.

The remaining issue, then, is whether the city carriers are also entitled to the award of thousands of new deliveries *beyond* the line of travel for the 136 converted deliveries. The answer to that question depends on the scope of the grievance and on the policy considerations that bear on the various possibilities.

A. The Scope of the Grievance

The starting place is the scope of the grievance. Absent exceptional circumstances, a grieving union may not expand the grievance as it proceeds through the negotiated dispute resolution process. Doing so would deprive the later decision makers of the benefit of their subordinates' consideration of the dispute, would often lead to less satisfactory managerial decisions, and would force the arbitrating parties to shoot at a moving target. These parties in particular have a strong and useful policy favoring full disclosure of evidence (and full statement of claims) at the second step of the grievance procedure. Liberally allowing the grieving union to change its claim thereafter would contradict the parties' negotiated preference for an early and firm statement of the union's allegations and demands.

This general rule does not mean that a union is always limited to the phrasing found on the original grievance. The Union quotes an appropriate and pithy statement from Arbitrator Irvin Sobel in case no. S4N-3R-D 35445 (Jacksonville, FL, March 7, 1987) to the effect that an arbitrator

> does not have to take the less than precise verbiage of a frequently inexperienced and sometimes technically unschooled Union Steward as gospel, either when that officer requests, for more than the grievant (or Union) is entitled to, or as in this comparatively rare instance, too little.

Other cases such as W4N-5R-C 32984 (Pasco, WA, Carl Lange, III, April 18, 1989) make the same point.

If the steward misstates the appropriate remedy, however, the union has an obligation to correct the error as soon as possible so that all parties will know just what is at stake and can design

their strategies, evidence, and arguments appropriately. It would hardly be fair or efficient for the union to push an erroneous claim all the way through the grievance process only to abandon it in favor of another at the last step. By the higher stages of the grievance process, the union can no longer blame "a frequently inexperienced and sometimes technically unschooled Union Steward." If it fails to make a timely correction, it will have to fight on the ground it initially chose, unless there are exceptional circumstances.

The Union cited several cases presenting such exceptional circumstances:

- In Case No. S1N-3W-C 48118 (Miami, FL, Raymond L. Britton, May 9, 1986), the NALC protested the Postal Service's refusal to award the grievant a certain bid. It initially asked for compensation in the form of "out of schedule pay," a remedy all parties later agreed was inappropriate. The arbitrator therefore allowed the Union to switch horses and seek pay for the difference between the hours she would have worked and those she actually worked. Here, of course, the remedy the NALC initially sought was completely appropriate.

- In F90N-4F-C 94018740 (Los Angeles, CA, Donald E. Olson, Jr., October 6, 1996), a national level settlement of a grievance effectively barred the remedy initially sought by the Union. The parties returned the grievance to regional arbitration for determination of whether some other remedy was warranted. The arbitrator allowed the NALC to seek a different remedy, citing the common-law maxim that "there is no right without a remedy." In this case, however, the remedy initially sought by the NALC is still available.

- In H7C-NA-C 36 (Richard Mittenthal, January 29, 1994), the arbitrator awarded the union the remedy it first sought, a cease-and-desist order. In the face of later violations of that order, he allowed the NALC a monetary remedy. This case, on the other hand, is before me for the first time.

In sum, none of these exceptions applies to the present case, so the general rule applies.

The NALC's Cary grievance was strictly limited. From the start and through the entire grievance process until this last step, the NALC sought nothing more than reconversion of the disputed deliveries. To be sure, it also asked that the "above practice be eliminated by management." The NALC now tries to interpret that phrase as a plea for a remedy going far beyond the 136 deliveries. The reinterpretation is unpersuasive. It is clear from the face of the grievance itself and from the evidence offered by the parties that the "above practice" at issue was simply the Postal Service's *conversion* of city deliveries to rural deliveries. To put it differently, the NALC brought the grievance to stop city-to-rural *conversions* and therefore sought as a remedy the correction of one set of conversions and a ban on future ones. Never before the national level arbitration did the NALC suggest that it had anything else in mind. The grievance constituted a shield, to preserve deliveries, not a sword to gain new deliveries.

The NALC recognizes, no doubt with some regret, that it didn't seek as much at the start of this case as it would now like to have. That is why it makes such prominent use of Arbitrator Mittenthal's 1980 description of the arbitrator's wide remedial power. One critical difference between the two cases prevents Arbitrator Mittenthal's award from being pressed into service to resolve this case. The grievance before Arbitrator Mittenthal attempted to enforce a vague agreement to agree. By its very nature, that far-reaching and unspecific grievance required an unusual remedy. The NALC consistently asked for the same remedy throughout the grievance process. Arbitrator Mittenthal wisely responded to the case before him, not to the facts of more specific grievances on other issues filed years later. Even so, he recognized that "the 'remedy sought' remains an essential ingredient of the dispute." His award contains no suggestion that he might grant a broader remedy in any case than the "remedy sought" through the grievance procedure.

This dispute, in contrast to the one facing Arbitrator Mittenthal, concerns 136 specified deliveries, and the NALC requested a vastly different remedy at the last step than it asked for in the earlier steps. No special circumstances would justify a remedy that is far wider than the scope of the grievance itself.

The remedy sought by the grievance is presumptively the only one properly before an arbitrator.[1] A union seeking at the arbitration step to overcome that presumption must demonstrate why the normal rule is not appropriate. The NALC failed to do so in this case.

B. Institutional and Practical Considerations

Even if a broader remedy were available in principle, institutional and practical considerations would make it inappropriate. The Postal Service has the resources, authority, and responsibility for initially developing delivery plans. Its product may be challenged through a grievance. In the common description of modern labor relations, management acts and the unions react. Congress charged the Postal Service, not the postal unions or an arbitrator, with managing mail delivery. Of necessity, the employer must take the first crack at any establishment or extension of deliveries, subject to the grievance procedure.

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[1] The NALC's brief offers an ingenious analogy to show that an arbitrator is not bound by the union's requested remedy. If arbitrators were so limited, the union argues, they "would be obliged to award full back pay in every removal grievance this [sic] is sustained and would have no discretion to impose lesser discipline." In other words, because arbitrators often award *less* than a union asks for, they could also award *more*.

Argument by analogy is a risky tactic because any material difference in the situations will destroy the analogy. The reason an arbitrator may award less than requested is that the claim and the response set boundaries that mark the parties' understanding of the case and its scope. An arbitration award should therefore fall within those boundaries in order to comply with the parties' expectations. An award falling outside those boundaries by definition defeats their reasonable expectations. That is why awarding less than a union requests is often appropriate while awarding more would almost never be.

The alternative sought by the NALC would be impractical and inefficient. If the parties were to proceed to a hearing to assign deliveries in the newly developed territory, they would have to argue their cases on a street-by-street basis. It is unlikely that they could do so without relying primarily on their subordinates at the local level. Because those subordinates are the only ones familiar with the area in question, they are obviously better suited to the task at the first stage than the parties' legal counsel or an arbitrator from another state. Trying to micromanage every delivery assignment from Washington through the clumsy mechanism of a national level arbitration hearing would waste the parties' resources for no good end.[2]

C. The Compensation Claim

The NALC's opening statement at the hearing on the remedial phase argued that a make whole award should compensate the individuals injured by the Postal Service's breach. The NALC's brief simply alludes to a possible monetary award in the course of rejecting the Postal Service's assertion that the NALC's desired remedy is too speculative.

At first glance, the game hardly seems worth the candle. The challenged conversion occurred in 1984. Trying to determine, more than seventeen years later, which employees would have received which new routes and how much they would have earned compared to how much they actually earned would be enough to stump Solomon. Even if it were theoretically possible to resolve those issues, it would take an enormous commitment of resources by all the parties. Litigation costs alone might very well exceed any provable compensation due.

In any event, it would be impossible to tackle that problem until new, contractually permissible routes are established. It is therefore too early to rule in or out the possibility of a compensatory remedy. Once the Postal Service realigns deliveries in the disputed area, the

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[2] The NALC's opening statement at the hearing and its post-hearing brief cite many national and regional awards for the proposition that the proper remedy for an erroneous conversion includes all new deliveries around the disputed deliveries, even beyond their line of travel. After carefully reading all of the cited awards, I find none that takes so broad a proposition. Most, like Arbitrator Garrett's landmark *Sioux Falls* decision, simply use general phrases about "returning" deliveries, routes, or areas to the proper craft. They do not specifically address growth beyond the line of travel for the disputed deliveries. Almost inevitably there will have been some growth between the grievance and the final award. "Infill" growth along the route of travel naturally goes with the reconverted deliveries.

The successful union might also be entitled to some "extension" growth beyond the previous line of travel, under the usual principles for extending service. If so, the Postal Service will either award those deliveries to the prevailing union when it realigns routes after the arbitration award, or will face a new grievance. However, none of the cited awards clearly commands the Postal Service to award growth beyond the line of travel to the grieving union. S1N-3W-C 18751 (William Holley, 1983) involved a different manner of delivery (to individual homes rather than to a sales office); S1N-3W-C 33880 (J. Earl Williams, 1985) involved "projected growth" *within* an area previously served by city delivery; RC-C-0283 (Marvin Feldman, 1979) simply revoked an improper extension of city service and awarded the territory *covered by that extension* to the rural carriers because there was no direct access through city streets. The other cited cases are equally inapplicable.

contending unions will either accept its plan or challenge it in further grievances. By settlement or award, some day the parties will know what the new routes are to be, and who will fill them.

The parties may then find it in their best interest to put the Cary dispute behind them and go on to other matters. If not, some individual carriers might seek compensation for income lost to the improper conversion. If they grieve for a monetary remedy, they will at the least have to show that they were actually harmed and will have to present a reasonable estimate of their losses. Alternatively, the NALC might seek some other form of monetary compensation for the craft, if not for identifiable individuals. Arbitrator Mittenthal recognized the possibility of such an award in his 1994 decision in H7C-NA-C 36. Prudently, he found a way to avoid having to decide that issue.

D. The Next Steps

It seems appropriate to spell out where the parties go from here. First, the Postal Service must promptly reconvert the 136 erroneously converted deliveries, along with any new deliveries along the line of travel for those stops. Because the relevant streets are known to all parties, this normally should take no more than 30 days. Given the press of the holiday mail, however, I will extend that period to 60 days from the date of this award.

Realigning deliveries in the rest of the growth area will undoubtedly be more complicated. As noted above, the Postal Service has the burden of coming up with an appropriate delivery plan. In doing so, it will have to follow the criteria it normally applies to establishment and extension of delivery, using the proper assignment of the reconverted territory as a baseline. Some new growth, off or beyond the line of travel for those stops, will undoubtedly appear as natural extensions of the city service. Other new growth in the surrounding area will undoubtedly appear as natural extensions of existing rural routes. Still other new deliveries will require more sophisticated judgment calls. Normally that process should not take more than 60 days, but again, because of the holiday rush period, I will extend the period to 90 days.

Even with the best of intentions, the Postal Service may not be able to design a delivery plan that will satisfy all three parties. If either union believes that the Postal Service has abused its discretion in assigning deliveries to city or rural routes, a grievance would be in order. (In fact, according to the NRLCA, a pending NALC grievance poses just such an issue.) The local nature of the disputes and the amount of detail necessary to resolve them make initial resort to a national forum a questionable procedure. The parties should carefully consider the advantages offered by initial recourse to a lower level.

AWARD

1. The Postal Service shall reconvert the challenged 136 deliveries, and any new deliveries established within the line of travel for those deliveries, to city delivery within 60 days of the date of this award.

2. The Postal Service shall, within 90 days of the date of this award, develop and implement a route realignment plan covering deliveries beyond the line of travel for the 136 deliveries, including Pinney Pines Road, Lochmere Drive, and nearby side streets. In developing its delivery plan, the Postal Service shall use the standard criteria and procedures it would apply in the case of any other extension of service, such as the need to avoid overlapping territories, the desire for squared boundaries, and efficient provision of services to customers. This may very well lead to the same result in many cases as the NALC's proposed "but for" standard, but the Postal Service need not use that standard instead of its normal methods for extending deliveries.

3. The Postal Service has broad discretion when assigning new deliveries, but that discretion is not unlimited. If either Union believes the Postal Service has abused its discretion in designing or implementing the new route structure, it may grieve in the usual fashion. Because the actual details of the revised delivery structure are outside the scope of this national level proceeding, any such grievances will be new ones. The parties should carefully consider whether they should be processed initially at the local level where the parties will have the requisite knowledge and sensitivities.

Dennis R. Nolan, Arbitrator

December 3, 2001
Date