PART XI
CLOSING
STATEMENT

CLOSING STATEMENT

- Done after the evidentiary portion of the hearing.
- Usually done orally. Article 15 precludes post hearing briefs in expedited cases.
- Written briefs can be utilized in discharge cases with mutual agreement or if the arbitrator directs it.
- Written briefs can be utilized at the discretion of the advocate in regular regional arbitration contract cases.
- **You should only write a brief when**:
  - The arbitrator requests one.
  - Management intends to submit one.
  - Management has introduced an aspect you were not prepared for.
  - The case is complex or has multiple issues.
  - The case has statistical data, which needs to be summarized or highlighted.
  - The arbitrator is inexperienced or hasn't been taking good notes.

COMPONENTS

- Issue
- Overview of dispute.
- Background summary of the facts.
- Applicable contract language.
- Arguments, yours and management's.
  - Damage control
  - Testimony and exhibits
- Conclusion.
- Specific Remedy. EXPLAIN MAKE WHOLE.
- Submission of case law.

PREPARATION AND PRESENTATION

- Prepare your closing properly. If done orally take the necessary time to do it right.

- Remember to use the components and theory of your case.

- The chronology of events may also be of benefit in assuring a proper flow to your closing presentation.

- Good note taking during the hearing allows you to quickly assess the strengths and weaknesses of the evidence.

- Prepare your case law. You will need three copies. It must be on point. Submit at end of presentation.

- Speak slowing and pause at appropriate times.

- Watch the arbitrator to establish pace.

*4 copies of case log

WRITTEN BRIEF

- A written brief is similar in structure to an oral close, but can be more detailed and extensive. The components above can be further developed by:

  - Specifying the language from the CBA which was violated.
  - Analyzing of the meaning of the language from the union's perspective.
  - Explaining how the contract provisions apply to the facts proven at the hearing.
  - Tying in or challenging evidence and/or argument, that was admitted during the hearing.
  - Responding to the USPS analysis of the case, refuting their view of the evidence.
  - Referring to documents and testimony from the hearing or other evidence, which supports your view of the case.
  - Discussing of supporting case law you are including.
  - Explaining as to why the remedy you are requesting is appropriate.

Tips

- Summarize all aspects for the case through utilization of the major components
- Since in your opening you used the major components to educate the arbitrator on what the case was about and how you would prove the violation, in closing the major components should now prove the violation based on your complete development of argument and evidence.
- Repeat your requested remedy. It must be specific. Do not leave the arbitrator in doubt as to exactly what you want and why.
- To do damage control when necessary.
- To challenge evidence should be addressed if necessary.
- Do not make new argument or attempt to bring in new evidence.

POST HEARING BRIEF

AMERICAN POSTAL WORKERS UNION, AFL-CIO

before

ARBITRATOR KATHY X. FRAGNOLI

GRIEVANCE G94C-1G-C 97053782 CLASS ACTION HOUSTON, TX

HEARING DATE: SEPTEMBER 17, 1997

ISSUE: **DID THE USPS VIOLATE THE AGREEMENT WHEN IT DID NOT MAINTAIN 80% FULL-TIME EMPLOYMENT IN THE HOUSTON, TX POST OFFICE? IF SO, WHAT SHALL THE REMEDY BE?**

APPLICABLE CONTRACT LANGUAGE

ARTICLE 7, SECTION 3.A

". . . The Employer shall staff all postal installations . . . as follows: 80% full-time employees. . ."

BACKGROUND

The instant grievance was filed at Step 1 on December 19, 1996 alleging a violation of Article 7, Section 3. The remedy requested was that 13 part-time flexible clerks be converted to full-time and made whole.[1] Management did not dispute the union allegation that they were not maintaining 80% full-time employment at Step 2, Step 3 or at arbitration. Rather, the position of the postal service has been to raise an affirmative defense to their admitted violation of Article 7.3.A. The defense raised by the USPS at Step 2, Step 3 and again at arbitration was that because they notified the Union on June 6, 1996[2] of the projected impact of automation and DPS (delivery point sequencing) at the Houston, TX post office, 192 full-time letter carriers might be excess to the needs of Houston, TX and that pursuant to Article 12, the USPS would withhold all full-time vacancies within 100 miles of Houston in all crafts.

ARGUMENT AND RELATED TESTIMONY

It is the position of the APWU that we have shown the Employer has not maintained 80% full-time employment in Houston, TX; therefore, a clear violation of the Agreement has been proved. The USPS has not challenged this point. Their affirmative defense has been that because of the June 6, 1996 letter, Article 12 permits the admitted violation of Article 7.3.A.

The affirmative defense raised by the USPS simply will not hold water for the following reason. Prissy Grace testified that the current withholding in the carrier craft alone is now close to 200 full-time duty assignments. **This testimony was not rebutted and does not include the assignments withheld in other crafts.** The withholding of carrier duty assignments has already exceeded the 192 positions mentioned in the June 6, 1996 letter; however, the USPS is still refusing to make conversions to full-time in the clerk craft and continues to violate Article 7.3.A by maintaining less that 80% full-time. There can be no valid reason for the USPS to continue to withhold clerk craft conversions when they have already withheld more than enough carrier positions to cover their own projection of 192 excess carriers.

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[1] The conversion Of 13 part-time flexibles at that time would have brought the complement to 80% full-time. That figure would fluctuate as the USPS hires and employees leave for one reason or another. Terry Finkle gave testimony that it currently would require around 60 conversions to bring the USPS into compliance with Article 7.3.A.

[2] Joint Exhibit 2, page 11

Prissy Grace also gave unrebutted testimony that the USPS was currently hiring letter carriers and clerks. Phillip Pelch on cross examination corroborated this fact. This proves without question the withholding of June 6, 1996 was pretextual and therefore the affirmative defense raised by USPS must fail. At the hearing, the Arbitrator even asked Phillip Pelch what if anything would keep the USPS from ever making a conversion and he did not give a straight answer to that question. There is no question that the Article 12 withholding by the USPS in Houston, TX is nothing but a ruse, a feeble attempt to justify continuing violation of the full-time maximization language in the Agreement.

POST-GRIEVANCE EVIDENCE/TESTIMONY

At the hearing the Union questioned the adequacy of the Article 12 affirmative defense raised by the Employer and produced testimony to rebut that argument, some of that testimony referred to relevant facts that continue to the present. The employer objected to that testimony at the hearing and the Arbitrator asked the parties to address that issue in briefs.

There can be no serious question but that the percentage of full-time employment is relevant to this day. Likewise the union should be allowed to introduce evidence to rebut the Employer's affirmative defense of withholding for 192 excess letter carriers, the USPS defense all along. If the employer is allowed to use the withholding of 192 positions for 192 excess letter carriers to justify violation of Article 7.3.A although they have already withheld more than enough letter carrier positions to cover the expected excessing[3], and then exclude testimony that proves this violation because the evidence proving the violation did not exist until after the grievance was filed, then there is no fairness in this process.[4]

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[3]Phillip Pelch testified that while some carriers have been shifted from station to station, no letter carriers had been identified as excess to the needs of Houston, TX. Even if there had been excess letter carriers, they have already withheld more than enough letter carrier vacancies to accommodate them according to the unrebutted testimony of Prissy Grace.

[4]"Evidence is sometimes presented at the arbitration hearing which has not been disclosed in pre-hearing grievance steps. . . Some of the considerations involved in an arbitrator's decision to accept or reject such evidence include the need for all the facts relevant to the case, the need to protect the integrity of the grievance procedure, general notions of fairness, whether the newly discovered evidence is consistent with the theory of the case, and the nature of the case being arbitrated." p.414, How Arbitration Works, Fifth Edition, Elkouri and Elkouri.

"When evidence comes to light after the grievance has been processed but before the hearing, it may still be admitted even if the evidence was available earlier. . . Unless the arbitrator is convinced that there has been a bad-faith attempt to keep evidence from the other side, the evidence should be admitted. . . " p.317, Evidence in Arbitration, Second Edition, Hill and Sinicropi.

There should be two questions for the Arbitrator in deciding whether to accept or reject this evidence. Is the information relevant? Did the Union withhold this information in an attempt to gain advantage?

The answer to the first question is undeniably, YES. The answer to the second question is undeniably NO. The testimony of Prissy Grace and Phillip Pelch as it relates to the current situation regarding excessing, withholding and hiring is; therefore, relevant and should be considered by the Arbitrator.

ARBITRAL PRECEDENT

H4C-NA-C 77
H4N-NA-C 93 - Richard Mittenthal - National Award - The arbitrator held that where violations of Article 7.3.A were demonstrated: "Those part-time employees who have been injured by such violations may, depending on the circumstances, be entitled to conversion to full-time status and back pay for any loss of earnings attributable to the violation."[5] This award is relevant in that it proves a monetary award is appropriate in addition to conversion where the USPS is violating Article 7.3.A.

NC-E 18340 - Howard Gamser - National Award - The arbitrator held the USPS did not violate the Agreement when it withheld letter carrier vacancies and failed to promote part-time flexible letter carriers to full-time because they were withholding vacancies in anticipation of them being filled by clerks excess to the needs of Altoona, PA.

The NALC alleged the withholding was improper and for too long a time. This case clearly decided the issue where Article 7 and the maximization language rubs against the withholding language in Article 12 in favor of Article 12. Where withholding is reasonable and proper, the arbitrator found the USPS could properly withhold; however, he "did not find that the USPS had absolute discretion to determine in each instance when or if it would promote a part-time employee to a vacant full-time position or withhold that position to meet some future contingency."

The arbitrator further held that it was necessary to decide on a case by case basis whether "it was reasonable for the Postal Service to withhold such vacant full-time positions" for the period in question. He went on to hold in that particular case, it was reasonable.

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[5]The language interpreted by Mittenthal was from a previous Agreement which has changed only in that the current agreement requires 80% full-time instead of 90%.

You must ask yourself whether it is reasonable to continue withholding full-time clerk positions for 192 carriers who *might* become excess to the needs of Houston, TX although more than enough letter carrier vacancies have already been withheld to accommodate them. I suggest it is not reasonable.

H7N-3D-C 22267 - Richard Mittenthal - National Award - The arbitrator again addressed the apparent conflict between Article 7 and Article 12 in favor of Article 12 and the APWU does not disagree with that assessment where the Article 12 withholding is bona fide. The arbitrator held: "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 the MPFSM." The APWU is on record in agreement with the assessment that the maximization requirement of Article 7 must defer to the withholding obligation of Article 12 under most circumstances.

CONCLUSION

Again, you must ask yourself whether it is reasonable to continue withholding full-time clerk positions for 192 carriers who *might* become excess to the needs of Houston, TX although more than enough letter carrier vacancies have already been withheld to accommodate them. Again, I suggest it is not reasonable.

REMEDY

I am confident that after you have considered the reasonableness of each parties position in this case, you will come to the conclusion the Agreement was violated and affected employees must be made whole. Since the affected employees were denied an opportunity to become full-time, they must be compensated as if they had been full-time. This would include applicable guaranteed time and out-of-schedule premium pursuant to Article 8.

Thank you.

Mike Morris
National Business Agent
American Postal Workers Union, AFL-CIO

POST HEARING BRIEF

AMERICAN POSTAL WORKERS UNION, AFL-CIO

Grievance H94C-4H-C 8066681 and H94C-4H-C 98026643

DUTY ASSIGNMENT NUMBER 39

Grievance H94C-4H-C 98009432

DUTY ASSIGNMENT NUMBER 40

Arbitrator Mark Lurie

Hearing Date: January 5, 2000

Key West, FL Post Office

ISSUE

Did the USPS violate the Agreement when it posted duty assignments #39 and #40 with non-consecutive off days when they had previously had consecutive off days? If so, what is the appropriate remedy?

APPLICABLE CONTRACT LANGUAGE

Article 8, Section 2.C

The employee's normal work week is five (5) service days, each consisting of eight (8) hours, within ten (10) consecutive hours, except as provided in Section 1 of this Article. *As far as practicable the five days shall be consecutive days within the service week.* [emphasis added]

Article 3

The Employer shall have the exclusive right, *subject to the provisions of this Agreement* and consistent with applicable laws and regulations: [emphasis added]

A [not applicable]
B [not applicable]
C To maintain the efficiency of the operations entrusted to it;
D To determine the methods, means, and personnel by which such operations are to be conducted;
E [not applicable]
F [not applicable]

BACKGROUND

Duty assignment #39 had consecutive days off, Thursday and Friday, from its inception on July 18, 1994 until December 13, 1995, when the non-scheduled (NS) days were changed to Wednesday and Thursday. The position had these consecutive NS days until October 11, 1996 when it was re-posted with non-consecutive NS days, Sunday and Thursday. This gave rise to grievance H98C-4H-C 98066681.

The position was again re-posted on April 30, 1997 with non-consecutive NS days, Sunday and Tuesday which gave rise to grievance H98C-4H-C 98026643. This duty assignment remains with non-consecutive NS days.

From October 11, 1995 through the present duty assignment #39 has had non-consecutive NS days. **The parties agreed to combine these two cases at the hearing.**

XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX

Duty assignment #40 had consecutive days off, Tuesday and Wednesday, from its inception on July 18, 1994 until January 6, 1997 when it was re-posted with non-consecutive NS days, Sunday and Tuesday. This gave rise to grievance H94C-4H-C 98009432.

From January 1997 until April 1999, the duty assignment was posted and was awarded two times, each time with non-consecutive NS days.

The duty assignment was finally re-posted on May 1, 1999 with consecutive NS days, Sunday and Monday.

In addition another duty assignment has been posted with the original NS days of duty assignment #40, Tuesday and Wednesday, changed from Saturday and Sunday.

The parties agreed at the hearing to decide this case based upon the record and testimony from duty assignment #39, since the argument and evidence are identical.

GENERAL ARGUMENT

It is the position of the APWU that the violation began when the USPS changed the NS days from consecutive to non-consecutive 1995, and continued until the NS days were again made consecutive on duty assignment #40. Please note the NS days remain non-consecutive on duty assignment #39.

This is an issue which is very important the Union and its members. It is important because it minimizes disruption to the employee when the NS days are consecutive. It is important because it allows two consecutive days of rest instead of one, which is of particular concern when overtime is excessive. It is important even if employees normally work one or both of their NS days because it allows them to have a three-day weekend (even if the NS days are during the week) by using only one day of annual leave.

The Union recognized this fact and negotiated into the Collective Bargaining Agreement (CBA) that NS days would be consecutive, "**as far as practicable.**" You can rest assured this language did not come without cost to the Union in other areas of the CBA, that is the nature of negotiations. The Union without doubt sacrificed other goals in order to achieve this important right for our membership.

The word PRACTICABLE has a very specific meaning. The fifth edition of Black's Law Dictionary defines it as "**that which may be done, practiced, or accomplished: that which is performable, feasible, possible.**"[1]

Please note the CBA does NOT state that "NS days shall be consecutive, "unless overtime can be reduced by making the NS days non-consecutive."

The CBA does NOT state that "NS days shall be consecutive unless it is more efficient to have the NS days non-consecutive".

The parties surely understood when the language was negotiated that the creation of consecutive NS days could possibly affect the overtime percentage, or the efficiency in a particular office. Notwithstanding that fact, they agreed to language that clearly states NS days shall be consecutive if practicable. That is, if it can be made to work. If it can be made to work and the mail still gets delivered.

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[1] See attachment A

Webster's Ninth New Collegiate Dictionary, makes a clear distinction between the words PRACTICAL and PRACTICABLE as follows:
"PRACTICABLE applies to what has been proposed and seems feasible but has not been actually tested in use; PRACTICAL applies to things and to persons and implies proven success in meeting the demands made by actual living or use."[2]

Management in Key West has taken the position it was not practicable to leave the NS days of this duty assignment consecutive without providing a single shred of evidence that the mail was not being delivered. There was no evidence offered that mail was being delayed or that service commitments were not being made as a result of this duty assignment having consecutive NS days.

To the contrary, the facts and work history demonstrate it was indeed PRACTICAL to do so because the NS days were consecutive for an extended period prior the change. Management cannot and did not attempt to show that it was not PRACTICAL for the duty assignment to have consecutive NS days. They did not come close to proving the even higher standard of PRACTICABLE.

Management's entire case consisted of testimony from the former Postmaster who stated he decided to change the NS days because the incumbents had scheme qualifications and he did not want to waste scheme qualified employees by working them on Sunday when scheme qualifications were not necessary. There was no testimony that there was less than eight hours work available for two clerks on Sunday.

The Union's witness, on the other hand, testified that the Key West Post Office employs two clerks on Sundays.

She further testified that when the NS days were split on these duty assignments, the full-time clerks were *immediately* replaced by PTFs and for a short time, by a casual. Her testimony was that the PTFs in this office are all scheme qualified, as well as the casual, a former transitional employee, who was used on Sunday. She offered that for a period of one year, there were no casuals employed in Key West, which clearly demonstrates the Sunday coverage was by PTFs with scheme qualifications. This unrebutted testimony clearly proves management argument is a red herring.

The postmaster was clearly on a campaign to eliminate as many duty assignments in Key West with consecutive NS days as possible.

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[2] See attachment B

The USPS failed to demonstrate how utilizing scheme qualified employees on Sunday adversely affected operations or that it was not feasible to accomplish the mission of the USPS and deliver the mail without leaving the NS days consecutive.

MANAGEMENT ARGUMENT

The employer advocate essentially argued in his opening statement that because of the "management's rights" language in Article 3: if the Employer was not acting in bad faith and the change was a "business decision", the change could not be questioned by the Union or the Arbitrator. He further stated the Union must show the Postmaster acted in bad faith in order to prevail.

His entire case, really, was to assert the change was made because of "business reasons."

The Employer is, in effect, claiming an exception to a general rule; therefore, they have the burden of proving the need for the exception. Theirs is an affirmative defense, which must be proven.

They did not offer a shred of evidence to support this bald assertion. There was no evidence introduced to show a lack of scheme qualified employees on the remaining six days of the week.

Management in this case has read a portion of Article 3 of the CBA and has stopped reading there. Even Article 3 makes it clear that management rights are **"subject to the provisions of this Agreement".**

The Union has no quarrel with Article 3 and the fact that it is Management's right and responsibility to "maintain the efficiency of the operations entrusted to it" and to "determine the method, means, and personnel by which such operations are to be conducted."

What the Employer in Key West does not seem to understand is that those management rights are limited by the remaining articles of the CBA.

It would certainly be more efficient and economical if the USPS could cross crafts as needed in post offices, but that efficiency and economy is limited by Article 7, Section 2.

It would certainly be more efficient and economical to assign overtime without having to consider an overtime desired list or without having to assign penalty overtime, at 200% regular pay, to employees who have signed the "overtime desired" list, prior to forcing employees, at 150% regular pay, to work overtime who have not signed it, but that efficiency and economy is limited by Article 8, Section 5.

It might even be more efficient and economical to have employees with non-consecutive NS days, although that was not proven, in Key West, **but that HYPOTHETICAL efficiency and economy is limited by Article 8, Section 2.C.**

RULES OF CONTRACT CONSTRUCTION

This case, as any contract case, will be decided upon your application of the contract language to the facts of the case.

Obviously, the meaning you give to the word "practicable" is very important, if not central to your decision in the case. In that regard, Carlton J. Snow, a well known and respected arbitrator who sits on our National Panel wrote a chapter on contract interpretation in The Common Law of the Workplace, The Views of Arbitrators. This is a recent publication of the National Academy of Arbitrators, edited by Theodore J. St. Antoine.

In that chapter many of the rules of contract construction are discussed. For example, under Section 2.5 titled "Ordinary and Popular Meaning of Words", Snow states:

"When interpreting agreements, arbitrators use the ordinary and popular meaning of words, unless there is an indication that the parties intended a special meaning. . . Although not usually dispositive, dictionaries may be consulted by arbitrators when determining the ordinary and popular meaning of words. Decisions of courts, administrative agencies, and arbitrators, as well as the totality of circumstances, may provide assistance in determining the meaning of terms in collective bargaining agreements. . . Arbitrators rely on a presumption that parties negotiated their agreement with a knowledge of arbitral jurisprudence and that they expect an arbitrator to apply commonly accepted arbitral principles when interpreting their agreement."[3]

The Union's interpretation of the word "praticable" as defined by both Black's Law and Webster, is consistent with the great body of arbitral jurisprudence as you will see later in this brief.

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[3] See attachment C

Snow goes on to state in Section 2.7, titled "Specific and General Language":

"Specific terms in an agreement more clearly reflect the parties' intention than does general language. . . Most arbitrators assume that, had the parties thought expressly to state it, they would have indicated that a specific provision constituted an exception to general language. An arbitrator uses this interpretive tool in an effort to implement the parties' implicit intent."[4]

In this case, the very specific language of Article 8, Section 2.C, which clearly enunciates the employee's right to consecutive NS days when practicable, takes precedence over and limits the general "management's rights" language in Article 3.

ARBITRAL PRECEDENT

In the seminal and extremely cogent award on this issue from the Southern Region, which is often quoted by other arbitrators throughout the country, Arbitrator Ernest E. Marlatt, in a case arising in 1987 in Mt. Dora, FL held:[5]

". . . the issue comes down to the question of the burden of proof. Initially, the Union has the burden of proof in contractual disputes . . . The Union, as the charging party, has the burden of opening the hearing and establishing its prima facie case. The Union did this by proving that the Grievant's work week did not consist of five consecutive days, and that it would be possible to restructure the bid jobs at the Mt. Dora Post Office whereby the Grievant would be provided an opportunity to bid for consecutive days off. At this point, the burden of proof shifted to the Postal Service to prove that this would not be "practicable." Any party to a contract alleging that its actions fall within an exception to the general terms of the contract must prove the existence of the exception. . .

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[4] See attachment D

[5] See attachment E

In this case, the general rule stated in Article 8.2(C) is that employees be scheduled to work five consecutive days. This is a very important contractual right for Postal employees. Almost all private sector employees work a five consecutive day week, even employees who are not represented by Unions. Split non-scheduled days are highly disruptive to family life and personal business. Article 8.2(C) recognizes the need for such consecutive scheduling, but also recognizes that there may be Postal installations which have so few employees that split non-scheduled days are the only practicable way to provide postal services to the public. However, it is up to the Postal Service to establish that services would be impaired.[6] It is not enough to show that consecutive-day schedules would result in the need for more overtime, or would reduce the efficiency of the work force.

Article 8.2(C) does not say that employees will be scheduled to work consecutive days if "convenient" or "economical." It says they will be scheduled to work consecutive days "as far as practicable." The word "practicable" is synonymous with the word "feasible", and although it is not as strong as "possible", it refers to something which can be made to work. The Postal Service in this case did not offer any evidence to suggest that the reposting of the Grievant's bid job would result in unacceptably long lines at the windows, or otherwise create public dissatisfaction."

In another case arising in Russelville, AL,[7] Marlatt stated:

" How can the Union prove that some particular work schedule is "practicable"? Management has all the facts. Let management come forth and say, "We can't let this employee off on Saturday because if we do, we will be late getting out our dispatches, or we can't cover a carrier route in the carrier goes on leave (or whatever the reason may be)." It is not sufficient for the Postal Service to hide behind a general excuse that splitting non-scheduled days for an employee will enhance the economy of the operation. It would obviously enhance it even more if the Postal Service could staff itself entirely with part-time flexible employees, but the contract also requires the Postal Service to justify its failure to convert part-time employees to full-time status under certain prescribed conditions. . . If it is uneconomical to allow consecutive non-scheduled days for employees wherever practicable, then the Postal Service is going to have to sit down with the Union at the bargaining table and seek relief from this obligation, and not attempt to gain such relief through arbitration."

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[6] Management offered absolutely no testimony that service would be impaired in this office if the split day duty assignments were returned to consecutive days off.

[7] See attachment F

Arbitrator Thomas G. Terrill discussed management's rights in this issue in a case arising in Duncan, SC.[8] He held:

" Management's authority, however, is not unlimited. Limitations on that authority include those imposed by the National Agreement. Article 8.2C is not permissive. "Shall" is not permissive; it is imperative. Moreover, employees understandably want consecutive days off."

Terrill goes on to quote Marlatt's Mt. Dora case and regarding the burden of proof, stated:

". . . to say that the Service does not bear the primary burden is to say that the party with the clear contractual commitment does not have the primary responsibility for explaining why it cannot honor its commitment."

In a case arising in Corpus Christi, TX,[9] Arbitrator Barry J. Baroni sustained the union's grievance relying heavily on the Marlatt award for reasoning.

Also supported by Marlatt's logic are cases by Arbitrator Lamont E. Stallworth, arising in Rochester, MI[10], I.B. Helburn, arising in San Antonio, TX[11], Robert J. Ables, arising in Myrtle Beach, SC[12], Robert W. Foster, arising in Opelika, AL[13], Gary L. Axon, arising in Eugene, OR[14], Robert W. McAlister, arising in Council Bluffs, IA[15], and Susan T. Mackenzie, arising in Mayaquez, PR[16]. This is quite an array of arbitral opinions on this issue and encompasses the entire country and beyond.

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[8] See attachment G

[9] See attachment H

[10] See attachment I

[11] See attachment J

[12] See attachment K

[13] See attachment L

[14] See attachment M

[15] See attachment N

[16] See attachment O

Arbitrator Bennett S. Aisenberg, in a case arising in Provo, UT[17] quotes from Marlatt as well as seven other well respected arbitrators, all unanimous, on the meaning and intent of Article 8.2.C.

The only real divergence has been in regard to remedy and that will be addressed next.

REMEDY

It is clear that in Key West, under the leadership of former postmaster Mike Barker, the USPS has carried on a program to split the off days of every single duty assignment that became vacant from 1995 until Barker left some 3 years later except one T-6 window position. It was not until Barker left that the USPS began to post some duty assignments with consecutive NS days. Steward Katherine dePoo's testimony in this regard was not rebutted.

It is also clear that for every breach of the CBA there must be a remedy. To allow the USPS to have an ongoing program for five years which deprived the clerks in Key West of their contractual right to consecutive NS days without a monetary penalty for the violation will only encourage further abuse.

The incentive would then be for the Employer to violate the Agreement again and again if they are led to believe they can do it with impunity. The award should be more than an advisory opinion which states, "Yes Postal Service, you violated the contract for 5 years in Key West and you really shouldn't have done that". That is all an opinion without a monetary award for the violation would be in a case such as this.

While many of the earlier awards on this issue did not award a monetary remedy, some of the better reasoned ones did and this issue is clearly turning in the favor of monetary awards in more recent decisions.

I was the Union Advocate in one of the early cases before Arbitrator J. Earl Williams, in 1989 in League City, TX[18]. While Williams sustained the grievance, he did not rule on the issue of remedy. The issue of remedy on that case was heard in 1990 before a different arbitrator, Seymour X. Alsher[19].

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[17] See attachment P

[18] See attachment Q

[19] See attachment R

He held:

"It is a well established principle that if there is a violation, there must be a remedy. It is clear that scheduling of RFT [regular full time] Clerks was violative of the contract and was not corrected until after issuance of Arbitrator Williams' award. . . I shall, therefore, direct the Employer to reimburse RFT clerks so affected with out-of-schedule pay for the period indicated in the award."

Likewise Arbitrator Robert W. McAllister required to payment of out-of-schedule pay in the case previously cited by him as follows:

" The postal service is directed to repost Case 1-5 with consecutive days off. The former incumbent is to be retroactively paid out-of-schedule overtime from August 7, 1993, until it is reposted and awarded to the successful bidder."[20]

Arbitrator Thomas F. Levak, in a case arising in Madras, OR held:

" Service violated Article 8.2.C of '84-'87 National Agreement. Grievance sustained. Grievant awarded out-of-schedule pay equal to four hours at the applicable straight-time rate for each actual work week from May 1, 1986 through March 6, 1987."[21]

In a well reasoned award out of Concord, CA, Arbitrator William Eaton held:

"One principle which seems to emerge from these cases is that, to a significant degree, the remedy provided should depend upon the degree of good faith, or lack thereof, on the part of Management in taking the action which ultimately proves to have been a violation. In the present dispute, while the Postal Service has failed to justify its actions, the evidence is convincing that, at the same time, those actions were taken in good faith to provide a "meaner and leaner" operation. In this case, out-of-schedule overtime for the period involved would amount to a very considerable sum, if the out-of-schedule overtime view were to be followed. Compensation would, of course, amount to nothing if the position were simply restored to consecutive days off.

Whether the incumbent in the position bid the position knowingly and willingly or not is not the contractual question presented. The contractual issue is the right accorded to the Union to have consecutive days off for as many employees as "practicable." To enforce this contractual obligation there must be compensation to the individual involved, which, of necessity, amounts to a penalty assessed against the Employer. If a violation were always to be remedied simply by restoring the correct order of assignment, there is no penalty to be feared, and nothing to be lost, by violating the agreement. All that would then be required would simply be to stop the violation which

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[20] See attachment N

[21] See attachment S

had occurred. This, it seems to me, is not effectively discharging the duty of an arbitrator to enforce the provisions of the National Agreement.

Based upon these considerations, a reasonable monetary award has been provided for, in addition to re-posting of the position."[22]

Finally, Arbitrator John C. Fletcher held in a case arising in Colorado Springs, CO:

"There is no problem with awarding the employee who observed split non-scheduled days out of schedule pay because he is the one that was required to observe a schedule that was at odds with Agreement requirements."[23]

CONCLUSION

The Union is confident that after you have considered all the testimony and evidence at the hearing as well as the parties' post-hearing briefs, you will sustain the grievance and provide the requested remedy of out-of-schedule pay to the employees who held duty assignment #39 from October 11, 1996 until the present.

And also pay out-of-schedule pay to the employees who held duty assignment #40 from January 6, 1997 until May 1 1999, when the duty assignment once again received consecutive days off.

Thank you.

Mike Morris
National Business Agent
American Postal Workers Union, AFL-CIO

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[22] See attachment T

[23] See attachment U

POST-HEARING BRIEF

AMERICAN POSTAL WORKERS UNION
AFL-CIO

Submitted by:

Belinda Starr, Advocate
APWU, AFL-CIO
100 Centre Street
Tribune, AZ

Argued before:

Arbitrator Lawrence DeRabia
on
August 4, 2000
at
Thornton, CO

In the case of:

Ms. Leslie Moore
D94C-4D-C 98100000
(071 17B)

September 5, 2000

Introduction

This dispute between the APWU (Union) and the USPS (Service) was arbitrated before Arbitrator DeRabia on Thursday, August 4, 2000 at Thornton, CO. The Service was represented by T. H. Mann. The dispute arose under the parties' 1994-1998 collective bargaining agreement (CBA) (Jt. Exh. 1) and pertains to Ms. Leslie Moore, the grievant. It concerns the Service's contractual obligation to provide reasonable accommodation to a handicapped employee and to not unlawfully discriminate against such a handicapped person as prohibited by the Rehabilitation Act (Jt. Exh. 4).

Issues Presented

The issue as jointly stipulated is "Did the Service comply with Article 2.1 of the CBA; EL-307. "Guidelines on Reasonable Accommodation"; and the Rehabilitation Act of 1973. If not, what shall the remedy be?" The Union argues that when the Service failed to provide Ms. Moore with medically suitable employment they violated their contractual and legal obligation to reasonably accommodate Ms. Moore's physical handicap as required by EL 307 (Jt. Exh. 3), and they similarly violated their obligation as stated in Article 2.1 (it. Exhs. 1 and 4) to not unlawfully discriminate against a handicapped employee.

Summary of the Facts

Ms. Moore is a part-time flexible clerk craft employee. She was injured at work on February 11, 1997, and her injury, lumbrosacral sprain, was accepted by the Department of Labor (DOL) as a compensable work-place injury. On October 2, 1997 the DOL determined that she had recovered from her compensable injury. However, Ms. Moore's treating physician, Dr. Michael E. Thomas, diagnosed a continuing medical condition of fibromyalgia syndrome (it. Exh. 5, pp. 1, 3, 6, 8, 14, and 15) as did Dr. Dallas, a consulting rheumatologist (Jt. Exh. 5, pp. 10-13). On November 26, 1997 Ms. Moore wrote to Postmaster Marshall of the Thornton, CO Post Office requesting reasonable accommodation as a disabled person under the Rehabilitation Act. She stated that her physical handicap was the result of her fibromyalgia syndrome and she identified approximately twenty-eight specific work activities which she could perform (Jt. Exh. 5, p. 7). During the arbitration all of the parties visited the Thornton Post Office and Ms. Moore pointed out these various activities and testified that these were the types of work activities which she performed as a part-time flexible clerical employee prior to her injury. Subsequent to her November 26, 1997 letter she also provided to the Service a more detailed list of work activities that reflected her normal work day prior to her injury and which she believed were within her fibromyalgia-based medical restrictions (Union Exh. 1).

The record establishes that three formal "Reasonable Accommodation Meetings" were held between Ms. Moore and the Service (Service Exhs. 1, 2, and 3), but, notwithstanding the Service's final conclusion that there is approximately five hours work that is available at the Thornton Post Office that may be within Ms. Moore's restrictions" (Service Exh. 2, p. 2), not one hour of work has ever been offered to Ms. Moore.

Relevant Contract Provisions

Article 2.1 of the CBA (Joint Exhs. 1 and 4) states that "... there shall be no unlawful discrimination against handicapped employees, as prohibited by the Rehabilitation Act." To this end the Service promulgated Handbook EL-307, "Guidelines on Reasonable Accommodation" (Joint Exh. 3) in order to provide postal managers and supervisors with (as stated in Section 123) "...guidance in administering our affirmative action programs for persons with disabilities and in the interpretation and correct application of the laws and regulations governing the employment of persons with disabilities". These guidelines also state in Section 150 that "Individuals returning to work with permanent physical limitations resulting from non-work related injury or illness should be afforded reasonable accommodations under these guidelines" (p.3). The "Guidelines" also state in Section 210 ("Concept of Accommodation") that "Accommodation is a way of life in the Postal Service. We restructure jobs to eliminate unnecessary duties and to maximize the talents and skills of our employees." (p. 4). Section 230 ("Job Modifications") establishes that::

> *Resourcefulness and ingenuity in many cases result in modifying the manner in which a job is performed, thus enabling the person with a disability to perform the essential functions. In other situations, the nonessential functions may be eliminated. Essential functions of a job may not be eliminated or modified. However, the way they are performed may be changed as long as productivity is maintained (p. 5).*

In addition, Section 241 ("Controlled Equipment Modification") states that:

> *There are numerous ways to alter the place where work is performed, the equipment with which it is performed, and the job procedures used to perform it in order to accommodate the limitations of a person with a disability (p. 5).*

Arguments

There is work that Ms. Moore can perform.

The Service's own exhibit establishes that as a result of their last documented "Reasonable Accommodation Meeting" of June 15, 1999 the Service concluded that "In summary, there is approximately five hours work that is available at the Thornton Post Office that may be within Mrs. Moore's restrictions" (Service Exh. 3, p.2). Therefore, based on Service Exhibit 3 we argue that the issue now simply becomes one of determining if there was more than five hours of medically suitable work for Ms. Moore. That the Service could have reasonably accommodated Ms. Moore by providing her with five hours of work, but failed to do so, appears to be an established fact, and the only issue that now needs to be decided is whether the Service could have provided her with medically suitable work over and above five hours per day. It is important to note that it is also clear from the evidentiary record that in this case there is no issue of creating a "make work" situation. In order to cover the work which Ms. Moore was performing prior to her work-place injury Postmaster Marshall borrowed individuals from other installations (with those borrowed work hours averaging over 107 hours per month), hired a casual employee, and relied on a supervisor to impermissibly perform bargaining unit work (Service Exh. 2).

We do not understand how the Service can realistically attempt to argue that Ms. Moore cannot perform the essential functions of her clerical position. The standard position description for her job lists twelve broad areas of duties and responsibilities (Joint Exh. 6). Even a cursory comparison of this exhibit with the specific medically suitable work listed by Ms. Moore as available in the Thornton Post Office (Joint Exh. 5, p 7), the usual physical work requirements of Ms. Moore's job in Thornton (Union Exh. 3, p. 7), and the physical restrictions established by her treating physician (Joint Exh. 5, ppl-3, 6), clearly establish that Ms. Moore is able to perform the essential functions of her job. This determination was also supported by the parties' site visit. Any argument by the Service that Ms. Moore cannot perform the essential functions of her job, or that reasonable accommodation will cause an undue hardship, is nothing more than pretext. As a matter of established fact, failing to accommodate Ms. Moore is the action that has actually caused an undue hardship to the Service by requiring them to borrow employees, hire an unnecessary casual employee, and violate the CBA by directing a supervisor to perform bargaining unit work.

It is important to point out that the record clearly establishes that Ms. Moore is a part time flexible employee and therefore can be assigned to work flexible hours and can be scheduled to work less than forty hours per week. Therefore, the Service has maximum flexibility for any reasonable accommodation assignment. It is also important to note that the Service, in their opening statement, claimed that they made "every effort" to reasonably accommodate Ms. Moore not only in the Thornton Post Office but "in the surrounding area".

This same point is made in the report prepared by Jimmy Fields, USPS Labor Relations Manger (Mountain District), when he states that"...there are no vacancies within close proximity to the Thornton, CO Post Office which the grievant could be reassigned to that would not be similar to her current position" (Service Exh. 2, p. 2). This clearly establishes that it is appropriate for the Service to look at other postal installations when attempting to reasonably accommodate Ms. Moore. Arguably she would, at the very least, be able to work for five hours in Thornton, CO and then work additional hours in a nearby installation, e.g. Denver Processing and Distribution Center. Postmaster Marshall testified that Denver was where Ms. Moore worked during the time she was on limited duty. Therefore, we can conclude that the Denver facility has medically suitable work available for Ms. Moore. However, no accommodation was offered at the Denver facility either.

The Service unlawfully discriminated against Ms. Moore

The Service has unlawfully discriminated against Ms. Moore, who meets the definition of a handicapped person which is defined as someone who:

> *has physical or mental impairment which substantially limits one or more major life activities (e.g., caring for one 's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working) (Jt. Exh. 3, Section 131).*

Not only was this evident from her testimony, but it is also the medical opinion of Dr. Thomas. He states that "Leslie Moore has a physical impairment which substantially limits her major life activities. She is currently unable to perform her housework without assistance as well as limited ability to walk extended distances or do continuos repetitive movements" (Jt. Exh. 5, pp. 1 and 3). It is also obvious from the record that Ms. Moore is also substantially limited from working in a broad variety of jobs outside of the Post Office that have physical requirements greater than those which the medical documentation states that she is able to perform (Jt. Exh. 5, pp. 1-6).

Late in the arbitration hearing Jimmy Fields, a Service witness, attempted to establish doubt as to Ms. Moore's status as a qualified handicapped employee by attempting to substitute his lay opinion for Dr. Thomas's medical opinion that Ms. Moore's physical impairment limits some of her major life activities. Mr. Field's testimony is objectionable on several points. First, of course, his opinion regarding medical issues should be given no weight due to his obvious lack of competency. Second, there is nothing in the moving papers to indicate that the Service has ever argued that Ms. Moore was not a handicapped person. For example, the Step Three decision only states that there is nothing in the file to indicate that an accommodation could be made (Jt. Exh. 2, p. 2).

This witness's attempt to raise an argument regarding an issue as critical as handicap at the end of the hearing is a classic example of an attempt by the Service to improperly introduce new argument in an effort to buttress what had become a severely eroded position. The Union asks that you recognize this tactic for the pretext that it is, and that you draw the adverse inference that necessarily adheres to such a maneuver. Third, we would also point out that at the beginning of the hearing the Service, in responding to your inquiry, stated that they did have an obligation to attempt to reasonably accommodate Ms. Moore. Such an obligation would only flow, of course, from their acceptance of the fact that Ms. Moore is indeed a handicapped person entitled to the protection of the Rehabilitation Act and its bar against handicap discrimination.

We make an additional argument that the Service has also demonstrated unlawful discrimination in the manner in which they distinguished between their limited duty obligation to Ms. Moore under the Federal Employees Compensation Act (FECA) and their reasonable accommodation obligation under the Rehabilitation Act. The Service's policy in regards to providing work for employees with work-place injuries is established both by Postmaster Marshall's February 27, 1997 letter to Dr. Thomas (Union Exh. 2) which states that: "Being a large organization, we are able to accommodate and provide work for any physical limitation identified, unless the employee is total [sic] incapacitated"; and by the added language imprinted on DOL Form CA-17 (Union Exh. 3) which states that: "We can provide work for any type of medical restrictions."

This above quoted language was confirmed on cross-examination by Postmaster Marshall as accurately reflecting the Service's policy regarding limited duty availability for those with work-place injuries. In regards to this specific case the Service's policy means that as long as Ms. Moore's medical restrictions were the result of a work-place injury, the Service would as a matter of self-interest accommodate her and provide medically suitable work "for any physical limitation identified", because, as PM Marshall also testified on cross examination, if the Service didn't put Ms. Moore to work, then they would be required to pay her for staying home. However, when Ms. Moore's medical restrictions were no longer a result of her work-place injury the Service suddenly could no longer accommodate her with medically suitable work, and she was now forced to stay home. How can such a dual policy be considered as anything other than discriminatory? It is driven by the Service's self-interest. When making their decision on accommodation the Service apparently simply looked at the manner in which Ms. Moore's medical condition occurred: work-related? Yes, the Service can accommodate; Non-work-related? No, the Service cannot accommodate.

The Service failed to apply the language of Handbook EL -307 in good faith.

As previously established Handbook EL-307 (Jt. Exh. 3) provides guidance regarding the manner in which the Service is to administer its affirmative responsibilities for employees with disabilities. The Union argues that PM Marshall and local management did not exercise their responsibilities in good faith. EL-307 establishes that jobs can be restructured "... to eliminate unnecessary duties and to maximize the talents and skills... "(section 210); that "Resourcefulness and ingenuity" can result in "... modifying the manner in which a job is performed, thus enabling the person with a disability to perform the essential functions" (section 230); that "There are numerous ways to alter the place where work is performed, the equipment with which it is performed, and the job procedures used to perform it in order to accommodate the limitations of a person with a disability." (Section 241). Ms Moore provided unrebutted testimony that the Service never meaningfully discussed any of these accommodation techniques with her nor, to her knowledge, applied them realistically to the circumstances of her disability. In addition to Ms. Moore's testimony even a disinterested review of the minutes from the "Reasonable Accommodation Meetings" (Service Exhs. 1, 2, and 3) leads to the conclusion that the Service was only interested in establishing why it could not accommodate her and was not interested in making a good faith effort to attempt to accommodate her. The only "resourcefulness and ingenuity" displayed in these minutes is that which was used in support of the Service's preconceived determination that there was no way that they were going to "modify", "alter", or "restructure" any job, anywhere, in a manner which would accommodate Ms. Moore's limitations as a person with a disability. Not only do the Service's minutes of the "Reasonable Accommodation Meetings" demonstrate a lack of genuine effort, but PM Marshall testified that although he attended these meetings he never received any "results" of these meetings. How could the Service's efforts be sincere if the Postmaster of the office where Ms. Moore is assigned did not receive any feedback from his principles regarding their opinions as to the possibility of reasonably accommodating Ms. Moore in the Thornton Post Office. He apparently never knew that the Service had determined that there may be five hours of work in Thornton which she could perform. I would remind the arbitrator that our visit to the Thornton Post Office, albeit brief, indicated by direct observation of the employees that there is apparently a fair amount of sedentary clerical work in that office. However, if he never received the results, then he never made an effort to at least provide five hours of work.

The Service has Failed to Meet Its Burden of Proof

It is widely understood that in a contract dispute the Union is the moving party and has the burden of proving their case. However, it is also widely understood that the burden of proof shifts back and forth between the parties as claims and counterclaims surface during the arbitration hearing. This is particularly true when the fundamental issue is one of discrimination. The Union believes that the evidence clearly establishes a *prima facia* case of discrimination based on handicap.

It is undisputed that Ms. Moore was not accommodated with medically suitable work. Therefore, she was discriminated against. The burden now shifts to the Service to prove that their discriminatory act was not unlawful. It is their burden to prove that accommodating Ms. Moore with any medically suitable clerical work would impose an undue hardship on the Service. As stated in Joint Exhibit 3, Section 227:

> What constitutes "undue hardship" is not defined by the law; it is considered on a case-by-case basis, taking into consideration factors such as the number of employees in the office, the type and size of the facility, the size of the budget, the composition of the work force, and the nature and cost of the accommodation in question.

What is on the record in this case specific to the issue of undue hardship? First, we would point out that there is no claim made by the Service anywhere in the moving papers regarding any undue hardship. At the arbitration they introduced some documents relating to a series of "Reasonable Accommodation Meetings" (Service Exhs. 1, 2, and 3). In the document that refers to the final meeting held on June 15, 1999 (Service Exh. 3) the Service makes no claim of undue hardship. In fact they conclude that ". . . there is approximately five hours work that is available at the Thornton Post Office that may be within Ms. Moore's restrictions." There was testimony from Postmaster Marshall for the Service regarding some of his concerns with accommodation. For example, he noted that letter trays could weigh more than twenty pounds; that "somebody would have to be there all the time"; that the workplace could become congested; that there could be a "morale problem". However, on cross examination when asked if at this time there was work that Ms. Moore could perform he replied, "everything is possible". The Union argues that Postmaster Marshall's testimony does not prove undue hardship. The Service may point to their memorandum of the first "Reasonable Accommodation Meetings" in February, 1998 (Service Exh.I) in an attempt to prove undue hardship. In that document they list their "three major concerns", which were that Ms. Moore will be in a career position, that using her would cause excessive overtime, and that co-workers would probably say that she was getting preferential treatment. The Service apparently believes that these speculative generalities are sufficient to establish a persuasive case of undue hardship since they conclude this report of their first meeting by stating that because of these concerns, providing Ms. Moore with any medically suitable employment "would severely impede the effectiveness and efficiency of the office..." This is a good example of attempting to fatten a thin argument with a paucity of facts. In addition it should be noted that the Service did not raise specific undue hardship arguments in the final meeting of June 15, 1999 (Service Exh. 3). The Union argues that the Service has failed in their burden to prove undue hardship. Their discrimination against Ms. Moore is therefore unlawful and violative of Article 2.1 of the CBA.

Conclusion

The Service unlawfully discriminated against Ms. Moore, a handicapped person. If they had exercised the reasonable accommodation guidelines in good faith Ms. Moore could have been provided medically suitable work. The Service may argue undue hardship, but that is a defense that must be proven by facts, and sufficient facts are not in the record for that argument to prevail. The Service, rather than making "every effort" to accommodate Ms. Moore, simply acted to please itself, and then proceeded to act in the manner necessary to justify and defend its precipitant decision to bar Ms. Moore from returning to work. It was a decision that was made without any genuine regard for the CBA, for Handbook EL-307, for the Rehabilitation Act, for Ms. Moore's talents and skills, or for Postmaster Marshall's opinion that she was "an outstanding employee". The Service behaved in an unprofessional, inappropriate , and callous manner, and in so doing they illegally discriminated against Ms. Moore.

Remedy

Ms. Moore and Postmaster Marshall testified that prior to her injury Ms. Moore was normally working at least forty hours per week, and Form CA-17 (Union Exh. 3) as completed by the Service on "Side A", "Part 6", indicates that Ms. Moore was working eight hours per day, six days per week. Also, Ms. Moore testified that a "Reasonable Accommodation Meeting" was held on December 23, 1997 and that at the time of that meeting she had already supplied the Service with thorough medical opinion as to her physical limitations (Jt. Exh. 5, p.6). We argue, therefore, that as of December 23, 1997 the Service had sufficient information to provide Ms. Moore with medically suitable work. Therefore, we ask that Ms. Moore be made whole for the period beginning on December 27, 1997 (the first full pay period beginning after December 23, 1997) to the present. Specifically, that she be paid for forty hours per week to include all raises, bonuses, and COLAs, and be granted all other rights and benefits that would have accrued to her as if she had been working during this period.

Thank you.