

REGULAR ARBITRATION PANEL

In the Matter of Arbitration Between)
Grievant: Class Action)
Post Office: Manchester NH)
)
)
UNITED STATES POSTAL SERVICE) Case No.:B10C-1B-C 15171234
)
)
and)
) Union No. Manch0419C
AMERICAN POSTAL WORKERS UNION)
)

Before: Timothy Buckalew, Arbitrator

Appearances:

For the Postal Service: Rhett C. Walton, Labor Relations Specialist
250 Colby Corner
East Hampstead, NH 03826

For the Union: Thomas O'Brien, National Business Agent
Clerk Division B
2 Electronics Drive Suite 38
Danvers MA 01923-1038

Place of Hearing: Manchester, NH
Date of Hearing: September 13, 2016
Briefs Filed: NA
Award Issued: November 11, 2016
Relevant Contract Provisions: Article 37.3.A.2
Contract Year: 2015
Type of Grievance: Contract

AWARD SUMMARY

The failure to make every effort to maintain a duty assignment for career employees to bid violated Article 37 and resulted in the arbitrary and capricious reversion of Position No. 71270716.

ISSUES

Did the USPS violate Article 37 when they reverted job #71270716? If so, what shall be the

RELEVANT CONTRACT PROVISIONS

NATIONAL AGREEMENT

ARTICLE 37

CLERK CRAFT

Section 3. Posting, Bidding, Application

A. Newly established and vacant clerk Craft duty assignments shall be posted as follows:

1. All newly established Clerk Craft duty assignments shall be posted to craft employees eligible to bid within 28 days. All vacant duty assignments, except those positions excluded by the provisions of Article 1. Section 2, shall be posted within 28 days unless such vacant duty assignments are reverted. **Every effort will be made to create desirable duty assignments from all available work hours for career employees to bid.** [emphasis in original]

A. 2. **Reversion.** When a vacant duty assignment is under consideration for reversion, the local Union President will be given an opportunity for input prior to a decision. The decision to revert or not to revert the duty assignment shall be made not later than 28 days after it becomes vacant and if the vacant assignment is reverted, a notice shall be posted advising of the action taken and the reasons therefor.

USPS-APWU JOINT CONTRACT INTERPRETATION MANUAL (2012)

[. . . .]

Section 3.A.2.

68. *When reverting a vacant duty assignment, what steps are required under Article 37.3.A.2?*

Response: In order to comply with Article 37.3.A.2 management must take the following steps within the 28 day period:

1. Give the local union president the opportunity for input prior to making the final decision.
2. The final decision to revert must be made within 28 days of the

vacancy.

3. A notice must be posted advising of the reversion and the reasons therefor.

[. . .]

69. *When does the 28 day time period begin for purposes of making a decision whether to revert a duty assignment?*

Response: The 28 days begins when the duty assignment becomes vacant. A duty assignment is vacant on the effective date a bid holder moves to a new duty assignment, quits, retires, etc.

[. . .]

70. *What is the 'normal' remedy for management exceeding the 28-day period for reverting a duty assignment?*

Response: The assignment must be posted for bid.

RELEVANT FACTS

On January 21, 2015. Mark Devane, Manager In Plant Support notified the local Union President that position 71270716 (Tour 1, Automation Letter, the Position in dispute) vacated on January 10, 2015. was under consideration for reversion. "Due to operational changes and decreases in letter volume, both standard and first." On February 2, 2015, before expiration of the twenty-eight day contractual wait prescribed by Article 37, Devane informed the Union that the Position was reverted, "due to decreasing first class mail volume and the new network rationalization plan."

The Union filed a timely grievance arguing that the reason cited, "is the general statement of reason always used for everting a position" and further specifically challenging the assertion that decreased mail volume supported the reversion because, "PSE hours are well over 40 hrs. weekly and the regulars still in the section [automation] are working overtime averaging 153 hours weekly and penalty overtime averaging over 15 hrs. weekly. The Step 1 response denying the grievance stated, "the grievance is beyond the scope of the step one designee."

The Union appealed to Step 2. No Step 2 answer was filed and after an extensions to

file an appeal was granted, the Union filed its appeal on March 9 reiterating the arguments made at Step 2. A Step 2 answer was not filed and the Union appealed to Step 3 on May 4, 2015. Management submitted a Step 2 decision on May 29, but that decision is not found in the case record submitted at the arbitration hearing. Over the objection of the Union, the Postal Service offered the written response which it represents was in its files for the grievance. The substance of the letter sets out the position of the union that there were enough hours to maintain the position. Barbara LaFlamme, management's Step 2 designee, did not address the Union's claim that the hours worked in the section justified maintaining the position, but rather reiterated the position that satisfying the procedural requirements of Article 37.3.A.2 satisfied its contractual obligation.

The Step 3 decision denying the grievance issued on August 28, 2015 following a Step 3 meeting with the National Business Agent. Without explaining the specifics of the Postal Service's reasoning, the answer states, "The basis for this decision has been outlined in managements (*sic*) Step 2 decision which is herein incorporated into the Step 3 decision." The National Business Agent represented at the hearing that the Step 2 answer referenced in the denial letter was not produced at the meeting preceding the Step 3 answer, and he was uncertain if the Step 2 management answer was in the possession of the local union at the time the Step 3 meeting was held.

Over the Union's strenuous objections that his testimony was new evidence excluded by Article 15, Manager Devane, who was not involved in the grievance procedure, testified that he first reviewed the Employee All Reports supplied the Union the day of the instant hearing. He asserts that the information provided did not overcome the decision to revert automation position because while it confirms the Union's claims made in the written grievance that there was approximately 150 hours of overtime in the section, that there was penalty overtime averaging more than fifteen hours, and PSE hours greater than forty hours a week, the data was not persuasive because it was not compiled to show the Year-over-Year comparison, did not show if some employees were being move to other operations for some part of their total hours and did not constitute a sound measure of productivity. The Union's data, supplied by the Postal Service also did not show if the overtime rate was influenced by clerks taking vacations, sick leave use.

Mr. Devane also maintained that the reversion was justified by the overall rationalization of work at the plant relating to changed in mail moved into the plant under a new operational plan that shifted automation from one shift to a more equal distribution of that work across all shifts. Secondly, he testified, the use of PSE's reflected in the reports does not show a need for a clerk position, but that PSE's were being deployed to deal with changing volume of mail processing related to the changes in the implementation of the new operational plan. The Postal Service did not offer any documentary evidence to support Devane's testimony and he acknowledged that all the PSE's at the plant were deployed in the automation section at the time the reversion of the position occurred.

POSITIONS OF THE PARTIES

The Union has the burden of proving a contract violation. The Union contends the grievance has merit and should be sustained because the evidence from the Postal Service's time records shows that PSE's were working in the section more than forty hours a week, FTR's in the section were averaging 153 hours of overtime and fifteen hours of penalty overtime. There is no dispute the duties of the clerk position reverted still exist and are being performed by employees other employees. The grievance record in this case shows that the Postal Service never offered any reason for the reversion that should be considered by the Arbitrator. At Step 1, the PS2608 shows that the supervisor stated, the grievance is beyond the scope of the step one designee. Management failed to file a timely Step 2 within the time limits prescribed by Article 15.2(f). The contract gives the employer ten days after the Step 2 meeting to file a written decision addressing the Step 2 appeal. That did not happen here--instead, a written decision was not received by APWU until twenty four days after the grievance had been appealed to Step 3, and the answer given merely states that management followed the proper procedure to revert the position vacated on January 10, 2015. The May 25 written answer should be excluded because it violated the parties' agreement on the proper processing of grievances, but if considered it should be

taken as evidence of the arbitrary and capricious nature of this reversion. APWU offers numerous regional panel awards including two from this Arbitrator, B10C-4B-C 15182470 (Lexington, 2016) and B10C-4B-C 13180572 (Belmont 2013) and the national panel award of Arbitrator Stephen Goldberg, Q10C04Q-C 12320729 (2013). With respect to the Goldberg award, which addressed the question of management's obligation to consider and make available PSE duty assignments when excessing employees, the Union argues that Article 37.3.A.1 obligates management to consider PSE hours and create desirable duty assignments from all available work hours for career employees to bid. By that language, the Union argues, the PSE hours in the Tour 1 automation section should have been considered for reduction before reverting the position in question. The claim that alleged "network rationalization" is a blanket justification for the reversion of the position is much too vague to warrant the reversion in light of the evidence showing there were nearly a thousand regular hours and more than three hundred overtime hours worked by PSE's in some pay periods after the reversion. This evidence shows the Postal Service's obligation under Article 37.3.A. 1. has not been met. To remedy the violation, the Union asks for the same remedy it sought from the time the grievance was filed. The position should be restored and made available for bid as required by the contract.

The Postal Service

The Union has failed to meet its burden of showing by clear and convincing evidence that management violated Article 37 in any manner when it reverted the vacant job number 71270716. By the very terms of the contract, the Postal Service has the right to revert a vacant position. Article 37. 1.F defines a reversion as "Management's decision to reduce the number of duty assignments in an installation when such duty assignment(s) is/are vacant." Article 37.3.A.2 puts procedural requirements when reverting a position: giving the local Union President an opportunity for input prior to a decision; management must make the decision to revert or not revert not later than 28 days after a duty assignment is

vacated; and if reverted, management must post a notice advising of the action and the reasons therefor. APWU stipulates that this procedure was followed. Management sent the local union president adequate notice on January 10. The Union did not respond to provide input. Management implemented the reversion on February 2, 2015, well within the twenty-eight day contractual requirement.

The Union responded with a grievance alleging that there were enough hours to make up a full time clerk job. The Postal Service argues that the evidence offered during the grievance meetings and at the arbitration is insufficient to show the reversion was arbitrary or capricious. The evidence relates only to a few weeks in February and a mail volume study covering the end of December 2014 to February 6, 2015. There is no comparative year-over-year data and nothing that shows the decision was not based on the needs of management to maintain an efficient operation as mandated by Article 3.

The Postal Service offered numerous awards with special reliance of the decisions of Arbitrator Cenci in B10C-1B-C 13128281 (Burlington PD&F ,2014) and B10C-1B-C 13122077 (Easter Maine P&DC, 2014) dismissing grievances contesting reversions. Arbitrator Cenci found that the Union had failed to show that they had been denied information that would permit them to provide input before the reversion was implemented.

The Postal Service insists that it is proper and consistent with the contract for the Arbitrator to accept and give weight to Devane's testimony, and the Step 2 written decision, late filed though it was. Arbitrator Cenci addressed the issues surrounding the missing Step 2 decision in her Eastern Maine P&DC award cited above, where she held that the Step 2 grievance meeting where the reversion disputed there was discussed was effectively addressed by advancing the grievance to Step 3, which she found to be the contractual remedy. The Union was not prejudiced by the delayed Step 2 answer because that written decision was in the hands of Union for months before this arbitration hearing. The Postal Service argues it should not be punished by effectively casting the late-filed Step 2 written answer as effectively a default on the grievance which has no merits at

any rate.

Management has an obligation under Article 3 to maintain the efficiency of the mail operations and the management right to determine the methods, means and personnel by which operations should be conducted. Once it is shown that management has acted reasonably to improve efficiency, it is not the case that the Postal Service must show that the alternatives offered by the Union were unfeasible, and management does not have present statistical evidence to support its decision, citing Arbitrator Kathleen Spilker, C90C-4C-C 97014544, Arbitrator Neveu, G10C04G-C 12294990 (2013), Arbitrator Dobry, J06C-4J0C 10038686 (2013), Arbitrator Pecklers, B00C-4B-C 0 7209736 (2014), and others. The Arbitrator should deny the grievance because management has shown there was a rational business reason for reverting the position and unless the Union shows that the action was unreasonable, it should not be reversed.

Discussion

The many awards offered by the parties dealing with grievances contesting the reversion of positions demonstrate the attempts by arbitrators to balance the relationship between the understanding of the parties of management's Article 3 rights to run an efficient mail operation and the newly wrought promise in Article 37.3.A.1. : "All newly established Clerk Craft duty assignment shall be posted to craft employees eligible to bid within 28 days. All vacant duty assignments, except those positions exclude by the provisions of Article 1, Section 2, shall be posted within 28 days unless vacant duty assignments are reverted. **Every effort will be made to create desirable duty assignments from all available work hours for career employees to bid.**"

Arbitrators looking at this new language have frequently held that the addition of the bolded language in the most recent contract imposes a higher obligation on management to take positive steps to preserve or create vacated duty assignments where PSE's are deployed to absorb the hours and work done by a reverted position. Arbitrator Viale's 2014 award in E10C-1E-C 13013167 illustrates how arbitrators have read the language promising to "create desirable

duty assignments from all available work hours...” In that decision, the arbitrator drew a sharp line between awards issued on Article 37 reversion grievances before and after the addition of the quoted language. Reading the “every effort” clause together with Article 7.3.A.1, abolishing PTRS and dPTF’s with Article 7.3B’s commitment to maximize full time employees while minimizing part-times without a fixed schedule, she concluded that the new language of Article 37.3.A.1 supersedes earlier decisions, notably Arbitrator Byars national panel award ,Q94C-4Q-C 96096822 (2009), holding that management did not have to combine hours of non-traditional , casual and regularly scheduled PTF’s when making staffing reduction decisions. Arbitrator Viale, concluded, as have I, that to give meaning to this recent amendment to Article 37, the contract as a whole and the broad language adopted amounts to a “an affirmative obligation to maximize the scheduled career work force” and a failure to show that such efforts were made requires a conclusion that a reversion was “arbitrary, capricious and/or unreasonable”. Awards issued before the agreement on the “every effort” provision finding that management’s obligations when reverting a position were satisfied by following the notice and input procedure set out in 37.3.A.2 have been pushed aside by the agreement that management must do more than provide notice and give the local union an opportunity for input. Before reverting a vacant duty assignment, the parties agree that management must take steps (every effort) to create a desirable duty assignment “from all available work hours”. The evidence shows here that there was a steady, substantial use of PSE hours to perform exactly the same work in the automation section. Manager DeVane testified that he implemented the reversion without any consideration of the hours worked by PSEs at the time of the reversion. Under this elevated standard, the Postal Service failed to adhere to the contract since it clear management made no affirmative effort to determine if the vacant duty assignment could be preserved for career employees to by diverting PSE hours, with or without changing hours, days off and/or skill requirements as allowed by Article 37.

I recognize that this conclusion is at odds with at least one recent award addressing Article 37.3.A.2. In B10C-1B-C 15171221 (2016), Arbitrator Zaigler rejected the argument made here that the “every effort” clause requires considering the amount of overtime being worked in the automation section. He noted the Union did not offer any input after getting notice of the proposed reversion and never raised the “every effort” clause during the grievance process. Under the Aaron rule barring new evidence or arguments, NC-E11359 (1984), he refused to consider the “every effort” arguments. He determined that the Postal Service had given notice and an opportunity for input to the local Union President and had reverted the position within 28 days, without considering the implications of the new language. His conclusion is also consistent with Arbitrator Cenci’s awards cited by the Postal Service where she concluded that compliance with the reversion procedures were satisfied. Arbitrator Cenci did not address the application of the “every effort” provision and there is no showing that argument was before her in either regional panel case cited by management.

In contrast, the record here shows the Union consistently argued that the high levels of overtime for FTR’s and the deployment of PSE’s for substantial hours meant there was ample available hours to create/maintain a desirable duty assignment for bidding. The existence of the large number of PSE’s working and they were deployed to provide flexibility to respond to new mail processing schedules apparently but the reversion was not based on a decline volume that caused the reduction in PSE hours as far as the evidence discloses. While a close case in some respects because the work hours record are only a snap shot of a few weeks around the time of the reversion, I found the undisputed evidence showing large number of PSE’s working regularly in the automation section on the same tour and the high use of overtime and penalty overtime sufficient to support a prima facie case that management failed to make any every effort to maintain a desirable career duty assignment.

Unlike the grievance addressed by Arbitrator Zielger, the failure to maximize hours for a FTR position argument was preserved through the

grievance record and was never addressed substantively during the prior grievance meetings or decisions. There is no evidence that prior to finalizing the reversion that management took any steps to determine if a desirable duty assignment could be maintained from hours worked by PSE's or overtime hours worked by PSE's and FTR's. Failure to do so was "arbitrary and capricious" and inconsistent with the "every effort" promise of Article 37. 3. A.1.

To remedy the violation I order the Postal Service to repost bid 71270716 as proposed by the Union's grievance.

AWARD

The Postal Service violated Article 37.A.by failing to make every effort to create desirable duty assignments from all available work hours for career employees to bid. Management shall make every effort to use available hours to maintain that position and repost it for bid consistent with its rights under Article 37.

Respectfully submitted,



Timothy J. Buckalew, Arbitrator