

NATIONAL ARBITRATION  
BEFORE IMPARTIAL ARBITRATOR STEPHEN B. GOLDBERG

In the Matter of Arbitration )  
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 between )  
 )  
 UNITED STATES POSTAL SERVICE )  
 )  
 and )  
 )  
 AMERICAN POSTAL WORKERS )  
 UNION, AFL-CIO )  
 )  
 and )  
 )  
 NATIONAL POSTAL MAIL HANDLERS )  
 UNION, AFL-CIO as Intervenor )  
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 and )  
 )  
 NATIONAL ASSOCIATION OF LETTER )  
 CARRIERS, AFL-CIO as Intervenor )  
 )

Q06C-4Q-C 09250752

BEFORE: Stephen B. Goldberg, Arbitrator

APPEARANCES:

United States Postal Service: Patrick M. Devine, Manager, Contract Administration;  
Neftali "Nefty" Pluguez, Labor Relations Specialist

American Postal Workers Union, AFL-CIO: Anton G. Hajjar, Attorney (O'Donnell,  
Schwartz & Anderson, P.C)

National Postal Mail Handlers Union, AFL-CIO: Mady Gilson, Attorney; Bruce R.  
Lerner, Attorney; Daniel A. Zibel, Attorney (Bredhoff & Kaiser, P.L.L.C.)

National Association of Letter Carriers, AFL-CIO: Keith E. Secular, Attorney (Cohen,  
Weiss and Simon, L.L.P.)

Place of Hearing: USPS Headquarters, 475 L'Enfant Plaza, S.W.,  
Washington, D.C.

Date of Hearing: April 25, 2012

Date of Award: August 1, 2012

Relevant Contract Provisions: Article 6; Sections (1), (2) ; Article 14, Sections 1, 4.D;  
MOU re Layoff Protection

Contract Year : 2006-2010 ; 2010-2015

Type of Grievance : Contract Interpretation

**Award Summary**

There were two issues in this case: (1) whether the grievance was arbitrable ; (2) if so, whether the Layoff Protection MOU in the 2010-2015 Agreement protects an employee who has transferred out of the APWU bargaining unit into another unit covered by the Healy Award of September 15, 1978. The USPS arguments that the grievance was not arbitrable because (1) premature, (2) barred by Article 4, (3) APWU cannot advocate on behalf of employees it does not represent, and (4) no interpretive issue was presented, were rejected. On the merits, I concluded that APWU's position that the Layoff Protection MOU continued to apply to an employee transferred into another bargaining unit would present such practical problems of contract administration and personnel management for USPS that it should not be adopted in the absence of persuasive evidence that USPS and APWU intended its application in those circumstances. Such evidence was found to be lacking. Accordingly, the grievance was denied.

  
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Stephen B. Goldberg, Arbitrator

## I. STIPULATED ISSUE

Whether each employee in the regular work force as of November 20, 2010, and who has not acquired the protection provided under Article 6 is protected henceforth against any involuntary layoff or force reduction during the term of the National Agreement (November 21, 2010, through May 20, 2015) although that employee has transferred out of the APWU bargaining unit and into another unit covered by the Healy Award of September 15, 1978.<sup>1</sup>

## II. SUMMARY OF RELEVANT EVIDENCE

In 1978, the American Postal Workers Union (APWU), the National Postal Mail Handlers Union (NPMHU), and the National Association of Letter Carriers (NALC), which at that time jointly bargained with the Postal Service as the Postal Labor Negotiating Committee, were parties to an interest arbitration proceeding which resulted in the issuance by Arbitrator James J. Healy of what has become known as the “Healy Award”. That Award provided protection against involuntary layoffs or force reduction to individuals employed in the regular workforce as of September 15, 1978, the date of the Award, as well as to all such employees who became employed after the date of the Award and who achieved six years of continuous service with the Postal Service. The Healy Award was codified in Article 6 of the 1978 Agreements between USPS and each of the unions which were members of the Postal Labor Negotiating

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<sup>1</sup> Although the original dispute leading to this arbitration related to the interpretation of the Layoff Protection MOU in the 2006-2010 National Agreement, the Postal Service and the APWU stipulated that the Arbitrator’s decision was to interpret the language of the Layoff Protection MOU in the 2010-2015 National Agreement. The language of the two MOUs is the same with the exception of the years each is in effect.

In the course of this decision, I shall at times refer to the Layoff Protection MOU simply as “the MOU”, since no other MOU is relevant to this case. Similarly, while the MOU protects employees against both involuntary layoff and force reduction, I will typically refer to layoff protection as encompassing both involuntary layoff and force reduction.

Committee (APWU, NPMHU, and NALC, and has remained in each of their contracts since 1978.

By 1987, NPMHU had ceased participating in joint bargaining with APWU and NALC. During its separate negotiations with the Postal Service that year, NPMHU sought two relevant changes to its National Agreement. First, it proposed amending Article 6 to provide that the protections of the Healy Award would apply to each individual employed in the regular workforce as of July 20, 1987 (instead of the date of the Healy Award), irrespective of length of prior service. Second, NPMHU sought no-layoff protection for future employees after one year of service, rather than the six-year requirement contained in the Healy Award. The Postal Service counter-proposed a Memorandum of Understanding which granted protection for the term of the National Agreement against layoff and force reduction for all employees in the regular work force who were employed as of the date of the Agreement. This MOU, which is the predecessor of the MOU involved in the instant case, was accepted by NPMHU, and remained in effect until July 20, 1990.

The Joint Bargaining Committee, which at that time consisted of APWU and NALC, subsequently made a proposal to USPS that was similar to the original NPMHU proposal (“to amend Article 6 to prohibit layoffs for those not already covered by no layoff protection”), and ultimately entered into a Layoff Protection MOU similar to that which had been accepted by NPMHU.

In the years that followed the expiration of the 1987-90 Agreements between USPS and the three unions, the Layoff Protection MOU, modified only as to its effective and expiration dates, was in all APWU and NPMHU contracts through 2006-2010, with the sole exception of 1994, when those two unions, still bargaining jointly with USPS, went to post-impasse interest

arbitration and were not awarded the Layoff Protection MOU. NALC, in contrast, has not had the benefit of the Layoff Protection MOU in any contract subsequent to the expiration of the 1987-90 Agreement.

At present, the Layoff Protection MOU is found in the 2010-2015 APWU contract. Inasmuch, however, as NPMHU now bargains separately from APWU, and the MOU in the 2006-2011 NPMHU Agreement expired on November 20, 2011, and a successor agreement has not yet been entered into, employees in the bargaining unit represented by NPMHU are without the protections of the MOU. Also without the protections of the MOU are those employees in the bargaining unit represented by NALC, who, as previously noted, have not had the benefit of the MOU since 1990.

The controversy giving rise to the instant arbitration appears to have arisen for the first time on April 17, 2009, when William Burrus, at that time APWU President, sent the following letter to USPS Contract Administrator John Dockins:

We discussed this date the application and interpretation of the "Layoff Protection" Memorandum appearing on page 286 of the APWU 2006-2010 Collective Bargaining Agreement. The issue is the definition of the word "employee" as included in the Memorandum.

It is the position of the union that employee is defined as one who was employed in the APWU bargaining unit on November 20, 2006; continues employment until lay off procedures are implemented for non protected employees or who achieves the required six years of employment for lifetime protection. This definition of employee is unaffected by the change of assignment or craft so if prior to the expiration of the 2006 national agreement, a protected employee is reassigned to a craft that is not protected by the provisions, such employee would continue the protection of the Memorandum.

As you are aware, "protected" status, temporary or permanent, is unaffected by the reassignment of employees from one bargaining unit or craft to another.

A contrary interpretation would result in an employee who was employed within a craft that did not negotiate a Layoff Protection Memorandum achieving such protection by virtue of his/her transfer to the APWU craft during the term of the 2006 national agreement.

Due to excessing and reassignments, many junior APWU represented employees have been reassigned outside the APWU crafts. In the event that lay off is necessary it will be essential that we identify covered and non covered employees.

Please respond with your interpretation of the referenced provision so that the union can take appropriate action.

Mr. Dockins' June 3, 2009, response stated, in relevant part:

Dear Bill:

This responds to your April 17 letter regarding the Memorandum of Understanding (MOU) Re: Layoff Protection, which is printed on page 286 of the 2006 USPS/APWU Collective Bargaining Agreement. In particular, you request to know the Postal Service's definition of the word "employee" as used in the MOU. In sum, it is the APWU's position that once an employee obtains the protective status against layoff under the MOU, you opine that the employee has that protection forever, even if the employee transferred out of or is reassigned to a non-APWU bargaining unit position.

The Postal Service does not agree. It is the Postal Service's position that once an employee leaves, voluntarily or involuntarily, from an APWU-represented position, that employee is not covered by any of the provisions of that collective bargaining agreement. Put another way, application of this particular MOU is limited to those APWU-represented craft employees covered under the parties' 2006 National Agreement, just as would be the case with other provisions of the Agreement. In the Postal Service's view, this position is supported, among other things, by the plain reading of Article 1, Section 2, of the National Agreement which states:

*The employee groups set forth in Section 1 above do not include, and this Agreement does not apply to . . . :*

*7. Rural letter carriers;*

- 8 *Mailhandlers; or*
9. *Letter carriers.*

Accordingly once an employee is reassigned to any of the above positions, the terms of the 2006 APWU Agreement, including the MOU Re Layoff Protection would not apply. . . .

Mr. Dockins' response was followed by two letters from Mr. Burrus to Doug Tulino, USPS Vice President, Labor Relations. The first of those letters, dated June 5, 2009, and captioned "Dispute over the application of the No Layoff Memorandum", stated:

Dear Mr. Tulino:

I received your June 3, 2009 response to my interpretive inquiry regarding the application of the 2006 Memorandum protecting the APWU represented employees who had not achieved no lay off protection on the date of the agreement. I disagree with your response of June 3, 2009.

Pursuant to the provisions of the 2006 national agreement, this is to initiate a Step 4 grievance. The union's position is as outlined in my April 17 letter. I am available to discuss this matter at your convenience consistent with the terms of the national agreement.

You may contact Robin Bailey of my staff at 202-842-4248 for a mutually agreeable date for discussions.

The next Burrus-Tulino letter, dated July 6, 2009, was captioned, "Appeal to Arbitration, National Dispute", referred to the Layoff Protection Memorandum, and stated:

Dear Mr. Tulino:

Consistent with the terms of the Collective Bargaining Agreement (CBA), this is to appeal to arbitration the dispute over the above referenced issue.

The parties have met at Step 4 on this issue; however the Postal Service has failed to respond in writing of its understanding of the issue and to render a Step 4 decision. The Postal Service has failed to provide a written response and at the time of this appeal, I am unaware of the USPS' understanding of the issue and will be informed for the first time in arbitration.

There is no evidence of further discussion or exchange of written material concerning the Layoff Protection Memorandum between July 6, 2009, and the April 25, 2012, hearing in this matter.

### III. RELEVANT CONTRACT PROVISIONS

#### ARTICLE 6 NO LAYOFFS OR REDUCTION IN FORCE

- (1) Each employee who is employed in the regular workforce as of the date of the Award of Arbitrator James J. Healy, September 15, 1978, shall be protected henceforth against any involuntary layoff or force reduction.

It is the intent of this provision to provide security to each such employee during his or her work lifetime.

Members of the regular work force, as defined in Article 7 of the Agreement, include full-time regulars, part-time employees assigned to regular schedules and part-time employees assigned to flexible schedules.

- (2) Employees who become members of the regular work force after the date of this Award, September 15, 1978, shall be provided the same protection afforded under (1) above on completion of six years of continuous service and having worked in at least 20 pay periods during each of the six years. ...

[See Memo, page 281]

#### MEMORANDUM OF UNDERSTANDING BETWEEN THE UNITED STATES POSTAL SERVICE AND THE AMERICAN POSTAL WORKERS UNION, AFL-CIO

Re: Layoff Protection

Each employee who is employed in the regular work force as of November 20, 2006, and who has not acquired the protection provided under Article 6 shall be protected



henceforth against any involuntary layoff or force reduction during the term of this Agreement. It is the intent of this Memorandum of Understanding to provide job security to each such employee during the term of this Agreement; however, in the event Congress repeals or significantly relaxes the Private Express Statutes this memorandum shall expire upon the enactment of such legislation. In addition, nothing in this Memorandum of Understanding shall diminish the rights of any bargaining-unit employees under Article 6.

Since this Memorandum of Understanding is being entered into on a nonprecedential basis, it shall terminate for all purposes at midnight, November 20, 2010, and may not be cited or used in any subsequent dispute resolution proceedings.

## ARTICLE 15 GRIEVANCE-ARBITRATION PROCEDURE

### Section 1. Definition

A grievance is defined as a dispute, difference, disagreement or complaint between the parties related to wages, hours, and conditions of employment. A grievance shall include, but is not limited to, the complaint of an employee or of the Union which involves the interpretation, application of, or compliance with the provisions of this Agreement or any local Memorandum of Understanding not in conflict with this Agreement. . . .

### Section 4.D

It is agreed that in the event of a dispute between the Union and the Employer as to the interpretation of this Agreement, such dispute may be initiated at the Step 4 level by either party. Such a dispute shall be initiated in writing and must specify in detail the facts giving rise to the dispute, the precise interpretive issues to be decided and the contention of either party. Thereafter the parties shall meet in Step 4 within thirty (30) days in an effort to define the precise issues involved, develop all necessary facts, and reach agreement. Should they fail to agree, then, within fifteen (15) days of such meeting, each party shall provide the other with a statement in writing of its understanding of the issues involved, and the facts giving rise to such issues. In the event the parties have failed to reach agreement within sixty (60) days of the initiation of the dispute in Step 4, the Union then may appeal it to arbitration, within thirty (30) days thereafter. . . .

#### IV. DISCUSSION

##### A. Arbitrability

###### 1. Prematurity

USPS asserts that the grievance should be dismissed because it is not arbitrable. Initially, according to USPS, the grievance is premature – it raises no issue ripe for resolution...

APWU, on the other hand, asserts that:

The correct interpretation of this MOU presents an issue of utmost importance to the members of the APWU bargaining unit as the Postal Service goes through a traumatic transition. . . . The Postal Service is redeploying its facilities and workforce in dramatic fashion. As the Postal Service declares large numbers of APWU-represented employees such as clerks excess to its needs and reassigns them under Article 12, these employees must decide whether to seek and accept voluntary transfers out of the APWU unit and into those represented by the National Postal Mail Handlers Union . . . or the National Association of Letter Carriers . . . , where they will start a new period of seniority, or to be involuntarily reassigned, often to distant locations and perhaps on different tours, often at great cost to their personal and family lives. The decision is especially momentous for those who have not achieved Article 6 protection from layoffs in all three units . . . According to the Postal Service, the no-layoff MOU . . . does not apply to these employees, making them vulnerable to seniority-based layoffs because they will have to start a new period of seniority in their new crafts in accordance with the NALC and NPMHU National Agreements. If they choose not to transfer voluntarily, the Postal Service asserts the right to negate their APWU-negotiated no layoff protections by the simple expedient of involuntarily reassigning them out of the APWU unit. . . .

The USPS response to APWU's assertion is that in the history of the USPS no clerk has ever been laid off, that it has given no notice or indication that any clerk is being considered for layoff, and that APWU has presented no evidence to the contrary.

Although USPS is correct in pointing out that APWU presented no evidence of imminent harm to APWU-represented employees that would flow from an arbitral acceptance of the USPS interpretation of the MOU, there is nothing in Article 15 – or generally in the administration of collective bargaining agreements - that requires evidence of imminent harm as a condition

precedent to filing or arbitrating a grievance. Article 15, Section 1, provides that “A grievance shall include, but is not limited to, the complaint of an employee or of the Union which involves the interpretation, application of, or compliance with the provisions of this Agreement . . .” The instant grievance clearly involves the interpretation of an MOU that is part of the Agreement, hence the prematurity objection to arbitrability is without merit.

## 2. Article 15.4.D

According to USPS, at the time APWU appealed the instant matter to arbitration – July 6, 2009 – several of the pre-arbitration requirements of Article 15.4.D had not been met. There had been no Step 4 meeting, there had been no exchange of the post-Step 4 meeting statements in which each party is to provide the other with “its understanding of the issues involved and the facts giving rise to such issues”, and APWU had not defined a precise interpretive issue. Furthermore, USPS asserts, the sole interpretive issue and contentions relating to that issue set out in Mr. Burrus’ April 17 letter to Mr. Dockins dealt with the MOU, not with Article 6 or the Healy Award. Hence, USPS concludes, relying on various national interpretive arbitration decisions:

Because the APWU failed to present Article 6 in its filing, the grievance should be dismissed in its entirety. In the event the grievance is not dismissed, the decision should be limited to the application of the Layoff Protection MOU as expressly communicated between the parties in the correspondence between Burrus and Dockins.

Stated otherwise, it is the USPS position that the arbitrator should either dismiss the grievance as not arbitrable or, at very least, preclude APWU from relying on Article 6 or the Healy Award.

The argument that the grievance should be dismissed due to APWU’s failure to cite Article 6 in its July 6 filing for arbitration or in its letters of April 17 or June 3 is without merit. To be sure, APWU did not refer to Article 6 in its pre-arbitration letters or its appeal to arbitration, but it did set out a precise interpretive issue – whether an employee who was

employed in the APWU bargaining unit on November 20, 2006, and thus benefits from the protections of the MOU, loses MOU protection if he/she is transferred to a bargaining unit not covered by the MOU. As far as setting out a “precise interpretive issue” is concerned, no more than that is necessary to comply with Article 15.4.D.<sup>2</sup>

Dealing with the USPS argument that APWU’s failure to refer to Article 6 or the Healy Award in its pre-arbitration statement of the precise interpretive issues to be decided bars APWU from relying on either of them in this arbitration requires a clear understanding of the manner and extent to which APWU relies on Article 6 and the Healy Award.

In order to develop such an understanding, I here set out a summary of the APWU contentions relating to Article 6 and the Healy Award as they are understood by USPS (Brief, pp. 10-11):

The Layoff Protection MOU should be read together with Article 6 of the National Agreement to determine the intent. The wording of Article 6 and the Layoff Protection MOU have close parallels so the familiar rule of contract interpretation codified in the Restatement (Second) of the Law of Contracts, § 202.2, applies, “A writing is interpreted as a whole, and all writings that are part of the same transaction are interpreted together.” Reading the Layoff Protection MOU with Article 6, means there is a third way to obtain job security in the form of no-layoff and no-RIF. The same Article 6 protection vests or accrues to the individual regular work force then on the rolls for the duration of the contract; whether they stay in the APWU crafts or leave it. The JCIM also references the Layoff Protection MOU

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<sup>2</sup> The decision of Arbitrator Linda Byars in HOC-NA-C38 (June 24, 2009), on which USPS relies, is not inconsistent with this conclusion. In that case, the Union failed, at any time prior to arbitration, to identify a contract provision or language in support of its claim. It was under those circumstances that Arbitrator Byars held that the Union could not rely on Article 12 for the first time at arbitration. And, since that was the only contract provision on which the Union relied, Arbitrator Byars further held that the grievance must be dismissed under Article 15 for failure to present an interpretive issue. In the instant case, however, the Union clearly notified USPS that it was relying on the Layoff Protection MOU.

As for the USPS contention that there had been no Step 4 meeting and no exchange of 15 day letters, Mr. Burrus stated in his July 6 Appeal to Arbitration that there had been a Step 4 meeting and that it was the Postal Service that had failed to provide a written statement or a Step 4 decision. Inasmuch as USPS does not rely on these asserted APWU failures as a grounds for dismissing the grievance, I shall make no effort to resolve the factual discrepancy, other than to note that there is no record evidence contradicting Mr. Burrus’ assertions.

under Article 6 so they go together. Further, the “Notes:” section found on page viii in the National Agreement creates a “Bridge” for Article 6 into all bargaining units covered by the Healy Award.

The Layoff Protection MOU applies only to APWU represented employees even though the term regular workforce is defined identically for the APWU, NALC and the NPMHU for the purposes of Article 6. This may lead to greater protections granted to employees formerly employed by the APWU; however the Postal Service has an obligation to comply with all contracts. If the Postal Service has taken on contradictory obligations, the solution to the problem should not be to rob APWU represented employees from their MOU protections, even if it limits the ability of the Postal Service to conduct a layoff or RIF.

It is apparent that, even as USPS understands APWU’s contentions, APWU does not rely on the Healy Award as the source of the no layoff protections it seeks in this arbitration. The Healy Award is referred to only to describe the bargaining units other than APWU in which a transferred employee receives Article 6 protection. Indeed, the Stipulated Issue refers to the Healy Award for that limited purpose.

Nor does APWU assert that the layoff protections it here seeks flow from Article 6. Rather, it argues that both Article 6 and the MOU deal with layoff protections, hence that one of the elements to be considered in interpreting the MOU is Article 6. Thus, APWU states, quoting from the Restatement of Contracts, that “A writing is interpreted as a whole, and all writings that are part of the same transaction are interpreted together”. Looking to Article 6 for guidance in interpreting the MOU is not at all the same as relying on Article 6 to establish the transferable layoff protections that APWU seeks here. There is nothing in Article 15 to the contrary.

None of the cases relied upon by USPS compels a contrary conclusion. The first such case is NC-E-11359 (1/25/84), in which Arbitrator Ben Aaron wrote:

It is now well settled that parties to an arbitration under a National Agreement between the Postal Service and a signatory Union are barred from introducing evidence or arguments not presented at preceding steps of the grievance procedure, and that this principle must be strictly observed.

The reason for the rule is obvious: neither party should have to deal with evidence or argument presented for the first time in an arbitration hearing, which it has not previously considered and for which it has had no time to prepare rebuttal evidence

and argument. The spirit of the rule, however, should not be diminished by excessively technical construction. The evidence establishes to my satisfaction that [the grievants] were aware from the outset of the reason for [the Postal Service's actions]. NALC is therefore in no position to claim surprise by the testimony and argument offered by the Postal Service during the arbitration hearing. Accordingly, I conclude that on this point NALC's objections must be overruled.

USPS, similar to NALC in the above case, is in no position to claim surprise by virtue of APWU's reference to Article 6 in support of its interpretation of the MOU. USPS is surely familiar with the traditional principles of contract interpretation set out in the Restatement of Contracts, and so often relied upon by Arbitrator Carlton Snow.<sup>3</sup> One of the core principles of the Restatement, referred to above, is that "A writing is interpreted as a whole, and all writings that are part of the same transaction are interpreted together". In light of that principle, it was entirely foreseeable that APWU would seek to support its interpretation of the MOU by reference to Article 6, which, like the MOU, deals with layoff protections. The failure of APWU to notify USPS in advance that it would refer to Article 6 thus does not bar it from doing so, any more than it would be barred from relying on the bargaining history of the MOU or the parties' practice in implementing the MOU because it had not notified USPS that it would do so. Each party is obliged to notify the other of the Agreement provisions on which it will rely and the position that it will take with regard to those provisions, but it need not notify the other party of every principle of contract interpretation on which it will rely in support of its position. To hold otherwise would do violence to Arbitrator Aaron's warning that "The spirit of the rule . . . should not be diminished by excessively technical construction". It would also make Article 15 a trap for the unwary, rather than a valuable means of protecting against the last-minute presentation of arguments not reasonably foreseeable by the other party.

Nothing in the facts of the cases relied upon by USPS is inconsistent with the forgoing conclusion. For example, in Case No. N8-W-0406 (9/21/81), referred to by Arbitrator Snow in B90N-4B-C 94027390 (8/20/96), Arbitrator Mittenthal refused to allow the Postal Service to rely on Article XIII to defeat the Union's claim because:

[T]he Postal Service made no mention of Article XIII in Steps 2, 3, or 4. Its reliance on this contract provision did not surface until the arbitration hearing itself.

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<sup>3</sup> See, e.g. Case No. 194N-4I-D 96027608 (April 8, 1998)

In the instant case, however, APWU is not relying on Article 6 to provide it with the transferable layoff rights it claims. Those rights, according to APWU, flow entirely from the MOU, with Article 6 being cited solely to aid in the interpretation of the MOU, not as an independent source of the claimed rights. Nothing in the Mittenthal decision bars APWU from using Article 6 in this fashion.

In another Mittenthal case relied upon by USPS (H4C-NA-C 30 (1/29/90), the Union's grievance conceded that simultaneous scheduling was permitted under Article 8 in certain situations. The Union's interpretive issue was not whether the Postal Service had a right to simultaneously schedule, but the circumstances under which that right could legitimately be exercised. Then, according to Arbitrator Mittenthal:

At the arbitration hearing, APWU counsel argued that simultaneous scheduling is not permitted under Article 8 in any situation. This was a radical change of position, a one hundred and eighty degree turn. The grievance admitted the existence of a Management right which counsel now denies. For four years, both parties had apparently assumed the existence of that right. The APWU cannot be allowed to change the essential thrust of the grievance at the arbitration hearing. Its action is tantamount to the filing of an entirely new grievance at the hearing.

The Union's change in position, as described by Arbitrator Mittenthal – taking one contract interpretation position during the grievance procedure and reversing its position at arbitration – is far removed from APWU's raising for the first time at arbitration an entirely foreseeable principle of contract interpretation.

In sum, neither the arguments made by USPS nor the cases on which it relies support its position that APWU should be barred from asserting that Article 6 may be considered in support of the same contract claim that APWU raised during the grievance procedure – that the layoff protections provided by the MOU survive an employee's transfer from the APWU bargaining unit to another unit covered by the Healy Award.

3. APWU Cannot Advocate on Behalf of Employees It Does Not Represent

The next USPS arbitrability challenge is that APWU is here claiming rights on behalf of employees it does not represent. There is a certain plausibility to that argument inasmuch as the right that APWU is claiming – the transferability of MOU layoff protections – would not be enjoyed until the employee in question had left the APWU bargaining unit. On the other hand, the employees for whom APWU is claiming the right to carry layoff protections into other units are currently represented by APWU. Hence, APWU is empowered to seek protections for those employees that will survive a transfer into another unit. Whether the MOU provides such protections is a separate question – to be dealt with momentarily - but the existence of that question does not bar APWU from seeking transferable layoff protections for employees it currently represents.

The cases on which USPS relies in support of the argument that APWU is barred from seeking post-transfer layoff protections for employees it currently represents are clearly distinguishable. In H4C-NA-C 106 (July 25, 1994), Arbitrator Carlton Snow held that APWU could not complain of alleged USPS discrimination against handicapped employees before those employees became members of the APWU bargaining unit. In H1N-3D-C 40171 (April 13, 1987), Arbitrator Neil Bernstein held that NALC could not prosecute a grievance seeking compensation on behalf of an employee who served as an NALC representative, but who was not and never had been in the NALC bargaining unit. In H4C-NA-C 34 (August 12, 1992), Arbitrator Richard Mittenthal held that APWU could not challenge subchapter 450 of the ELM because that subchapter dealt solely with employees not included in any collective bargaining unit. In sum, while a union cannot use the grievance procedure to seek rights for employees it has never represented or to enforce rights that matured before they began to represent those employees, none of the cases cited by USPS bar APWU from seeking to establish rights for employees it currently represents, even though those rights would not be enjoyed until the employees had left the APWU unit.<sup>4</sup>

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<sup>4</sup> USPS also asserts that the grievance is not arbitrable because it presents no genuine interpretive issue. That assertion is dealt with at page 20, note 6.



## B. Merits of the Grievance

It is a fundamental principle of American labor law, too well-accepted to require citation, that a union which has been certified as the exclusive bargaining representative of employees in a particular bargaining unit bargains on behalf of those employees only, and is without authority to enter into agreements on behalf of employees in other bargaining units whom it does not represent.

It is equally clear that, as a general rule, benefits that have been negotiated by a union on behalf of employees in a bargaining unit represented by that union apply to those employees only as long as they remain in that bargaining unit. An employee who leaves one bargaining unit to join another does not generally carry with him/her contractual rights that were negotiated on his/her behalf in the former unit, but is rather covered by the contract in the unit which he/she joins, and is entitled to only the benefits contained in the latter contract.

To be sure, the general rule that an employee's rights under a collective bargaining contract do not travel with the employee if he/she moves to a different bargaining unit covered by a different contract can be overridden by an employer and union who wish to negotiate rights that will continue in effect after the employee has left the bargaining unit. There is, however, the practical problem that it may be difficult or impossible for an employer to comply with a commitment to provide enforceable rights to an employee entering another bargaining unit with which the employer has a collective bargaining contract without either violating the contract rights of employees in the transferee unit or being forced to engage in unproductive conduct in order to comply with its commitments under both contracts. Suppose, for example, that an APWU-represented employee is transferred to an NPMHU unit which does not have the Layoff Protection MOU. Suppose further that USPS decides that it is overstaffed in the NPMHU unit and that effective management of its resources requires it to lay off 10 employees in the NPMHU unit. Under the NPMHU contract, such layoffs must take place in inverse order of seniority. Yet, according to the APWU, the former APWU-represented employee, despite being the least senior employee in the NPMHU unit due to his/her recent transfer to that unit, cannot be laid off without violating the MOU. On the other hand, if that employee is not laid off, and USPS lays off a more senior employee in order to reduce the unit size by 10, USPS will have violated the NPMHU contract.

According to APWU – as well as Intervenor NPMHU - that situation does not pose an insuperable problem for USPS. It could, they assert, accord MOU protection to the former APWU employee without violating the NPMHU contract by either forgoing the planned layoff entirely or by allowing the former APWU employee to return to the APWU unit, laying off the nine least senior NPMHU-represented employees. Combining those nine layoffs with the return of the former APWU employee to the APWU unit would effectively reduce the NPMHU employee complement by ten without having done violence to either the NPMHU contract or the layoff protections of the MOU as it is interpreted by APWU.

The difficulty with this solution, however, is that it would require USPS either to retain nine more employees in the NPMHU unit than it believes necessary (by forgoing the planned layoff) or to add an additional employee to the APWU unit (by returning the former APWU-represented employee to the APWU unit), which it also believes unnecessary. There is no cost-free escape from the problems presented for USPS if it is found to have agreed with APWU to provide for the layoff protections of the MOU to continue in effect after an APWU represented employee has gone to another bargaining unit. In light of the entirely foreseeable problems created for USPS if it were to have agreed to portable no layoff protections, I am unwilling to assume, in the absence of persuasive evidence to the contrary, that it has agreed to such protections.

APWU's response to the foregoing analysis, expressed by the Arbitrator in a tentative fashion at the hearing, was:

As for the Arbitrator's reluctance to conclude that the Postal Service would enter into agreements which might hamper execution of future personnel moves, the APWU pointed out that the Postal Service has done so before, as in the situation described in the award of Arbitrator Carlton Snow [194N-4I-D 96027608 (April 8, 1998)], in which the Postal Service agreed with the NALC to provide work in other crafts to city letter carriers whose occupational drivers' licenses had been suspended or revoked. Arbitrator Snow held that the Postal Service must honor both the APWU and NALC contracts and if the result was that affected city letter carriers could not be accommodated under the APWU contract, they must remain employed as city letter carriers notwithstanding the fact that their licenses had been suspended or revoked.

Arbitrator Snow's decision, however, provides little support for the APWU positions that (1) the Postal Service should be found in the instant case to have agreed to layoff protections that an APWU-represented employee could carry with him/her into another bargaining unit, and (2) finding the existence of such an agreement does not create such significant problems for USPS that the Arbitrator should be reluctant to so find. As for (1), a significant difference between the instant case and that before Arbitrator Snow is that in the latter case USPS conceded that it had agreed with NALC to provide transfer rights into the APWU unit that might conflict with the APWU contract, but argued that subsequent events should operate to relieve it of that agreement.<sup>5</sup> USPS makes no such concession here, instead vigorously arguing that it did not agree with APWU to provide transferable no layoff protections. As for (2), while Arbitrator Snow did not order USPS to engage in conduct violative of the APWU contract (temporary cross-craft transfers to positions not first offered to employees in the APWU unit), he did order, in lieu of such transfers, that USPS place all affected NALC employees on leave with pay until such time as work was available for them. The consequence of USPS having been found to make an agreement with one union (NALC) that it could not carry out without violating the contract of another union (APWU) was that it was required to pay the employees who were the beneficiaries of its agreement with NALC, even though those employees could perform no productive work for USPS. An employer who knows or should know that such may be the consequences of a promise to provide rights to employees in one bargaining unit that they will carry into another bargaining unit will be unlikely to make such a promise, warranting the conclusion that such a promise ought not to be found to have been made here absent persuasive evidence warranting such a finding.

Turning next to whether such evidence exists in this case, APWU asserts that it is clear on the face of the MOU that it provides employees with layoff protection even after they have transferred into another bargaining unit. APWU points out that the MOU states that it "henceforth" protects each employee in the regular work force from layoffs or RIFs in order "to provide job security to each employee during the term of [the] Agreement". The only limitation on employee protection against layoffs is that it expires when the Agreement expires; there is

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<sup>5</sup> W.R. Grace & Co. v. Rubber Workers, 461 U.S. 757 (1983), is distinguishable on the same grounds. There, too, the Company conceded that it had entered into conflicting obligations under its collective bargaining agreement and its conciliation agreement with EEOC, but argued that it should be relieved on public policy grounds of its obligations under the collective bargaining agreement.

no provision stripping employees of their layoff protections if and when they transfer into a different bargaining unit.

From the USPS perspective, it is clear on the face of the MOU that it does not apply to employees who have transferred from the APWU bargaining unit into another bargaining unit because there is no language in the MOU providing transfer rights. Since no such rights are provided, the parties did not intend to provide them, and the analysis can and should stop there.

Neither of these arguments is persuasive. The MOU is silent on the transferability of employee layoff protections. It doesn't say that they do survive, as USPS points out, but it equally doesn't say that they do not survive, as APWU points out. Accordingly, in order to discern the meaning of the MOU, one must go beyond its language and apply standard rules of contract interpretation.<sup>6</sup>

Among the rules of contract interpretation on which APWU relies is that "A writing is interpreted as a whole, and all writings that are part of the same transaction are interpreted together"<sup>7</sup>. As noted in the discussion of arbitrability (pp. 12-13), APWU asserts that the MOU must be interpreted in light of Article 6, and argues that doing so supports its position in this case. The APWU argument begins with what it calls the undisputed fact that APWU employees carry Article 6 protection against layoffs with them if they transfer to other Healy Award bargaining units. APWU next points out that the language of the MOU, other than its limited duration, is essentially the same language as is contained in Article 6. Each provides protection against involuntary layoff or force reduction, and each expresses the intent to provide job security to the employee, albeit the duration of the protection is different - during the employee's work lifetime in Article 6, during the term of the Agreement in the MOU. In using essentially the same language in the MOU as in Article 6, APWU argues, it was the parties' intent to provide the same - albeit limited to the duration of the Agreement - protections in the MOU for employees not protected under Article 6 as they had provided during their work lifetimes for

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<sup>6</sup> The conclusion that the MOU is not clear on its face regarding the transferability of layoff protections disposes of the USPS argument that the grievance is not arbitrable because it fails to present an interpretive issue. As Arbitrator Carlton Snow pointed out (H7N-1A-C 25966 August 12, 1992):

An 'interpretive issue' exists when there is a reasonable conflict about the meaning to be attributed to the symbols of expression used by the other party. That is, an 'interpretive issue' exists when there is a legitimate dispute about the meaning of the language contained in the contract.

<sup>7</sup> Restatement (Second) of the Law of Contracts, Sec. 202.

employees protected by Article 6. Among those rights, APWU asserts, is that the employee retains protection against layoffs if transferred to another Healy Award bargaining unit.

One problem with the APWU argument lies in its basic assumption - that APWU employees carry Article 6 protection against layoffs with them if they transfer to another Healy Award bargaining unit. While it is undisputed that an APWU-represented employee who is protected against layoffs under Article 6, and who transfers into another Healy Award bargaining unit, is equally protected against layoffs while in the latter unit, it is far from clear that the source of that protection is APWU Article 6, rather than Article 6 of the Agreement covering the bargaining unit into which the employee transfers.

The fact that employees in all three Healy Award bargaining units have the same Article 6 protections means that, as a practical matter, there has been no need for the parties to have tested the source of those rights as applied to a transferred employee – whether they came from Article 6 of the APWU unit which the employee has left or from Article 6 of the contract covering employees in the Healy Award unit to which the employee has been transferred. It is sufficiently unusual, however, for contractual rights to be carried over from one bargaining unit to another that I am unwilling to find, absent clear supporting evidence, that the source of Article 6 layoff protection for a formerly APWU-represented employee who transfers into an NALC or NPMHU unit covered by a Layoff Protection MOU is the APWU Agreement, rather than the Agreement covering employees in the transferee unit. There is no such evidence in this case. And, absent a finding that Article 6 in the USPS-APWU contract provides a right against layoffs to APWU employees who transfer to other Healy Award bargaining units, the APWU argument that the MOU provides such rights because it is virtually identical to APWU Article 6 must fail.<sup>8</sup>

Furthermore, even if Article 6 in the APWU Agreement were interpreted as applicable to employees who transferred to a different bargaining unit, it does not necessarily follow that the MOU applies to employees who do so. APWU and USPS know how to indicate that some contract clauses apply across crafts, and did so in the Bridge Memo with respect to Articles 7,

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<sup>8</sup> APWU raises a number of additional arguments in support of its position that since Article 6 no layoff protections apply when an employee is transferred from one bargaining unit to another, MOU rights are similarly transferable. None of those arguments, however, whether they rest on Article 7.1, USPS-APWU Joint Contract Interpretation Manuals, or the June 15, 1979, APWU Overview of the Healy Award, deal with what I have found to be a fundamental weakness in the APWU argument – the absence of persuasive evidence that Article 6 layoff protections for APWU-represented employees who transfer into a different bargaining unit find their source in the APWU Agreement rather than from the application of Article 6 in the Agreement applicable to the transferee unit.

12, and 13. Similarly, as APWU points out, the Note at page viii of the 2006-2010 Agreement provides that Article 6 applies to all bargaining units covered by the Healy Award (though it does not indicate which Article 6 applies in the event an employee is transferred— that in the Agreement of the transferor union or that in the Agreement of the transferee union). What is important for our purposes, however, is that neither in the Note nor anywhere else in the Agreement did the parties indicate that the USPS – APWU MOU applies to all bargaining units.<sup>9</sup>

APWU asserts that if its MOU is not interpreted as allowing APWU-represented employees to carry layoff protection with them on being transferred to a different bargaining unit, the Postal Service could negate their layoff protection by the simple expedient of involuntarily excessing them into other units – even if the latter are covered by a similar MOU, as could happen if NPMHU and/or NALC obtain such an MOU as a result of their current negotiations with the Postal Service. That, states APWU, “is the kind of absurd result that is inconsistent with the rules of contract interpretation” (Tr. 89).

There are a number of responses to this APWU assertion. In the first place, saying that it is unthinkable that APWU-represented employees should lose their MOU rights against layoff as the result of an involuntary transfer assumes that such rights were intended to be transferable – the very question at issue here. Secondly, if NPMHU and NALC were to obtain an MOU in all respects identical to the APWU MOU, and an APWU-represented employee were transferred into either the NPMHU or NALC unit, that employee would be protected from layoff under one MOU or another, and it would make no practical difference which MOU provided that

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<sup>9</sup> The 2009 exchange of letters between APWU president William Burrus and John Dockins, USPS Manager of Contract Interpretation, in which each set out his view of the post-transfer survival of MOU rights, is of little value in determining the appropriate interpretation of the 2006-2010 MOU. Initially, the parties' expression of their differing views took place long after the 2006-2010 Agreement was negotiated, hence casts no light on their understanding of the 2006-2010 version of the MOU at the time they agreed to it. Furthermore, subsequent to the Burrus-Dockins exchange of views and the 2009 filing of the instant grievance, the parties did not discuss the survivability of MOU rights in the course of bargaining the 2010-2015 Agreement. (At least there is no evidence they did so.) Rather, it appears that they were content to leave the resolution of that issue to arbitration. Under these circumstances, there is nothing in the bargaining history of either the 2006-2010 Agreement or the 2010-2015 Agreement that sheds light on the parties' understanding of the MOU at the time those Agreements were negotiated.

Also without value in interpreting the survivability of MOU rights is a 1999-2000 exchange of correspondence between William Burrus, at that time APWU Executive Vice President, and Peter Sgro, then USPS Acting Manager of Contract Administration. While APWU asserts that Mr. Sgro at that time accepted the APWU view regarding survivability of layoff protections under the MOU, that issue was not raised either in Mr. Burrus' letter to Mr. Sgro or in Mr. Sgro's response.

protection, as is currently the case when an employee is transferred from one bargaining unit protected by Article 6 to another unit protected by Article 6. Finally, if NPMHU and/or NALC were to negotiate no-layoff MOUs that were different from that in the APWU Agreement, for example with different effective dates, an employee transferring from the APWU unit into the NPMHU or NALC unit would have the protections of the MOU in the unit to which he/she was transferred, whether those protections were superior or inferior to those provided by the APWU MOU. There is nothing absurd about that result; it is the consequence of the general rule that a union typically bargains only for those employees in the bargaining unit it represents, and when employees leave that unit for another, they are covered by the contract in effect for the latter unit, not the former.

#### V. AWARD

There were two issues in this case : (1) whether the grievance was arbitrable ; (2) if so, whether the Layoff Protection MOU in the 2010-2015 Agreement protects an employee who has transferred out of the APWU bargaining unit into another unit covered by the Healy Award of September 15, 1978. The USPS arguments that the grievance was not arbitrable because (1) premature, (2) barred by Article 4, (3) APWU cannot advocate on behalf of employees it does not represent, and (4) no interpretive issue was presented, were rejected. On the merits, I concluded that APWU's position that the Layoff Protection MOU continued to apply to an employee transferred into another bargaining unit would present such practical problems of contract administration and personnel management for USPS that it should not be adopted in the absence of persuasive evidence that USPS and APWU intended its application in those circumstances. Such evidence was found to be lacking. Accordingly, the grievance is denied.



Stephen B. Goldberg, Arbitrator

August 1, 2012