

NATIONAL ARBITRATION
BEFORE IMPARTIAL ARBITRATOR STEPHEN B. GOLDBERG

In the Matter of Arbitration)

)

between)

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UNITED STATES POSTAL SERVICE)

Case No. Q10C-4Q-C 15174956

)

Clerk Craft Jobs MOU – Paragraph 4

and)

)

AMERICAN POSTAL WORKERS)

UNION, AFL-CIO)

)

BEFORE: Stephen B. Goldberg, Arbitrator

APPEARANCES:

United States Postal Service: Brian M. Reimer, Labor Counsel; Shannon R. Richardson, Labor Relations Specialist

American Postal Workers Union, AFL-CIO: Melinda K. Holmes, Attorney; Jason R. Veny, Attorney (Murphy Anderson, PLLC)

Place of Hearing: United States Postal Service, 475 L'Enfant Plaza, SW, Washington, D.C.

Hearing Date: January 17, 2017

Date of Award: April 21, 2017

Relevant Contract Provisions: Memorandum of Understanding, Clerk Craft Jobs

Contract Year: 2010-2015

Type of Grievance: Contract Interpretation

SUMMARY OF AWARD

- A. The Postal Service shall, as soon as reasonably possible, comply with its Clerk Craft Jobs MOU commitment to provide the bargaining unit with 800 administrative and technical positions.

- B. Jobs created by the Postal Service in compliance with the Award in Sales Retention Team, Case No. Q10C-4Q-C 14011344 (Goldberg, 2016) shall not count towards the number of jobs provided to the bargaining unit under the Clerk Craft Jobs MOU.

- C. The Postal Service shall make whole all employees affected by its violation of the MOU by providing each with all pay and benefits lost as a result of that violation. Employees affected by the violation include those employees who would have successfully bid on one of the promised administrative or technical positions at the time that those positions should have been filled. Also included among the employees affected by the violation are those who would have been the successful bidders on the vacancies created by the employees who would earlier have been placed in an administrative or technical position had the Postal Service complied with the MOU in a timely fashion.

- D. The Postal Service should have fully complied with the MOU by August 1, 2013. Its liability for loss of pay and benefits to employees affected by its violation of the MOU shall commence on that date.

- E. The Postal Service may deduct from back pay awards under this Award the amount of Union dues owed by the employees receiving such awards, transmitting those amounts to the Union.

- F. The issue of whether the amount of back pay and benefits due to affected employees should be determined at the

national level or the local level is remanded to the parties for further discussion and resolution.

- G. The Arbitrator retains jurisdiction over this matter to resolve any issues related to the Decision and Award, including, but not limited to, the issue remanded to the parties.



April 21, 2017

Stephen B. Goldberg, Arbitrator

I. SUMMARY OF RELEVANT EVIDENCE

As stated in POStPlan:¹

It is . . . undisputed that the Union's central objective in the negotiations for the 2010 Agreement was work protection. The Union's approach to those negotiations took into account the difficult financial position of USPS by making concessions that resulted in approximately \$3.7 billion in savings to the Postal Service over the 5-year term of the Agreement. In exchange, the Union sought to protect existing bargaining unit work from being assigned outside the unit, and to regain bargaining unit work that had, over time, been assigned to outside contractors or to Postal Service employees who were not part of the bargaining unit.

Among the work protection/work recapture provisions that the Union obtained in 2010 was the Clerk Craft Jobs MOU (hereafter frequently referred to as "the MOU"). As relevant here, the MOU provides

The United States Postal Service (USPS) agrees to create certain duty assignments in the Clerk Craft of the American Postal Workers Union (APWU), AFL-CIO in accordance with the following provisions . . . :

3) Audit of EAS Jobs

The Employer shall return duties and responsibilities from Executive and Administrative Schedule (EAS) positions within Mail Processing and Customer Service to

¹ Case No. Q11C-4Q-C 12243899 (Goldberg, 2014, at 11-12.)

the APWU bargaining unit based upon an audit conducted by the employer. . .

The Employer will develop career position descriptions, or assign work to current positions, based on the bargaining unit duties derived from the audit of these positions.

At the request of the Union, the Employer shall engage in the above audit process with respect to any EAS position which the Union believes contains bargaining unit work.

The parties shall meet within 30 days of the execution of this Agreement to review the audits and career position descriptions. .

4) Bargaining Unit Positions

It is understood and agreed that the Employer will provide 800 administrative and technical jobs to the APWU bargaining unit in addition to those provided in paragraph 1 and 2 above. Jobs provided pursuant to paragraph 3 above will count toward the number of jobs provided pursuant to this paragraph. . .

Clerk Craft Director Clint Burelson testified that the Postal Service commitment to provide 800 additional administrative and technical positions to the Clerk Craft was of great value to the bargaining unit. Administrative and technical jobs are highly prized because they tend to be physically less taxing and mentally more stimulating than many other bargaining unit jobs, as well as being typically day shift work on regular schedules. Because they are skilled jobs, the successful bidders are likely to be senior employees. As a senior employee moves into a new job, that leaves a vacancy for a junior employee to bid on. Ultimately, as a result of this “ripple” or “cascade” effect, Mr. Burelson stated, a vacancy will be created that could be filled by a PSE, and “that’s a big thing for a PSE to go from non-career to career”.

According to Rickey Dean, USPS Manager of Contract Administration, in late 2011, Mike Morris, then APWU Director of Industrial Relations, presented the Postal Service with a list of 30 or 32 EAS jobs that the Union thought might contain bargaining unit work. The Postal Service Organizational Effectiveness group

“audited” those positions, and concluded that two of them could be returned to the bargaining unit.² The Address Management Systems Specialist (EAS 15) was returned in September 2012, resulting in the posting of 319 Level 7 AMS Technician positions; the Mail Flow Coordinator (EAS 14) was returned in July 2013, resulting in the posting of 119 Level 8 Mail Flow Coordinator positions, a total of 438 positions.

Meetings between Postal Service and Union representatives continued throughout 2013, with the Union suggesting additional EAS jobs to be audited for possible return to the bargaining unit. The Postal Service, however, provided no additional administrative or technical jobs to the bargaining unit subsequent to July 2013. At some point in 2014, after new Union leadership took office³, the Union took the position that it was not its job to suggest positions for audit, but that, as Mr. Dean stated, “the impetus was on us to do the work, provide the jobs”. Mr. Dean testified, however, that the Postal Service never engaged in a review or audit of EAS positions to see if they could be returned to the bargaining unit unless the APWU requested such a review. Mr. Dean also testified that the Postal Service could have created new administrative and technical jobs for the bargaining unit, but doing so would have been difficult, and the Postal Service did not do so.

II. DISCUSSION

A. What is the appropriate remedy for the Postal Service failure to fully comply with the MOU?

It is undisputed that the Postal Service has not fully complied with its promise in paragraph 4 of the MOU to provide 800 administrative and technical jobs to the Clerk Craft bargaining unit. The issue for decision here is the appropriate remedy for that non-compliance.

The Postal Service position is that no monetary remedy should be awarded at this time. The appropriate remedy for an employer’s wrongful failure to provide a job to an employee entitled to that job under the collective bargaining contract is

² An “audit” of a position, as that term is used in the MOU and by the parties, refers to an examination or review of that position. These terms will here be used interchangeably.

³ According to Mr. Burelson, the Union membership’s election of new leadership at that time was, at least in part, due to the discontent of Union members with the Postal Service delay in complying with the job protection and recapture provisions of the 2010 Agreement, a delay for which the members blamed the Union leadership which had negotiated that Agreement.

to direct the employer to provide the job in question, as well as to make the employee whole for any loss in pay and benefits resulting from the wrongful denial of that job. Compliance with such a make-whole order requires that the parties know the pay and benefits the employee receives in his/her current job and those he/she would have received in the job that was wrongfully denied. The difference between the two, multiplied by the period of time during which the employee was wrongfully denied the job, is the appropriate amount of the make-whole remedy to which the employee is entitled.

In this case, however, as the Postal Service points out, the administrative and technical jobs to which 362 bargaining unit employees are entitled have not yet been provided. Nor have the employees who will fill those jobs been determined. Hence, neither the arbitrator nor the parties know the facts which are necessary to determine the appropriate amount of a make-whole order. Accordingly, the Postal Service asserts, no monetary make-whole award is appropriate at this time. Instead, the Arbitrator should direct the Postal Service to provide all jobs due under the MOU, and to make all affected employees whole for its failure to have done so in a timely fashion. As positions are provided, and employees fill those positions, the amount of an appropriate make-whole order for each employee who was wrongfully denied a position can be determined. The Arbitrator should thus remand the case to the parties so that they may seek to determine the appropriate remedy for each affected employee on a case-by-case basis. This should be done at the local level, with the Union having the right to seek arbitration if it disagrees with the amount of the make-whole award proposed by the Postal Service.

The Union does not contest the Postal Service assertion that normally the appropriate remedy for an employer breach of contract that results in an employee's losing or not being placed in a job to which he/she is entitled is an order that the employer place the affected employee in that job and make him/her whole for any loss of pay and benefits resulting from the contract violation. In this case, however, the Union argues that such a remedy would not make the affected employees whole.

This argument rests on two assertions. First, the Union states that the goal of the Clerk Craft Jobs MOU was not to benefit specific employees, but to benefit the Clerk Craft as a whole. Indeed, at the time the MOU was negotiated, the identity of the persons who would receive the promised jobs was unknown. Second, as stated in the Union brief (pp. 22-24):

Paragraph Four of the . . . MOU was one part of a larger *quid pro quo* of bargaining unit work and jobs made in exchange for billions of dollars in financial concessions paid for by the bargaining unit. . . [The bargaining unit as a whole gave the Postal Service financial concessions paid from their own pockets in return for promises of future bargaining unit work and jobs . . .

When understood from this context, remedying the Postal Service's failure to make good on 362 administrative and technical jobs should be based on the full monetary value of the 362 jobs. The full value of these jobs is the whole of what each of those positions is reasonably calculated to be worth in terms of salary and benefits. . . Together, these aspects make up the objective dollar value of each of the 362 jobs the Postal Service has failed to provide the Union, and should be the basis for calculating a monetary remedy.

From the Union's perspective, then, an appropriate remedy for the Postal Service violation will direct the Postal Service to pay to the Union the estimated value of the 362 jobs it has not provided. For each such job, its estimated value, according to the Union, would consist of wages at Level 8, plus full benefits, beginning January 1, 2012, by which date the Union contends the Postal Service should have fully complied with the MOU. The total amount of such a payment is estimated by the Union to be slightly above \$150,000,000.

The Union's arguments are not persuasive. The Union argues that the fact that the employees who would benefit from the MOU were not known at the time the MOU was negotiated shows that the central purpose of the MOU was not to benefit individual employees, but the Clerk Craft. Hence, a make whole order based on the amount lost by each clerk is inadequate. There are, however, many other provisions of the Agreement, as in the typical collective bargaining agreement, which, when negotiated, do not benefit identifiable employees. One example is an employer's promise not to contract out bargaining unit work. This promise, too, does not benefit employees who are identifiable at the time it is negotiated. Hence, such a provision, like the MOU, may be said to benefit the entire bargaining unit, not an individual employee. Violations of such provisions,

however, are routinely remedied by a make-whole order for the benefit of employees who can be identified as having lost work and income as a result of the contracting out. See Elkouri and Elkouri, How Arbitration Works, Chapter 18.5.A (7th ed., 2012)

To be sure, there are situations in which, even after a contract violation has occurred, there is no means of knowing which, if any, employees have been injured by the violation. In such situations, the arbitrator may issue a monetary award based on grounds other than making injured employees whole. See, for example, Mallinckrodt Chemical Works and Independent Union of Chemical Plant Workers, 50 LA 933 (Goldberg, 1967)(to protect union against injury to its reputation and standing among employees); U.S. Postal Service and APWU, Q94T-4Q-C 97031616 (Das, 2014)(to make the bargaining unit whole and provide a meaningful remedy for the employer's failure to comply with important provisions of the contract); U.S. Postal Service and APWU/NALC, H7C-NA-C 36, H7C-NA-C 132, HOC-NA-C 28 (Mittenthal, 1994)(to redress knowing and repeated violation of the contract over a 5-year period).

In none of the above cases were injured employees identifiable. In the instant case, however, the employees affected by the violation will be identifiable as soon as the remaining jobs are filled. Hence, a remedy based on grounds other than making affected employees whole is not warranted. Indeed, the Union's ultimate argument is not that a remedy other than back pay and benefits is warranted because the injured employees could not have been identified when the promise to provide jobs was made, or cannot be identified when the jobs are filled, but that an award of back pay and benefits to injured employees is insufficient in light of the price paid by the Union for the MOU. The Union asserts that because the MOU was part of a larger agreement in which the Union exchanged \$3.7 billion in financial concessions for job preservation and recapture promises, the failure of the Postal Service to comply with the promises in the MOU should be measured by the monetary value of the 362 jobs promised and not delivered.

The problem with this argument, apart from its novelty, is that there is no demonstrated relationship between the amount demanded by the Union and the value of the concessions made by the Union. Why should the failure of the Postal Service to provide 362 jobs in the approximately 6-year period since those jobs were promised lead to an order directing the Postal Service to pay approximately

\$150 million to bargaining unit employees? Under what theory is this an appropriate recovery for the violation?⁴

This is not to say that the amount sought by the Union is excessive, a matter on which I express no opinion, but rather that the Union has not articulated a theory on which the loss to the bargaining unit should be – not could be, but should be – calculated as the amount of wages and benefits that would have been earned by the bargaining unit members likely to have been placed in those jobs, each of whom held a bargaining unit job at the time of the violation. Nor has the Union shown a relationship between the amount here demanded and the amount of the Union’s concessions in the 2010 Agreement. Finally, the Union has not shown that the employees affected by the Postal Service violation cannot be made whole by a standard back pay order.

In light of all these factors, I shall not grant the Union’s requested remedy of directing the Postal Service to pay to the Union the full value of the 362 jobs not filled in a timely fashion. Nor shall I grant the Postal Service request that no monetary award be issued. Rather, I shall direct the Postal Service to comply as soon as reasonably possible with its MOU commitment to provide the bargaining unit with the full complement of the 800 promised administrative and technical positions, and, as each position is filled, to make whole all employees affected by its delay in filling that position.

The directive that the Postal Service fulfill its MOU obligation “as soon as reasonably possible” should not be taken lightly. Although I recognize that the Postal Service cannot provide the bargaining unit with an additional 362 jobs overnight, I accept Mr. Burelson’s testimony that the promised administrative and technical jobs have quality of working life benefits in addition to their financial advantages. While the loss of the financial advantages can be remedied by a monetary award, the loss of the quality of work life benefits for the years during which employees who were entitled to those benefits did not receive them cannot be so remedied. Hence, it is an appropriate and meaningful element of the Award that the Postal Service provide the remaining 362 positions as soon as reasonably possible.

⁴ In Case No. H7C-NA-C 36, H7C-NA-C 132, HOC-NA-C 28, cited above, Arbitrator Mittenthal held that “some form of monetary remedy [was] plainly justified” for knowing and continued violation of the casual cap over a 5-year period. He did not, however, specify the amount of the monetary remedy, remanding that question to the parties.

I shall further direct, as noted above, that as each position is filled, the Postal Service it is to make whole the employees affected by its delay in filling that position. The monetary award to each affected employee is to be determined, consistent with the Postal Service position, on an individual, case-by-case basis, but the formula to be applied in doing so shall be that here established. Proceeding in this fashion will minimize further delay in providing affected employees with the back pay and benefits to which they are entitled as a result of the Postal Service violation.

I turn next to additional issues that must be resolved in determining the scope and application of the make-whole order.

1. How many positions, of the 800 promised in the MOU, remain to be filled?

In 2012-2013, the Postal Service created the Sales Retention Team (SRT), composed of employees on the OWCP periodic rolls. The work of SRT employees consisted primarily of telephoning small and medium size USPS customers to encourage them to continue doing business with USPS, and telephoning potential customers to encourage them to begin using USPS services. In Case No. Q10C-4Q-C 14011344 (Sales Retention Team)(2016), I found that similar work had been performed by EAS Sales Department personnel in the past, but solely as one aspect of an EAS position which, other than making such calls, consisted of duties and responsibilities far more extensive and complex than those performed by SRT employees. I stated:

[T]he work of making sales retention and lead qualification telephone calls which had previously been made by EAS Sales Department personnel is not “new” work within the meaning of Article 1.5. However, the consolidation of this work into a new position which performs solely that work has resulted in a “newly created. . . position which contains non-managerial and non-supervisory duties”.

Accordingly, I held that the Postal Service was required by Article 1.5 to assign all SRT positions to the Clerk Craft, the national craft unit most appropriate for such positions. I further held that by not posting the SRT positions for bidding by Clerk Craft employees at the time they were created, the Postal Service had violated Article 37.3.A.1. As a remedy for these violations, I ordered the Postal

Service to assign all SRT positions to Clerk Craft employees, and to post SRT work assignments for bid by Clerks.

The Postal Service here argues that any Clerk Craft jobs created by the Postal Service in compliance with the Sales Retention Team award should count towards the number of positions it has provided to the Clerk Craft under the MOU. In support of this position, the Postal Service relies on a March 14, 2011, APWU press release which stated that the effect of the MOU would be that “a minimum of 800 positions will be created in the Clerk Craft to perform administrative and technical jobs that are currently performed by EAS personnel”(Emphasis supplied). Since, according to the Postal Service, SRT positions had been administrative jobs previously performed by EAS personnel, providing those jobs to the Clerk Craft constitutes compliance with the MOU.

The flaw in the Postal Service argument is that in Sales Retention Team I ordered the Postal Service to remedy its violation of Articles 1.5 and 37.3.A.1 by assigning all SRT positions to Clerks. Actions taken by the Postal Service to comply with that remedial order cannot be considered as complying with its MOU commitment to provide 800 additional positions to the Clerk Craft. To hold otherwise would be to permit the Postal Service to avoid its obligations under the MOU on the ground that it was complying with its obligations under Articles 1.5 and 37.3.A.1. In fact, those obligations are separate; the Postal Service must comply separately with each.⁵

2. *Which employees were affected by the Postal Service violation of the MOU and are entitled to be made whole for the effects of that violation?*

One group of employees clearly affected by the Postal Service failure to comply with the MOU consists of those who would have successfully bid on one of the 362 administrative or technical positions at the time that position should have been filled. All such employees are entitled to be made whole in the amount of all pay and benefits they lost as a result of the lapse in time between the date they would

⁵ The Union asserted that several Postal Service arguments raised at the arbitration hearing should not be considered by the Arbitrator because they were not included in the Postal Service 15-day statement. Most of the arguments objected to by the Union on this ground were not raised in the Postal Service brief, hence were not considered. One exception was the Postal Service argument discussed above - that any Clerk Craft jobs created by the Postal Service in compliance with the Sales Retention Team award should count towards the number of positions provided by the Postal Service under the MOU. Because I have denied that argument on the merits, it is unnecessary to consider whether it should also be denied on procedural grounds.

have filled one of the 362 positions had the Postal Service filled them in a timely fashion and the date on which they are actually awarded one of those positions.

Another group of employees entitled to remedial relief is composed of those who were indirectly affected by the Postal Service violation. As Mr. Burelson testified, this group consists of employees who would have been the successful bidders on the vacancies created by those employees who should earlier have been placed in an administrative and technical position. There may be more than one employee indirectly affected in this fashion since each vacancy filled later that it should have been may lead to another – all the way down to a PSE whose conversion to career status is delayed by the original violation – and the Postal Service shall be required to make each such employee whole for any loss in pay and benefits sustained as a result of that violation. *CF. General Electric Company, 296 NLRB 844 (1990).*

3. *What is the date on which Postal Service liability for back pay and benefits should begin?*

The Postal Service asserts that it should have no liability for back pay and benefits prior to July 8, 2016, the date on which the extended 2010 Agreement terminated, and the 2015 Agreement became effective. This assertion appears to rest on the ground that an implied term of the Postal Service promise to provide 800 Clerk Craft provisions was that it would have the entire term of the 2010 Agreement to comply with that promise. The Union, for its part, proposes January 1, 2012, as the beginning date of Postal Service liability, asserting that seven months from the May 2011 effective date of the 2010 Agreement, was ample for the Postal Service to have fully complied with its commitment.

I accept neither of the dates proposed by the parties. Initially, the Postal Service view that the Union agreed, without explicitly stating, that the Postal Service would have the entire 4-year term of the 2010 Agreement within which to make good on its Paragraph 4 promise, is not persuasive. Absent explicit agreement to that effect, as was contained in Paragraph 1 of the MOU, it is unlikely that the parties would have contemplated that a promise made when the 2010 Agreement was entered into need not be fully acted on until that Agreement

had expired, and could not be enforced until a successor Agreement had been entered into.⁶

As for the Union assertion that Postal Service liability for non-compliance should begin on January 1, 2012, it is true that the Postal Service had not provided any positions as of that date. On the other hand, the Union had not complained of its delay in so doing. The absence of any Union complaint of a lack of progress through January 2012 suggests that the Union believed that the Postal Service was making a good faith effort to comply with the MOU as promptly as could reasonably be expected. Hence a Union effort at this time to assert that the Postal Service should be held liable for not having fully complied with its promise of 800 positions as of January 1, 2012, is not persuasive.

Whatever may be said of Postal Service compliance as of January 1, 2012, it is striking that after September 2012, when it provided 319 positions, and July 2013, when it provided another 119 positions, not a single position was thereafter provided. Nor is there evidence that, subsequent to July 2013, the Postal Service was engaged in a good faith effort to provide additional positions. The Union proposed several EAS positions from which the Postal Service might provide bargaining unit positions, but none of the Union's proposals led to additional positions. . Nor did the Postal Service, in the absence of a Union proposal, ever consider voluntarily adding any EAS positions to the bargaining unit, even after the Union told the Postal Service that it would no longer suggest EAS positions for audit, as it was the Postal Service obligation to do so. Finally, although the Postal Service admits that it could have complied with the MOU by creating bargaining unit positions other than those derived from EAS positions, it never did so.

In sum, in view of the Postal Service failure to provide any administrative or technical positions to the Clerk Craft after July 2013, and the lack of evidence that the Postal Service was engaged in a good faith effort to provide additional positions after that date, I conclude that Postal Service liability for failure to comply with the MOU begins on August 1, 2013.⁷

⁶ Paragraph 1 of the MOU provides that the Postal Service was to have the full term of the 2010 Agreement within which to provide 1,100 Clerk Craft duty assignments in Call Centers; Paragraph 2 provides a detailed time table from one to four years for the transition from 204-B positions to Lead Clerk positions; Paragraph 3 is silent on the time within which the Postal Service was to return EAS positions within Mail Processing and Customer Service to the bargaining unit; and Paragraph 4, as has been noted, is silent on the time within which the Postal Service was to complete the provision of 800 administrative and technical jobs to the bargaining unit.

⁷ My reliance on the absence of evidence of Postal Service efforts to comply with the MOU after July 2013, in determining the date on which its back pay liability begins should not be viewed as impliedly holding that good

4. Should the Postal Service be required to pay Union dues to APWU for each of the 362 bargaining unit jobs that it failed to provide in a timely fashion?

The Union's position that the appropriate remedy for the Postal Service violation of the MOU is a lump sum payment award to it includes the demand that the Union be made whole for the loss of dues from the 362 employees who did not fill Clerk Craft positions in a timely fashion. The Postal Service, drawing upon Postal Regulations and practice applicable to employees who have been wrongfully terminated, asserts that Union dues are normally deducted from back pay awards to Union members. Union dues are not generally paid to the Union in addition to back pay, as doing so would relieve the Union member of his/her dues-paying obligation, transferring that obligation to the Postal Service.

The Union asserts, in response, that whatever the general practice may be regarding deducting Union dues from back pay awards, that practice is not relevant in this case. For, the Union states, the lump sum remedy it seeks here is not tied to the loss of pay and benefits to individual employees, but to the harm sustained by the bargaining unit in not receiving the job benefits which it had been promised in exchange for the financial concessions it made in the 2010 Agreement.

Inasmuch as I have rejected the Union's proposed lump sum remedy based upon grounds other than making employees whole, I also reject the associated argument that Union dues should be paid by the Postal Service in addition to back pay, rather than deducted from the back pay awards of those employees. For, were I to accept the Union's argument, affected employees would be made more than whole; Union dues normally paid by them would instead be paid by the Postal Service

faith efforts to comply with a contractual commitment are a substitute for actual compliance. In this case, however, in which the Postal Service commitment was sufficiently substantial – the provision of 800 new positions – that even the Union concedes that the Postal Service was entitled to a reasonable period of time within which to comply, I believe that evidence of the Postal Service efforts to comply may be taken into consideration in determining when its liability for lack of full compliance should begin. See also Case No. Q11C-4Q-C 11311239 at 10.

5. Should the amount of back pay and benefits due the affected employees be determined at the national or local level?

In the course of opposing the Union's request that the Arbitrator award a lump sum amount as the remedy for the Postal Service violation of the MOU, the Postal Service brief asserted that the appropriate remedy should be determined individually for each affected employee at the local level, not as part of a National-level arbitration in which a lump sum amount would be awarded. The Union's brief, which was focused primarily on its argument in favor of a lump sum remedy, did not address the level at which individual make-whole amounts should be determined in the event the Arbitrator rejected a lump sum remedy.

In light of the conclusion reached here that the appropriate remedy for the Postal Service failure to fully comply with the MOU should not be a lump sum payment, but rather individual make-whole amounts, I shall remand the question of the level at which those amounts should be determined to the parties for further consideration and resolution. ⁸

⁸ The Union asserts that the Postal Service, by raising new arguments and evidence at and after the hearing, and by forcing the Union to invoke arbitration to obtain an appropriate remedy for an admitted violation of the Agreement, has created an expense the APWU should not have to bear. It requests that the Arbitrator order the Postal Service to pay the full costs of arbitration in order to "send a message that the arbitration process should not be abused to delay a resolution of legitimate disputes" (Brief, p. 26).

I deny the Union's request without considering the merits of its factual assertions. The Postal Service and the Union arbitrate frequently, and a determination of whether the Postal Service has "abused the arbitration process" and so should be required to pay the full costs of this arbitration would encourage assertions of this nature in future arbitrations. Bringing into each arbitration the issue of arbitration cost shifting because of bad behavior by the other party would be harmful to both the arbitration process and the parties' relationship. Both parties are sophisticated, and know how to draft a contractual provision that would allow or require arbitral cost-shifting. They have not done so and I decline the invitation to do so.

III. AWARD

- A. The Postal Service shall, as soon as reasonably possible, comply with its Clerk Craft Jobs MOU commitment to provide the bargaining unit with 800 administrative and technical positions.
- B. Jobs created by the Postal Service in compliance with the Award in Sales Retention Team, Case No. Q10C-4Q-C 14011344 (Goldberg, 2016) shall not count towards the number of jobs provided to the bargaining unit under the Clerk Craft Jobs MOU.
- C. The Postal Service shall make whole all employees affected by its violation of the MOU by providing each with all pay and benefits lost as a result of that violation. Employees affected by the violation include those employees who would have successfully bid on one of the promised administrative or technical positions at the time that position should have been filled. Also included among the employees affected by the violation are those who would have been the successful bidders on the vacancies created by the employees who would earlier have been placed in an administrative or technical position had the Postal Service complied with the MOU in a timely fashion.
- D. The Postal Service should have fully complied with the MOU no later than August 1, 2013. Its liability for loss of pay and benefits to employees affected by its violation of the MOU shall commence on that date.
- E. The Postal Service may deduct from back pay awards under this Award the amount of Union dues owed by the employees receiving such awards, transmitting those amounts to the Union.

- F. The issue of whether the amount of back pay and benefits due to affected employees should be determined at the national level or the local level is remanded to the parties for further discussion and resolution.

- G. The Arbitrator retains jurisdiction over this matter to resolve any issues related to the Decision and Award, including, but not limited to, the issue remanded to the parties.



April 21, 2017

Stephen B. Goldberg, Arbitrator