

In the Matter of the Arbitration Be

UNITED STATES POSTAL SERVICE

AND

Case No. H8T-4HC10784

AMERICAN POSTAL WORKERS UNION

Hearings held October 6, 1981 and April 6, 1982

Before Richard I. Bloch, Esq.

APPEARANCES:

For the Union

Thomas Freeman
Executive Vice-President, Maintenance Craft

Thomas F. Bianca, Esq.

For the Employer

Charles F. Kappler, Esq.

OPINION

Facts

In September of 1979, the Kansas City Post Office abolished the job of Robert Brewer, then a Level 10 Electronic Technician OCR. He was subsequently reduced and reassigned to a Level 7 Maintenance Mechanic subject to a two-year salary protection. The grievance in this matter concerns Brewer's claim that Management acted improperly in downgrading him and further, assuming that action was not improper, Management failed to accord him contractual "re-

treat rights" that would enable him to return to the Level 10 position under certain circumstances.

Issue

1. Whether the Employer violated the labor agreement by the manner in which Grievant was excessed and assigned to a lower level position.

2. Whether the Employer violated the labor agreement in failing to grant Grievant certain retreat rights under Article XII of the National Agreement.

Union Position

The Union claims that Management's determination to excess Mr. Brewer amounted to a "reduction in force" requiring the Employer to comply with the provisions of 5 U.S.C. Chapter 35. This was not done, says the Union, and the action taken to excess the Grievant must, therefore, be set aside.

Additionally, the Union contends that, assuming Brewer was properly excessed, Article XII of the labor agreement requires that he be reassigned outside the section so as to enable him to later avail himself of retreat rights guaranteed under Article XII. Inasmuch as he remained within the same section, it is claimed, there was a violation.

Employer Position

The Postal Service denies any violation of applicable

laws or regulations and notes that, while Grievant was given an opportunity to seek a remedy through the Merit Systems Protection Board, he opted to grieve his reassignment under the contract. It contends its authority to reassign the Grievant fell squarely within its prerogatives under Article III.

Noting that the Article XII retreat rights only apply in cases where an individual is excused outside a section and noting further that the reassignment in this case was within the section, Management says the grievance must be denied.

Relevant Contract Provisions

ARTICLE III
MANAGEMENT RIGHTS

The Employer shall have the exclusive right, subject to the provisions of this Agreement and consistent with applicable laws and regulations.

- A. To direct employees of the Employer in the performance of official duties;
- B. To hire, promote, transfer, assign, and retain employees in positions within the Postal Service and to suspend, demote, discharge, or take other disciplinary action against such employees;
- C. To maintain the efficiency of the operations entrusted to it;
- D. To determine the methods, means, and personnel by which such operations are to be conducted;
- E. To prescribe a uniform dress to be worn by letter carriers and other designated employees; and
- F. To take whatever actions may be necessary to carry out its mission in emergency situations, i.e., an un-

forseen circumstance or a combination of circumstances which calls for immediate action in a situation which is not expected to be of a recurring nature.

ARTICLE XII
PRINCIPLES OF SENIORITY, POSTING AND
REASSIGNMENTS

Section 5. Reassignments

A. Basic Principles and Reassignments

...C. Special Provisions on Reassignments

In addition to the general principle and requirements above specified, the following specific provisions are applicable:

...4. Reassignment Within an Installation of Employees Excess to the Needs of a Section

a. The identification of assignments comprising for this purpose a section shall be determined locally by local negotiations. If no sections are established immediately by local negotiations, the entire installation shall comprise the section.

b. Full-time employees, excess to the needs of a section, starting with that employee who is junior in the same craft or occupational group and in the same level assigned in that section, shall be re-assigned outside the section but within the same craft or occupational group. They shall retain their seniority and may bid on any existing vacancies for which they are eligible to bid. If they do not bid, they may be assigned in any vacant duty assignment for which there was no senior bidder in the same craft and installation. Their preference is to be considered if more than one such assignment is available.

c. Such reassigned full-time employee retains the right to retreat to the section from which withdrawn only upon the occurrence of the first residual vacancy in the salary level after employees in the section have completed bidding. Such bidding in the section is limited to employees in the same salary level as the vacancy. Failure to bid for

the first available vacancy will end such retreat right. The right to retreat to the section is optional with employee who has retreat rights with respect to a vacancy in a lower salary level. Failure to exercise the option does not terminate the retreat rights in the salary level in which the employee was reassigned away from the section.

Analysis

At the outset, one turns to the second claim -- whether Grievant should have been afforded retreat rights. In this case, this claim will be denied. Even assuming, without deciding, that such rights should have been accorded, there has been no showing that Grievant has been disadvantaged, inasmuch as there has been no vacancy to which, even assuming he had the retreat rights, he could have aspired.¹ Absent any demonstrated deprivation of a contractual right, there can be no relief. There are, therefore, no grounds in this particular case for a finding of violation with respect to retreat rights.

The case concerning to the original reassignment differs. Management contends that Grievant, having opted to pursue the matter under the contract, is somehow foreclosed from claiming a violation of law. It cites Article III as controlling its

¹Additionally, Management acknowledges that it intends to grant Grievant these rights as a matter of accommodation, not contractual necessity, should the situation occur.

prerogatives in this matter. However, Article III, while granting the Employer the "exclusive right" to, among other things, assign employees, restricts that right by making it "subject to the provisions of this Agreement and consistent with applicable laws and regulations." Thus, the parties have incorporated by reference external law and the contract must, of necessity, be read in light of it. The Employer's contention that Grievant somehow waived his ability to do this by proceeding through contractual instead of statutory channels is not persuasive, absent some provision requiring such an election.

In this case, however, one may not conclude that a violation based on law is supported by the record. In part, this is predictable, since it appears that the issue is relatively late-blooming. The original grievance, filed in October of 1979, contains no reference to violations of law and cites only Articles XII and XXXVIII. That was the core of the dispute thereafter throughout the lower steps of the grievance procedure, according to the evidence. The subject of external law was evidently not raised at all prior to the arbitration hearing.²

²Indeed, it is not clear that either the facts or the theory of this case were discussed in any detail at the lower steps. Consider the following colloquy:

Indeed, other than suggesting the existence of other applicable laws and regulations and an indication that the subject would be argued in the Union's brief, the matter was not raised at the initial hearing, although two decisions of the Merit Systems Protection Board were submitted at that time.

In its brief, the Union directs the arbitrator's attention to Title 5 of the United States Code and the Code of Federal Regulations relating to preference-eligible employees.³ It maintains that several of those statutory and regulatory provisions deal with reductions in force⁴ and notes that an

(Footnote # 2, continued from p. 6)

Mr. Bloch: [To the Employer] Do you acknowledge he did have retreat rights?

Mr. Kappler: Under circumstances. That's what I am trying to determine here, why I was asking the question as to how they held this to be excess and under what section of the contract. It depends on what section of the contract we are operating under, and I think that is something that you will determine.

Mr. Bianca: [For the Union] We are unable to determine because the Postal Service has told us that this person has not been excessed and therefore we couldn't tell what section of the contract -- their decision, what they were doing, would determine what section of the contract applies. We can't tell what section applies until we find out what they were doing. We assumed that we would find that out when they put someone on the stand, otherwise, we will argue every section of the contract could be applicable. (Transcript, p. 20).

³See 39 U.S.C. Section 1005(a)(2).

⁴Citing 5 U.S.C. Chapter 35; 5 CFR Part 351.

employee need not be separated in order for a personnel action to be classified as a reduction in force. The cited decisions of the Merit Systems Protection Board suggest this to be the case.⁵ The Union contends that Brewer was removed from his ET 10 position strictly on the basis of seniority. Accordingly, factors such as length of military service and performance ratings were not considered. But, says the Union, these were factors that, according to Federal Law, should have been considered under these circumstances.⁶

The record before the arbitrator, for the reasons suggested above, is wholly inadequate to support any reasonable response on this question. Numerous contractual questions, not discussed herein, have been raised and, significantly, have never been discussed by the parties. The relationship, if any, between the cited federal statute and regulations and the contract as well as the facts applicable to those considerations have not yet been held up to the scrutiny of the

⁵According to 5 CFR Section 351.201, a reduction in force occurs when the Postal Service:

. . . [R]eleases a competing employee from his/her competitive level by separation, demotion, furlough for more than thirty (30) days, or reassignment requiring displacement, when release is required because of lack of work . . .

See MSPB decisions AT07528110180 (Dec. 5, 1980) and AT03518110125 (April 1, 1981).

⁶Citing 5 U.S.C., Section 3502(a)(2) and (3).

earlier steps of the grievance procedure. Considering this, the arbitrator finds it appropriate to remand this case to the parties for the purpose of reviewing the question of the facts and arguments applicable to the initial reassignment. The arbitrator reserves judgment on that issue and retains jurisdiction should it be necessary for the parties to proceed with this case. For the reasons stated above, the claim as to deprivation of retreat rights is denied on the basis stated herein.

AWARD

The grievance is denied in part and remanded in part in accordance with the above-stated opinion.


Richard I. Bloch, Esq.

July 19, 1982