

NATIONAL ARBITRATION PANEL

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In the Matter of the Arbitration )  
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between )  
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UNITED STATES POSTAL SERVICE ) Case No. Q15C-4Q-C 18148486  
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 ) (Duty Assignments)  
and )  
 )  
 )  
AMERICAN POSTAL WORKERS )  
UNION, AFL-CIO )

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BEFORE: Shyam Das

APPEARANCES:

For the Postal Service: Kevin B. Rachel, Esq.

For the APWU: Melinda K. Holmes, Esq.

Place of Hearing: Washington, D.C.

Dates of Hearing: February 20, 2019  
August 13, 2019  
August 14, 2019

Date of Award: July 24, 2020

Relevant Contract Provision: Article 37.3.A.1

Contract Year: 2015 - 2018

Type of Grievance: Contract Interpretation

Award Summary:

The Postal Service position is upheld as set forth in the above Findings.

A handwritten signature in black ink, appearing to read "Shyam Das", is written over a horizontal line.

Shyam Das, Arbitrator

This interpretive dispute was referred to the national level by the Postal Service. The dispute involves the meaning of the sentence: "Every effort will be made to create desirable duty assignments from all available work hours for career employees to bid." This sentence was added to Article 37, Section 3.A.1 of the National Agreement in the 2010-2015 National Agreement.<sup>1</sup> In full, Article 37.3.A.1 provides as follows:

Section 3. Posting, Bidding, and Application

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

1. All newly established Clerk Craft duty assignments shall be posted to craft employees eligible to bid within 28 days. All vacant duty assignments, except those positions excluded by the provisions of Article 1, Section 2, shall be posted within 28 days unless such vacant duty assignments are reverted. Every effort will be made to create desirable duty assignments from all available work hours for career employees to bid.
  - a. Full-time duty assignments.
    - (1) Newly established full-time duty assignments are posted to full-time employees eligible to bid.
    - (2) Vacant full-time duty assignments are posted to full-time employees eligible to bid.

(Emphasis added.)

There is no dispute that the reference to "all available work hours" includes Postal Support Employee (PSE) work hours.<sup>2</sup> The meaning of "desirable" is not at issue in this case.

The parties' respective statements of the issue differ somewhat, but the crux of the dispute is clear enough. The Postal Service asserts:

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<sup>1</sup> Article 37 applies to the Clerk Craft.

<sup>2</sup> PSEs are non-career bargaining unit employees.

The basic issue in dispute is whether this provision requires the Postal Service, when it decides to post a duty assignment for bid or is obligated by some other contractual provision to do so, to make every effort to create a duty assignment for career employees to bid that is "desirable," or whether, as asserted by the Union, Article 37.3.A.1 requires the Postal Service to make every effort to explore the work hours in a section or facility to see if it can operationally come up with newly-established and additional duty assignments and post those for bid.

The Union states:

The narrow issue before the Arbitrator can be restated as the Postal Service claiming that the proper reading of Article 37.3.A.1 does not require the Postal Service to create a newly established duty assignment from PSE work hours if the new duty assignments exceed the career clerks in an installation or section (not including those clerks with contractual rights to duty assignments such as retreat rights, maximization or withholding -- the Postal Service does have to create desirable duty assignments for those career clerks based on other provisions of the contract). The Postal Service argues that the parties agreed that it can use PSEs "however we want to use them up to the negotiated percentage," including not using PSE work hours to create newly established desirable duty assignments under Article 37.3.A.1.

Moreover:

The Union contends that Article 37.3.A.1 speaks for itself -- it expressly requires that the Postal Service create career duty assignments from available PSE work hours and post them for bid. Article 37.3.A.1 makes no exception for where the work hours come from or whether or how the duty assignments align with the number of career clerks.

The meaning and application of the "Every effort..." provision in issue has been addressed in a number of regional arbitration awards, some ruling in favor of the Union and others the Postal Service.

In the 2010 negotiations the parties agreed to an MOU Re: Non-Traditional Full-Time (NTFT) Duty Assignments. The NTFT concept was proposed by the Union as one way to reduce excessing of career employees.<sup>3</sup> Paragraph 19 of the NTFT MOU provided for the addition of the sentence at issue to Article 37.3.A.1.

Management witnesses Michael Mlarkar and Patrick Devine, who participated in the 2010 negotiations, testified that this addition was proposed by the Union in reaction to the "Boston model" which the Postal Service had produced during the negotiations to simulate how traditional full-time assignments, NTFT assignments and non-career PSE assignments might co-exist in an installation. The Union vociferously complained that many of the schedules for the PSEs shown in the model were preferable to some of the NTFT schedules, and -- according to these witnesses -- the parties agreed to this additional provision to assure preference for career employees over PSEs in terms of scheduling.

Union witness Mike Morris, who -- as Director of Industrial Relations -- was a top Union negotiator in 2010, agreed that the "desirable" part of this provision was to deal with the "Boston model" problem, but stated that the "all available work hours" part was to remedy, from the Union's perspective, the problem created by a 2009 national arbitration award issued by Arbitrator Linda Byars limiting the scope of the "maximization" provision in Article 7.3.B.<sup>4</sup>

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<sup>3</sup> The MOU sets forth the rules concerning NTFT duty assignments of 30-48 hours.

<sup>4</sup> Article 7.3.B provides: "The Employer shall maximize the number of full-time employees and minimize the number of part-time employees who have no fixed work schedules in all postal installations...." In Case No. Q94C-4Q-C 96096822; Q94C-4Q-C 96096823, Arbitrator Byars held that:

Article 7.3.B applies only to the relationship between full-time employees and part-time employees with no fixed work schedule. The Postal Service does not have an obligation to combine the hours of non full-time employees, i.e. part-time regular, part-time flexible, transitional and/or casual employees and the regularly scheduled overtime hours of full-time regular employees, to maximize the number of full-time employees pursuant to Article 7.3.B of the National Agreement.

Non-bargaining unit casual employees essentially were replaced by bargaining unit non-career PSEs in the 2010 National Agreement.

According to Morris, whenever there were enough work hours in an installation to create an additional duty assignment, this new provision in Article 37.3.a.1, which was agreed to at the main table on the last day of negotiations, required that it be posted as a full-time position. Morris stated that he and then Union President Cliff Guffey were at the main table where the Postal Service's negotiator was Manager John Dockins. Morris testified:

Q And do you believe that Mr. Dockins understood this?

A Yes. I know he did. That's why it was -- at the clerk craft, it -- which Patrick [Devine] was the head for the Postal Service [at the Clerk Craft table] but...it was going nowhere with the clerk craft, Postal Service people, they wouldn't agree to it.

And we got up at the main -- so they kicked it up, they said, "We're at an impasse, we can't settle this." They kicked it up to Cliff and I and Dockins.

And we made it very clear that there wouldn't be an agreement without this language. It was one of the critical things that we believed we achieved in that -- in that round of negotiations.

Management witnesses Mlarkar and Devine testified that in discussions during the 2010 negotiations regarding the provision in issue, and later when the parties drafted Q&As regarding the new CBA provisions, there was nothing said by the Union about it being intended to add positions to the career complement or to overrule the Byars Award.<sup>5</sup>

The 2020 National Agreement was ratified in July 2011. On September 28, 2012, Megan Brennan, then Postal Service Chief Operating Officer-Executive Vice President, issued a memorandum to the field which stated:

SUBJECT: Employees in Non-Traditional Full-Time (NTFT) Duty Assignments Working Less Desirable Schedules than Postal Support Employees (PSE)

The collective bargaining agreement with the APWU provides for Non-Traditional Full-Time (NTFT) Duty Assignments of 30-48

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<sup>5</sup> Manager Dockins retired after the 2010 negotiations.

hours a week in the Clerk and MVS Crafts. It also provides for Postal Support Employees (PSE) who may work more or less than 40 hours a week, as needed. Employees working in NTFT Duty Assignments of less than 40 hours a week are not guaranteed more hours per week than the PSE's working in the same facility.

However, where employees working in NTFT duty assignments of less than 40 hours a week are regularly working less hours than the PSEs, and those work hours would otherwise be available to be performed by the career employees (same day or tour, etc.), the hours of the NTFT duty assignments should be appropriately adjusted to modify the hours and/or to achieve a more desirable work schedule. This adjustment should balance the workload according to operational need. It should also reduce any unnecessary impact to career employees.

On the same date, Manager Devine and Director Morris jointly issued Q&As further addressing application of this provision in Article 37.3.A.1. Devine testified that Morris drafted the scenarios, none of which involve aggregating PSE hours to create an additional duty assignment. All the scenarios refer to modifications of existing duty assignments to make them more desirable.<sup>6</sup> A "Note" at the end of the Q&As states:

The scenarios cited above are examples only. They are not intended to be an exclusive list of possibilities. These are examples of situations that should be considered for changing bid assignments however, it is understood that these concepts will not impede management's options under Art 7.1.b.3 & 4.

Article 7.1.B.3 and 4 establish the caps on the number of PSEs the Postal Service may employ.

On October 24, 2013, the Postal Service elevated a regional arbitration issue to the national level pursuant to Article 15. In a letter to the Union dated October 24, 2013, the Postal Service stated:

The primary issue in this case is whether the new language relative to creating desirable duty assignments from all available

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<sup>6</sup> The Q&As do make clear that this provision is not limited to NTFT duty assignments, but could apply to a less desirable regular duty assignment.

work hours under Article 37.3.A.1 requires maximization of PSE work hours to create new full-time duty assignments.

The facts giving rise to this dispute are:

The Union is contending that the new language at Article 37.3.A.1 requires management to create new full-time duty assignments based on the cobbling together of PSE work hours in order to maximize full-time assignments.

Following national level discussions, the parties settled the matter. The settlement, dated February 25, 2014, states:

The interpretive issue presented...was whether the new language at Article 37.3.A.1, relative to creating desirable duty assignments from all available work hours, requires maximization of PSE work hours to post new duty assignments (traditional or NTFT).

After further discussion the parties agree there is no interpretive issue of general application in this grievance and as such the Postal Service withdraws this case from Step 4. Article 37.3.A.1 obligates the Postal Service to make every effort to create desirable duty assignments from all available work hours for career employees to bid; however, this does not require the conversion of PSEs to career.

Following this settlement, similar grievances continued to be filed at the local level. The Postal Service again referred the matter to the national level under Article 15. In a letter dated February 4, 2015, the Postal Service identified the interpretive issue as: "whether the Postal Service is required to increase the complement of bid duty assignments in an installation or section by creating new additional bid duty assignments, to comply with the language at Article 37.3.A.1...." Following further discussions at the national level, the parties again entered into a settlement, dated November 24, 2015, which states:

1. The parties hereby affirm their joint understanding of the Step 4 Settlement Agreement, dated February 25, 2014...that the language at Article 37.3.A.1 obligates the Postal Service to make every effort to create desirable duty assignments from all available work hours for career employees to bid, however,

this provision does not require the conversion of Postal Support Employees (PSEs) to career.

2. The parties agree that by including the subject language under Article 37.3.A.1 the intent was to apply the language to the posting of newly established and vacant Clerk Craft duty assignments. The posting of a newly established duty assignment may increase the complement; however, this does not automatically create an obligation to the Postal Service to permanently change the complement of Full-Time duty assignments (traditional FTR or NTFT).
3. The parties agree that this settlement is not intended to alter any other existing provisions under Article 37, Section 3.
4. The parties further agree that the determination of the appropriate clerk craft complement is the right of management, when done in accordance with Article 3, subject to the provisions of the Collective Bargaining Agreement.
5. The Union has the right to challenge the validity of clerk craft complements in accordance with the Collective Bargaining Agreement.

Local grievances continued to be filed. This national arbitration follows the third Article 15 referral by the Postal Service on August 9, 2018, which states:

The primary issue in this case is whether the provision, *"Every effort will be made to create desirable duty assignments from all available work hours for career employees to bid"*...limits the Postal Service's right to determine if/when to create newly established full-time Clerk Craft career duty assignments or its right to full use of the negotiated percentage of Postal Support Employees.

In the referred grievance, the local Union contends that Article 37.3.A.1 requires the Postal Service to create and post newly established duty assignments based on the work hours of non-career Postal Support Employees (PSEs).

Rickey Dean, Manager-Contract Administration for the APWU CBA, signed the second settlement and was involved in discussions related to the first. He testified that it was his understanding that the Union agreed in the first settlement that there was no requirement to

maximize PSE hours or to convert PSE work hours into new career duty assignments that did not exist before, thereby increasing the complement of career employees and decreasing the complement of PSEs. Dean stated that the key provision of the second settlement was paragraph 2. His understanding was that the parties agreed that if the Postal Service decides to increase the career complement, Article 37.3.A.1 would apply to require the Postal Service to create a desirable duty assignment, but that 37.3.A.1 did not create an obligation to create a new duty assignment as the Union had been arguing at the local level. Dean testified:

I thought that we had an understanding that the parties agreed that the Postal Service has an obligation to create desirable duty assignments when it makes the decision to fill a vacancy or to create a new duty assignment and that there was no requirement under this language to add additional duty assignments that did not exist before. I thought that's what we achieved in this.

Lamont Brooks, Assistant Clerk Craft Director of the APWU, signed both settlements. He testified that in the first settlement, dated February 25, 2014, the parties agreed that Article 37.3.A.1 does not require the Postal Service to convert PSEs to career employees, which was management's concern, but that the Postal Service was obligated to create new duty assignments from all available work hours, including PSE hours. Such assignments would be posted, after which -- unless some other provision of the CBA required it -- the Postal Service would not be required to fill the residual vacancy. Brooks stressed that it was only after the parties adopted the Residual Vacancies MOU in March 2014 -- a totally separate provision -- that the Postal Service was required to convert a PSE to fill a residual vacancy. Prior to that, he explained, the Postal Service was free to assign a PSE to perform the duties of that residual assignment without any obligation to convert the PSE to a career employee.

Brooks testified that in his view paragraph 1 of the second settlement, dated November 24, 2015, reaffirmed the understanding in the first settlement that if the Union "shows the hours" for a duty assignment, the Postal Service has to post it. What was different now, he said, was that the parties since had agreed to the Residual Vacancies MOU under which -- wholly apart from Article 37.3.A.1 -- the Postal Service could be required to convert a PSE to fill the residual vacancy. Paragraph 2 of this settlement addressed increasing the career

complement as a result of posting a new duty assignment. That happens, he said, but the parties recognized it might not be permanent because operational changes might affect it in the future. Brooks also stated that he was able to agree to paragraph 4 because it included "subject to the provisions of the Collective Bargaining Agreement."

On rebuttal, Manager Dean testified regarding the first settlement:

The Union agreed that there was no requirement to convert PSEs. So my understanding was that the Union was agreeing that 37.3.A.1 was not a complement-adding provision. And because you don't have to convert the PSEs, then you're not required to post a new duty assignment.

Dean disagreed with the Union's assertion that prior to the March 2014 Residual Vacancies MOU, the Postal Service was free not to convert a PSE to fill a residual vacancy and that it was only after that MOU had been agreed that an obligation to do so existed. He and Manager Devine testified that prior to the hearing in this arbitration they had never heard the Union make such a claim or argument.

#### POSTAL SERVICE POSITION

The Postal Service contends that the language and context of Article 37.3.A.1 demonstrate that this provision is about the quality of career bids, not the quantity. The placement of the new sentence at the end of 37.3.A.1 makes abundantly clear that it is part of the process for posting duty assignments. This point was affirmed in the parties' second settlement agreement. The first two sentences of 37.3.A.1 address the issue of the timeframe by which "[a]ll newly established" and "[a]ll vacant duty assignments" must be posted. These pre-existing references are to duty assignments management has determined to post, consistent with contractual rights and mandates. The new final sentence can only reasonably be understood to establish a requirement related to the makeup of these very same duty assignments. There is no basis for asserting that the final sentence applies to the creation of new and additional duty assignments above and beyond those referenced and understood in the first two sentences. The language of this provision neither states nor implies that it is

addressing "new" or "additional" duty assignments. Rather, the key to this sentence clearly is the term "desirable" and management's obligation to expend "[e]very effort" to make "desirable" those bids being posted.

The Postal Service stresses that Article 7 is where complement-related provisions are located, including provisions that require the posting of new and additional duty assignments. The Postal Service points to Article 7.1.B.4 which was adopted in the 2010 CBA along with the sentence at issue in this case. This provision states:

When the hours worked by a PSE on the window demonstrates the need for a full-time preferred duty assignment, such assignment will be posted for bid within the section.

This provision is precisely what the Union seeks to require on a broad basis via Article 37.3.A.1. Not only would this provision in Article 7 be meaningless and unnecessary if the Union's interpretation of Article 37.3.A.1 was adopted, but the fact that this very same topic is addressed in Article 7 provides further confirmation that the sentence at issue in Article 37 did not have the same purpose and was not intended to have the same effect. The parties knew how to require additional postings when they meant to do so, and they clearly did not mean to do so in Article 37.3.A.1.

The Postal Service adds that all three provisions in the CBA that actually do require the Postal Service to post a new duty assignment provide specific criteria for when new career positions must be posted and use the phrase "demonstrate(s) the need" when the criteria are filled. In addition to Article 7.1.B.4, the Postal Service points to Article 7.3.C (PTF maximization) and Article 37.4.D (unencumbered employees). No such language, requirement or criteria is found in Article 37.3.A.1. Furthermore, the Postal Service notes, the parties in 2010 did negotiate a Minimizing Excessing MOU that required the Postal Service to review its operations and create new duty assignments. The parties did not use the same kind of language in Article 37.3.A.1.

The Postal Service argues that the bargaining history of Article 37.3.A.1 also demonstrates that its purpose was to enhance the desirability of career bids. A problem developed late in negotiations regarding the new NTFT positions and this language was developed to address it. The language was not part of any broader purpose to maximize career jobs, alter management's rights to determine when to post duty assignments or revise the criteria for reversions.

The Postal Service maintains that the Brennan Memorandum and the accompanying Q&As agreed by the parties fully support the Postal Service's position and are contrary to the arguments of the Union. All the scenarios in the Q&As were created by the Union and all involved modifying existing positions with a focus on improving the schedules of career employees. None suggest the posting of an additional duty assignment.

The Postal Service insists that the two Step 4 settlements also are fully consistent with its position in this case. In the first settlement, the Union agreed that Article 37.3.A.1 did not require the conversion of a PSE that would increase the complement. To the Postal Service, this meant that the Union was accepting the Postal Service's understanding that Article 37.3.A.1 did not require the cobbling together of PSE work hours to create new and additional duty assignments, since the posting of new duty assignments inevitably would lead to a residual vacancy that normally would result in a PSE conversion. As both management witnesses Dean and Devine testified, the Postal Service was not aware until this arbitration hearing of the Union's purported position that PSEs could just indefinitely be assigned to work a residual vacancy without meeting the limited criteria for reversions. Nor did they agree with that position.

Paragraph 1 of the second settlement reaffirms the provisions of the first settlement, including that no PSE conversions are required when implementing Article 37.3.A.1. As such, the Postal Service argues, the Union is agreeing in this second settlement that no PSE conversions are required under Article 37.3.A.1 even 18 months after the Residual Vacancies MOU was adopted. This reaffirmation cannot be squared with the Union's new theory that conversions began to be required as a result of the Residual Vacancies MOU. Such

reaffirmation, however, is fully consistent with the Postal Service view that PSE conversion obligations were the same before and after the Residual Vacancies MOU.

The Postal Service also rejects the Union's reliance on dicta in a 2013 national arbitration decision by Stephen Goldberg in which the arbitrator distinguishes Article 12.5.B.2 from Article 37.3.A.1.

### UNION POSITION

The Union contends that Article 37.3.A.1 obligates the Postal Service to create newly established career duty assignments and post them for career clerks to bid. If the Postal Service has non-career employees working duties and hours that properly can make a career duty assignment, Article 37.3.A.1 requires the Postal Service to create that duty assignment and post it to bid. The parties already have agreed that newly established career duty assignments may increase the number of such assignments. Whether or not filling the postings also increases the number of career employees is determined by other agreements beyond Article 37.3.A.1 and is not before the arbitrator.

The Union argues that the Postal Service acknowledges the application of Article 37.3.A.1 to its obligations under Article 7, Article 12 and elsewhere in Article 37 when creating newly established duty assignments that are filled by clerks already in the career complement. The evidence does not show that the parties' original agreement to Article 37.3.A.1, its affirmation in two Step 4 settlements, or the renewal of Article 37.3.A.1 in the 2015 and 2018 National Agreements meant or was understood by either party to limit the application of that provision only to situations in which the number of career employees matched the number of duty assignments created.

Furthermore, the Union asserts, there is no evidence of any negative impact on the Postal Service's use of PSEs or PSE work hours from complying with Article 37.3.A.1. The Union stresses that the Postal Service cannot challenge Article 37.3.A.1 as leading to the conversion of PSEs to career because conversions are not required by that provision. Rather,

Article 37.3.A.1 is about creating and posting desirable duty assignments for career clerks to bid. It is a provision to protect the work and hours of full-time career jobs from being inferior to non-career schedules or replaced with non-career work hours. The Union urges that the limit on Article 37.3.A.1 the Postal Service seeks should be rejected in favor of the plain language of the CBA and the intent of the parties to require the Postal Service to create newly established duty assignments with PSE works hours without limitation.

The Union insists that the bargaining history shows that the parties fully contemplated that Article 37.3.A.1 would require the Postal Service to create new desirable duty assignments from non-career work hours. Such assignments may or may not change the number of career clerks in the complement; the bargaining history shows either outcome is consistent with that provision's purpose. The Union stresses that the Postal Service did not rebut Union witness Morris' testimony that the Postal Service's main table chief negotiator, John Dockins, understood that the new language in Article 37 would apply to the creation of entirely new additional clerk duty assignments. It also notes that no language was added to Article 37.3.A.1 to ensure the protection of PSE usage. Instead, the parties unambiguously agreed that the Postal Service would make "every effort...to create desirable duty assignments from all available work hours for career employees to bid." Even though this provision was a concession by the Postal Service, the Union points out that under the agreements in place at the time the Postal Service temporarily could use PSEs to work in a newly established duty assignment that was not filled by a career clerk.

The Union asserts that the Brennan Memorandum and the related Q&As that were issued after the 2010 National Agreement took effect focused on NTFT duty assignments, and they state that they do not express every iteration or application of Article 37.3.A.1. While implementing NTFTs and the other new terms of the 2010 CBA may have focused on modifying duty assignments, that does not demonstrate that this provision never could be applied to create newly established career duty assignments.

The Union contends that the two Step 4 settlements and a 2013 national level award by Arbitrator Goldberg, Case No. Q10C-4Q-C 12320729, further support the evidence

that Article 37.3.A.1 is a requirement to create, improve, and protect career employees and career jobs. The first settlement reaffirmed the parties' agreement that Article 37.3.A.1 is not a conversion mechanism for PSEs. This supports the proper interpretation of Article 37.3.A.1 as an obligation to create and post, not a method for conversions or staffing. In the second settlement, the Union notes, the Postal Service affirmed its obligation to create new duty assignments. The parties reserved all of their rights to demand or challenge how the new duty assignments were filled and why duty assignments were reverted, but once again affirmed that Article 37.3.A.1 creates career duty assignments, including newly-established duty assignments. While not addressing the specific issue in this case, Arbitrator Goldberg affirmed in his Article 12.5.B.2 award that Article 37.3.A obligates the Postal Service to "create" duty assignments and that "create" means "to make or bring into existence something new," and that it, in contrast to Article 12.5.B.2, is a requirement "to cobble together PSE work hours...in order to create duty assignments for career employees."

The Union points out that the Postal Service now claims that the Union, by agreeing that the Postal Service did not have to convert PSEs to career to fill new duty assignments, was agreeing that the Postal Service did not have to create new duty assignments at all. This, however, was not the position previously expressed by the Postal Service during the disputes that resulted in the two settlements.

The Union also insists that this case does not present a restriction on the Postal Service's existing Article 3 management rights. Article 37.3.A.1 does not implicate the management right to hire and fire, to direct what work is performed, or to preserve efficiency. The only work subject to that provision are work hours the Postal Service already has decided it wants performed. Nor does this case implicate hiring and the number of employees the Postal Service determines it needs to conduct its operations. The Postal Service's challenge is not to the size of the complement, but to the number of career employees within that complement. Article 37.3.A.1 requires the Postal Service to combine PSE work hours into career duty assignments, and then to post those duty assignments to career employees for bid. Thus, as is always the case under Article 3, the Postal Service's purported management right to assign career work hours to PSEs, even if it existed, must yield to the parties' agreement in Article 37.

The Union further states that the Postal Service's claim that the Union's interpretation of Article 37.3.A.1 would deny the Postal Service its use of PSEs is a fiction. It is premised on the assumption that the Postal Service is entitled to maximize PSE hours, an assumption that is contradicted by the evidence. The Postal Service's alternative claim that there is not enough work for PSEs if Article 37.3.A.1 is applied as written is only conjecture, wholly unsupported by any data or evidence. The Union stresses that the arbitrator should take care not to conjoin Article 37.3.A.1 with other agreements about filling duty assignments. Those agreements are not before the arbitrator and do not alter the proper interpretation of Article 37.3.A.1. The Union reiterates that the Postal Service has not been denied the use of PSE work hours that it did not knowingly agree to. Even if the Postal Service could show that creating career duty assignments inalterably leads to a significant net decrease in PSE work hours, the Postal Service did not demonstrate that it is an outcome the parties agreed to avoid.

The Union maintains that the 2014 Residual Vacancies MOU changed the application of Article 37.3.A.1, but not its interpretation. The Union strongly challenged the Postal Service's bold statements about a requirement to convert PSEs to career to fill residual vacancies under the 2010 National Agreement. Not a single document prior to the Residual Vacancies MOU references a PSE conversion right. In some instances, a residual vacancy may result from the creation of a newly established duty assignment under Article 37.3.A.1. Because of the Residual Vacancies MOU, the Postal Service no longer can assign a vacancy to a PSE; now it may have to convert the PSE to career to fill the vacancy. The Residual Vacancies MOU may enhance outcomes for filling career jobs after Article 37.3.A.1 is applied, but it does not change the interpretation and application of that provision. Neither agreement, the Union insists, is reliant on the other.

### FINDINGS

Article 37.3.A addresses posting of newly established and vacant Clerk Craft duty assignments. As a general matter, the Postal Service has the right under Article 3 to determine whether and when to establish a new duty assignment. Like all management rights,

this right is subject to other provisions of the CBA. These include provisions requiring posting of new assignments in Article 7.1.B.4 (hours worked by a PSE on the window), Article 7.3.C (PTF conversion) and Article 37.4.D (unencumbered Clerks). Under Article 37.3.A.1, the Postal Service is required to post vacant duty assignments unless the duty assignment has been reverted.

The issue here is whether the "Every effort..." provision added to Article 37.3.A.1 in the 2010 National Agreement, pursuant to paragraph 19 of the NTFT MOU, imposes an obligation on the Postal Service to create new additional duty assignments by combining/cobbling together all available work hours, including PSE hours, thereby maximizing the number of career duty assignments.

Notably, Section 3 of Article 37 addresses "Posting, Bidding, and Application." As the Postal Service points out, Article 7 addresses complement, including use of and limits on the PSE work force. Section 3.A of Article 37, in particular, addresses how newly established and vacant duty assignments are to be posted. In this sense, Section 3.A is procedural in nature. The first two sentences, to which the sentence in issue was added in 2010, address the timing of such postings. The added sentence then states:

Every effort will be made to create desirable duty assignments from all available work hours for career employees to bid.

In this context, this provision logically applies to the two posting situations which precede it.

The bargaining history evidence indicates that addition of this provision to Article 37.3.A.1 was included in paragraph 19 of the NTFT MOU at the Union's insistence after the "Boston model" projecting potential NTFT assignments was produced and discussed by the parties. That was the triggering circumstance which preceded the Union's drafting of this provision. Union witness Morris testified that the term "desirable" was intended to deal with the "Boston model" NTFT issue, that is, to ensure that career employees got the more desirable hours and schedules, but that the purpose of the "all available work hours" part of this provision was, in effect, to overrule Arbitrator Byars' 2009 Article 7.3.C award and to require the Postal

Service to maximize the number of full-time duty assignments by combining "all available work hours" including PSE work hours. That is not an obvious or, in context, particularly logical reading of the agreed language. The direction in Article 37.3.A.1 is to "create desirable duty assignments," not to maximize or increase the number of duty assignments beyond the number the Postal Service deems required. Morris testified that Dockins, the Postal Service's top negotiator at the main table, understood the dual purpose, but there is insufficient evidence to show that this was effectively communicated to and acknowledged by Dockins -- who no longer is employed by the Postal Service.

In his 2013 Article 12.5.B.2 national award, Arbitrator Goldberg contrasted the direction in that provision to "identify duty assignments...held by PSEs" with the direction in Article 37.3.A.1 to "create desirable duty assignments from all available work hours." He was careful to specify, however, that he was doing so only as an aid to interpreting Article 12.5.B.2. Clearly, "identify" and "create" have different meanings, but the issue here is not the meaning of "create," as such, but whether the provision in Article 37.3.A.1 directs the Postal Service to create a new additional duty assignment not otherwise required under the CBA or in the Postal Service's judgment.

The parties' actions following ratification of the 2010 National Agreement in July 2011 also are instructive. In September 2012 the parties issued jointly agreed Q&As in conjunction with issuance of the Brennan memorandum. For the most part these Q&As focused on application of Article 37.3.A.1 to NTFT assignments addressed in the Brennan memorandum, but Question #5 is broader:

Question #5: Does application of Article 37.3.A.1 and this principle of creating desirable duty assignments only apply to NTFT duty assignments?

RESPONSE: No. For example, an occupied traditional FTR bid duty assignment exists as follows: 0800-1650 schedule with Tue/Wed NS days. PSE A regularly works 0800-1650 with a Sunday NS day. PSE B regularly works 0800-1650 with a Saturday NS day. The traditional duty assignment could be reposted with Sat/Sun NS days. The net effect is that a traditional

40 hour duty assignment can be modified when the Tue/Wed NS days are changed to Sat/Sun NS days.

Notably, this agreed Q&A -- which Postal witness Devine testified was drafted by Morris who signed off on the Q&As with Devine -- shows that the newly added provision in Article 37.3.A.1 can require modification of an existing FTR duty assignment to make it more desirable, after which it is to be reposted. But these Q&As make no mention of a requirement to apply Article 37.3.A.1, in a non-NTFT situation, to create a new additional duty assignment by combining PSE or other work hours. Devine further testified without contradiction that Morris made no reference to creation of such an assignment in their discussions. The "Note" at the end of the Q&As states:

The scenarios cited above are examples only. They are not intended to be an exclusive list of possibilities. These are examples of situations that should be considered for changing bid assignments however, it is understood that these concepts will not impede management's options under Art 7.1.b.3 & 4.

Article 7.1.B.3 and 4 address the caps on the total number of PSEs employed by the Postal Service. This note, and the preceding examples, are consistent with the notion that the provision in Article 37.3.A.1 at issue is addressed to situations where bid duty assignments are to be changed, or newly established duty assignments are to be created, so as to make them more desirable.

In this case, both parties rely on two earlier Step 4 settlements in support of their respective positions. By the time the first settlement was reached in February 2014, the 2013 Goldberg award had been issued. In the hearing preceding that award, the Union had expressed its position in the present case, which it also was asserting in regional arbitration cases. Perhaps not surprisingly, the wording of the first settlement is open to differing interpretations and, in my opinion, does not offer significant guidance.

Thereafter, the Union continued to press its position in regional cases -- in some of which it was successful -- causing the Postal Service to again elevate a case to the national level in February 2015. This resulted in the second Step 4 settlement reached in November

2015. That settlement seems to reflect the parties' efforts to reach some sort of joint understanding without directly conceding their respective positions. In this instance, however, they stated in the key second paragraph:

The parties agree that by including the subject language under Article 37.3.A.1 the intent was to apply the language to the posting of newly established and vacant Clerk Craft duty assignments. The posting of a newly established duty assignment may increase the complement; however, this does not automatically create an obligation to the Postal Service to permanently change the complement of Full-Time duty assignments (traditional FTR or NTFT).

(Emphasis added.)

The first sentence not only conforms to the language of Article 37.3.A.1, but lends support to the Postal Service's position in this case that the provision in issue applies when the Postal Service posts a newly established or vacant duty assignment, rather than requiring that the Postal Service establish a new additional duty assignment from PSE and other available work hours. The second sentence is less clear.<sup>7</sup> The fourth paragraph of this second settlement states that "determination of the appropriate clerk craft complement is the right of management" -- which by itself seems to support the Postal Service position -- but then goes on to somewhat beg the question by stating in a very open-ended manner "subject to the provisions of the Collective Bargaining Agreement." The fifth paragraph likewise expressly recognizes the Union's right to challenge the "validity of clerk craft complements" in accordance with the CBA.

In the final analysis, the issue here essentially has to be decided on the basis of the language in Article 37.3.A.1. When read in context, this language supports the Postal Service position that it requires the Postal Service, when it decides to post a duty assignment for bid or is obligated by some other contractual provision to do so, to make every effort to create a duty assignment from all available work hours for career employees to bid that is "desirable." It also is clear from the Brennan memorandum and accompanying Q&As that

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<sup>7</sup> By this time the Residual Vacancies MOU was in effect. Regardless of whether the Postal Service previously was required to convert a PSE to fill an otherwise unfilled residual vacancy, it now was required to do so.

Article 37.3.A.1 may require the Postal Service to modify and repost an existing duty assignment. The language does not, as the Union contends, broadly require that the Postal Service create (and maximize) career duty assignments from available PSE and other work hours and post them for bid on the basis that such assignments in themselves always are desirable.<sup>8</sup>

AWARD

The Postal Service position is upheld as set forth in the above Findings.

A handwritten signature in black ink, appearing to read "Shyam Das", is written over a horizontal line.

Shyam Das, Arbitrator

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<sup>8</sup> I express no opinion on whether this provision in a particular case might require the Postal Service to create an additional duty assignment for bid -- not just modify an existing duty assignment -- in a situation where the evidence demonstrates that such an assignment could be created from PSE and other work hours that is more desirable (hours/schedule) than one or more existing duty assignments. The parties did not focus on or sufficiently address that question in this proceeding.