

REGULAR ARBITRATION PANEL

In the Matter of the Arbitration	§	
	§	Grievant: Class Action
between	§	
	§	Post Office: Harrisburg
UNITED STATES POSTAL SERVICE	§	
	§	
and	§	
	§	Case No.: C98T4CC00087070--
	§	KAL0021¹
AMERICAN POSTAL WORKERS UNION,	§	C98T4CC00087071-KAL0022
AFL-CIO	§	

BEFORE: Irene Donna Thomas, Arbitrator

APPEARANCES:

For the United States Postal Service: Jeanette L. Horn, Labor Relations Specialist, 1400 Harrisburg Pike, Lancaster, PA 17604-9401

Witnesses: n/a

For the APWU: William J. LaSalle, Jr., National Business agent, Maintenance Division, Eastern Region, 1401 Liberty Place, Sicklerville, NJ 08081

Witnesses: Douglas Mirowski, retired National Business Agent, APWU

Place of hearing: 1425 Crooked Hill Road; Harrisburg, PA

Date of hearing: January 6, 2010

Date of award: February 9, 2010

Relevant Contract Article(s): 12, 19

Contract Year: 2000 - 2006

¹The parties agreed that this case is considered the “lead” case.

AWARD SUMMARY

Both grievances are sustained. A full-time position is to be posted and remedied as stated herein. The employer is directed to add 28 hours per month, seven hours, per week, to the PS Form 4852. The employer is also directed to total the number of missed work hour opportunities under the prior settlement agreement (28 hours per month), divide that number equally and to pay each custodial employee affected by this award at their appropriate rate. This arbitrator retains jurisdiction of this matter in the event the parties are unable to agree to a resolution on remand.



Irene Donna Thomas, Arbitrator

INTRODUCTION

Pursuant to the grievance-arbitration procedures between the United States Postal Service and the American Postal Workers Union, AFL-CIO, the undersigned arbitrator was selected to hear and decide the dispute described herein and to render a final and binding Opinion and Award. The union filed grievances alleging that the employer violated the national agreement when it failed to abide by a prior settlement agreement and when it failed to add an additional seven hours per week to the existing MS-47 survey.

The arbitration hearing opened before this arbitrator on January 6, 2010 at which time both parties were provided with an opportunity to offer the testimony of sworn testimony, to make arguments and to submit documentary evidence in support of their respective positions. The documents, submissions and the parties' arguments were carefully considered in rendering the following Opinion and Award.

ISSUE

The union stated the issue as "did the Postal Service violate the collective bargaining agreement or grievance settlement by the fashion in which the Carlisle custodial staffing is calculated? If so, what should the remedy be?"

The employer stated the issue as "did management violate the MS-47 when, by utilizing a full-time and part-time regular employee instead of two full-time employees?"

If so, what should the remedy be?"

The appropriate issue to be decided is the one cited by the union.

THE MATERIAL FACTS

The genesis of the present grievances lies with a prior grievance, C98T4CC99228774–KAL99143 (1999). On May 24, 1999, the union filed a grievance alleging as "background facts" that the "MS-47 Survey indicated that 2 full-time (or 1 full-time, 2 part-time) custodial positions are authorized for the Carlisle P.O. The current staffing is only 1 full-time and 1 part-time." On these facts, the union contended that the "requisite number of hours for a full-time custodial position is 1760 per year or 33.8 per week. The Carlisle staffing survey indicated 3634.06 hours per year and/or 69.89 (rounded to the nearest 10th = 69.9) hours per week. The current staffing is not in accordance with the MS-47." For its corrective action, the union demanded that the employer "1) [a]djust staffing accordingly and fill positions as per article 38; 2) Compensate any appropriate APWU employees for bypassed work."

The employer denied grievance KAL99143 at Step 1 alleging

Again we have nothing to do with the MS-1 or MS-47 survey. The unions own contentions, that current staffing is not in accordance actually disregards the factual information [unintelligible] 40 hrs + 30 hours = 70 hrs weekly.

The union appealed this grievance to Step 2 on May 26, 1999. The employer did not schedule a Step 2 meeting and, therefore, on July 2, 1999, the union appealed this

grievance KAL99143 to Step 3 of the parties' grievance-arbitration procedure. By letter dated September 24, 1999, the employer, by Gregory V. Williams, Labor Relations Specialist, denied this grievance at Step 3. On October 5, 1999, the union demanded arbitration.

On or about October 22, 1999, Mr. Doug Mirowski, an APWU National Business Agent, and William Hughes, a Postal Service Labor Relations Specialist, met to discuss this grievance before arbitration. The discussion resulted in the following agreement:

In full and final resolution of the above-referenced grievance(s), the parties mutually agree as follows: Management will comply with their findings on the 5/14/98 PS Form 4852.

In an effort to reaching the full complement under the settlement agreement, the union agreed to waive all claims to any monetary entitlement, i.e., back pay.

On or about January 20, 2000, the union filed a new grievance, C98T4CC00087070-KAL0021, alleging, in essence, that the employer failed or refused to implement the pre-arbitration settlement agreement to increase the complement to two full-time employees. The union also grieved the fact that the employer failed to add an additional seven hours per week on the then existing MS-47 survey for the Carlisle Post Office. The union asserted that the employer "is bound by the terms of their pre-arb agreement and must bring the complement in the Carlisle post office up to 2 full-time. To date, compliance has not been implemented." The union demanded that the

employer bring staffing up to the authorized complement of 2 full-time [employees] in accordance with settlement KAL99143 (C98T4CC99228774) and make whole any or all employees deemed to be deprived of hours, wages or benefits due to management's violation. On January 28, 2000, Shane Seitz, on the employer's behalf, denied the grievance without discussion.

On February 2, 2000, the union appealed this grievance to Step 2 continuing the arguments made at Step 1. By letter dated February 24, 2000, the employer denied the grievance at Step 2 stating:

Pre-arb settlement dated October 22, 1999, requires management to comply with the workhour requirements of PS Form 4852, dated May 14, 1998.

Subject form lists weekly workhours at 69.89 hrs/wk (line J). Total employees listed on line "L" is two. (These can be full-time or part-time)

We have two employees at Carlisle—one full-time regular at 40 hrs/wk and one part-time regular at 30 hrs/wk.

Total staffing is not determined by line "K" but by line "J". This is in accordance with Maintenance Management orders MMO-30-87, MMO-21-91 and MMO-28-97.

The language is, "If the Station/Branch Custodial work cannot be contracted, it should be staffed with any combination of part-time regular (PTR) or full-time regular (FTR) positions necessary to provide the weekly workhours indicated on line "J", form 4852."

This is historical language and has not been grieved at the National level as MMO-21-91.

Management has complied with the PRE-ARB settlement.

KAL-00-22 Step two is denied for the following reason:

Local management was involved with the MS-47 survey.

A local employee was with the Maintenance Supervisor during the completion of the survey.

By letter dated March 1, 2000, the union submitted the following additions and corrections:

The pre-arb settlement requires management to “comply with their findings on the 5/14/98 PS form 4852.” Subject form lists weekly workhours at 69.89 (line J). The number of weekly workhours that constitute a full-time position is 33.8. This is the figure of 1768 (MS-47 section 244.u) divided by 52 (weeks in a year). Thus, the 69.89 workhour figure indicates the need for either two full-time and one part-time or one full-time and two part-time custodians ($69.89 \div 33.8 = 2.0677514$ or 2.1).

Whether one uses line K or line J the answer is the same, 2.1.

Management has not complied with the pre-arb settlement. Accordingly, this grievance is appealed to step three.

That same day, March 1, 2000, the union appealed this grievance to Step 3. By letter dated May 2, 2000, the employer denied this grievance. The employer asserted:

It is the union’s responsibility to establish that a contractual violation exists. The union has not met its burden of proof. Consistent with the language of MMO-28-97, which contains the same words as MMO-21-91, which reads the same as MMO-30-87. “If the station/branch custodial work cannot be contracted, it should be staffed with any combination of part time regular (PTR) and/or full time regular (FTR) positions necessary to provide the weekly workhours indicated on line J, form 4852...” The record does not show that management failed to meet staffing

requirements. The union's arguments are not supported by any substantive evidence, contractually or otherwise, and lack any merit. The remedy requested by the union is inappropriate. Accordingly, this grievance is hereby denied.

On May 9, 2000, the union demanded arbitration.

On January 28, 2000, the union filed a second grievance, KAL0022. The union alleged that local management did not have input into the determination of the staffing through the MS-47 survey. The union alleged that "[n]o historical data was considered and in fact, it is acknowledged that frequencies are determined by 'District Standards' established by John boyle, Maintenance Manager for the Harrisburg District." The union further stated that "[e]ven the maintenance supervisor conducting the survey lacks any independent authority in this matter." Finally, the union reasserted the same argument it raised in KAL0021—that seven hours were identified, but not added to the existing MS-47 survey for the Carlisle Post Office.

The grievance file indicates that Jeff Ebersole contacted the union representative indicating that his "hands are tied" and that "Boyle says we are in compliance [and to] deny [the grievance]. A local management rep. was present when survey was done."

On February 2, 2000, the union appealed the grievance to Step 2 continuing the arguments made at Step 1. On February 24, 2000, Jeffrey S. Ebersole, OIC/Postmaster

Carlisle, denied the grievance.²

On March 1, 2000, the union submitted the following additions and corrections:

Management's step one response to the original grievance, KAL-99-143 (C98T-4T-C 099228774) stated in pertinent part, "Again we have nothing to do with the MS-1 or MS-47 survey." In a letter to LuAnn Glaser dated 1/11/00 OIC Ebersole stated "As I'm sure you are well aware the local office (Carlisle) does not have input (sic) into the completion of the 4852." Now management has reversed it's position and stated that local management was involved with the MS-47 survey! Accompanying the maintenance supervisor during the survey does not constitute input. If there is documentation to support the claim that local management had input please provide it ASAP.

Management's step two response lacked the elements required by Article 155.2 (Step 2)(f) in that the decision did not include a full statement of the Employer's understanding of (1) all relevant facts, (2) the contractual provisions involved, or (3) the detailed reasons for denial of the grievance. As stated during the step two discussion, management's step one response was untimely and was rendered in writing without discussion. The step one steward confirmed that the step one supervisor only requested five days to respond, not five *additional* days.

Accordingly, this grievance is appealed to step three.

That same day, March 1, 2000, the union appealed this grievance to Step 3. By letter dated May 2, 2000, the employer denied the grievance at this step.³ On May 9, 2000, the union demanded arbitration.

DISCUSSION AND ANALYSIS

²Mr. Ebersole denied the grievance with a letter identical to the one in KAL0021 (see above).

³The employer's step 3 denial is identical to the one issued in KAL0021 (see above).

Article 15.4.A of the national agreement provides that the “parties expect that good faith observance, by their respective representatives, of the principles and procedures [in this Article] will result in settlement or withdrawal of substantially all grievances initiated hereunder... Every effort shall be made to ensure timely compliance and payment of monetary grievance settlements and arbitration awards.”

Article 19 of the national agreement provides that

Those parts of all handbooks, manuals and published regulations of the Postal Service, that directly relate to wages, hours or working conditions, as they apply to employees covered by this Agreement, shall contain nothing that conflicts with this Agreement, and shall be continued in effect[.]

In Matter of the Arbitration between APWU and USPS, A8NA0375 (1981), Arbitrator

Gamser, in a binding national level decision interpreting the employer’s obligations under the MS-47 Handbook, held that its provisions ensure the Postal Service’s commitment to the maintenance of a clean and safe working environment. He held that “the provisions of [Article 19] impose upon the Service a duty to abide by the criteria or standards established in the MS-47 Handbook for both unit performance as well as frequencies.” Arbitrator Gamser clarified, however, that his decision did not

impose a manning floor or any manning commitment on the service in carrying out its maintenance responsibilities. The Service is required to instruct its facilities to employ these unit performance criteria and frequency standards in determining the number of man hours which will be required to perform the tasks at hand. Whether the man hours thus required are filled by employing overtime or by the reassignment of

employees from activities in which they might otherwise have been engaged, not prescribed by standards or criteria in some other handbook, manual or published regulation, is a management decision.

In 2003, national Arbitrator Shyam Das confronted the question of whether the employer was required, at a minimum, to use the number of hours each week noted on line J of PS Form 4852, the Workload Analysis Summary. See Matter of the Arbitration between USPS and APWU, I94T4IC98116745 (2004). In that case, Arbitrator Das observed

Line J simply is a useful measure of the weekly average of the total hours on Line H. That does not mean that all of those average hours necessarily have to be worked or even scheduled each and every week to comply with the MS-47. Nonetheless, a significant deviation from this average particularly over an extended duration is likely to reflect a failure to meet the required standards.

Ultimately, he held:

In sum, the Postal Service's obligation in a properly staffed facility is to abide by the criteria or standards established in the MS-47 for both unit performance as well as frequencies. The specific frequencies to be followed at a particular location are those specified on the PS 4852. The average weekly hours total shown on Line J of PS 4852 is an approximate yardstick against which to measure management's compliance, but does not constitute a rigid obligation which cannot be deviated from. . . . [T]here are a variety of circumstances in which management may schedule and/or work fewer hours than the Line J average in a particular week without violating its obligation to conform to MS-47 standards consistent with the Gamser Award.

After careful consideration of the national agreement, the interpretive decisions by national arbitrators Gamser and Das, the sworn testimony, the documentary evidence

and the parties' arguments, I conclude that both grievances should be sustained.

It is well-settled that settlements reached in the grievance-arbitration procedure are enforceable. In this case, the parties entered into a pre-arbitration settlement agreement in which management agreed to comply with their findings on the May 14, 1998 PS Form 4852. The employer argues that it is not required to hire two full time employees. It argues that the employer may staff stations and branches with any combination of part time regular (PTR) and/or full time regular (FTR) positions necessary to provide the weekly workhours indicated on line J, form 4852. The union responded that the grievance settlement is controlling and that whether the reference point is line K or line J, the answer is the same, a complement of 2.1 employees.

As a threshold matter, I find that the terms of the pre-arbitration settlement agreement are ambiguous. An inspection of the agreement does not reveal the ambiguity on its face. The agreement states that management **will** comply with its findings on the May 14, 1998 PS Form 4852. The referenced PS Form 4852 indicates that the Carlisle Post Office has a need for 2.10 custodial employees (line K) or 69.89 work hours per week (line J)(also equal to a need for two full-time employees). A latent ambiguity arises, however, due to Arbitrator Gamser's national arbitration award interpreting the MS-47 Handbook.⁴ Arbitrator Gamser held that while the Postal

⁴A latent ambiguity is one which appears only as the result of extrinsic or collateral evidence showing that terms, thought to have one meaning, actually has two or more meanings.

Service must adhere to the standards or criteria for unit performance and frequencies contained in the MS-47 Handbook, the employer is not held to particular manning requirements to meet the work hours on the PS Form 4852. The hours on line J may also be filled by overtime or reassignment of other employees. The Gamser award, a national level, binding interpretation of the MS-47 Handbook, the controlling document for the PS Form 4852, thus renders the pre-arbitration settlement agreement ambiguous. Extrinsic facts, those outside of the agreement, are required to determine the parties' intent between two possible meanings: (1) the employer was required to increase its complement to two employees, or (2) the employer was required to schedule less than two full time employees with sufficient work hours to meet line J's requirements on the May 14, 1998 PS Form 4852.

Here, Mr. Douglas Mirowski, a retired National Business Agent, and one of the individuals who participated in the discussions resulting in the pre-arbitration settlement, testified, unchallenged, that the parties agreed to increase the complement to two full time employees.⁵ Moreover, Mr. Mirowski testified, the union agreed to

⁵Mr. Mirowski also testified that the parties agreed to increase the work hours on the survey; but the terms of the pre-arbitration settlement agreement do not support this testimony. Mr. Mirowski's testimony on this issue not only adds to the settlement agreement, but also contradicts it. For instance, the pre-arbitration settlement agreement states that "Management will comply with their findings **on the 5/14/98 PS Form 4852.**" If the parties had agreed that the survey would be increased by the additional hours, surely they would have indicated that the two full-time employees would be required to work the full number of hours required to be on the survey. Therefore, although this testimony, too, is un rebutted, I do not credit it.

forego any monetary award/pay in connection with the settlement in return for reaching the full complement. I find that the pre-arbitration settlement agreement between the parties called for the hiring (or a complement) of two full-time employees, based on Mr. Mirowski's unrebutted testimony, the line J and line K numbers that show sufficient hours for two full-time regular employees, and the fact that the employer failed to establish a course of conduct under the pre-arbitration settlement agreement by producing proof that less than two full-time employees worked the required number of hours on line J.⁶ This is especially true where the union waived an entitlement to significant consideration in return for obtaining a full-time position for the bargaining unit.

As for grievance KAL0022, the genesis of that grievance arose from a prior grievance and a subsequent settlement in the alternative dispute resolution procedure. There, the union filed a grievance alleging that the employer failed to properly credit the non-cleaning related services performed by custodial employees on the MS-47

⁶As noted above, Arbitrator Gamser (1981) held that once the employer determined the number of man hours required to perform the tasks at hand, the employer must schedule those hours but it is not, necessarily, required to hire additional employees. Arbitrator Das' later award (2004) modified the effect of Arbitrator Gamser's decision by holding that the line J hours do not have to be, necessarily, worked or even scheduled each and every week so long as a "significant deviation" from the stated average does not occur over an extended duration. Thus, to establish a course of conduct, the employer would have been required to show that the hours on the PS Form 4852 were scheduled and worked between 1999 and 2004 by less than two full-time employees. After 2004, the employer needed to show that the scheduled work hours did not represent a "significant deviation" from the work hours on the PS Form 4852.

survey. The parties ultimately reached a settlement on June 11, 1999

A meeting or meetings will be scheduled to determine who is currently performing the listed tasks on each existing MS-1 survey for the Carlisle, Mechanicsburg and Chambersburg offices. After such determinations, additional steps will be taken to ensure that the appropriate number of hours are credited to the appropriate office(s)/functions in accordance with the above findings.

After the agreement had been reached, Ms. LuAnn Glaser, the local union president, took steps to have the non-cleaning services "quantified." The documentary evidence established that there were more than 20 hours of non-cleaning duties that were never included on the May 14, 1998 MS-47. Once this information came to light, Ms. Glaser filed a second grievance. This new grievance alleged that the parties jointly monitored the "Other Duties" as referenced in Section 244 of the MS-47 Handbook in an effort to establish the average number of hours to be added to the existing MS-47 survey for the Carlisle Post Office. The union alleged that an average of 28 hours per month, or 7 hours per week, were identified but not added to the existing survey.

Section 244, Other Duties, of the MS-47 Handbook reads:

Time may be included, if warranted, for other duties performed by custodial employees such as: furniture moving; loading, unloading, and stacking supplies; replacing lamps; etc. Entries for this time will be made as annual minutes and entered in column (N) on a blank line (e.g.: 120 minutes per week for furniture moving times 52 weeks per year equals 6,240 annual minutes. See Sample 2-4, line 69.) Custodial duties should be completed before non-custodial duties are assigned.

In its Step 2 decision for KAL0022, management did not deny that the parties jointly

monitored the "Other Duties," pursuant to the MS-47 Handbook, did not deny the validity of the joint monitoring process and did not deny that the parties jointly determined that an average of 28 hours per month or 7 hours per week were identified but not added. Moreover, during the grievance procedure, the employer did not assert any reason why the additional 7 hours per week should not be added to the PS Form 4852. Therefore, I find that the addition of 28 hours per month, 7 hours per week is warranted.

The final issue for resolution is the remedy for these contract violations. The union submits that a second full-time duty assignment should be created pursuant to the parties' pre-arbitration settlement and that the current PTR (who may bid for the position) should be made whole from 14 days prior to the filing of the Step 1 grievance. The union also demanded that the employer include the non-cleaning service hours in the custodial staffing calculations on the MS-47, that the Carlisle Post Office be staffed accordingly and that payment for the missed work opportunities be granted.

I agree that the employer should post and fill a full-time position. The parties agreed to increase the complement to two full-time positions and the union exchanged consideration for that agreement. It must be upheld. However, I find that the employer did not refuse to post and fill the position in bad faith but, rather, due to an improper interpretation of a latently ambiguous agreement. Therefore, I am directing a remedy

for the successful bidder (the union suggested that it may be the current PTR) for wages for the difference between a PTR position and a FTR position for a two year period beginning with the date of this award going backward, at the PTRs current rate of pay. However, the successful bidder is to be credited with seniority, pension credits, holidays, vacations, etc. (and all other benefits) as though the position were awarded after the parties entered into the settlement agreement on October 22, 1999.

As for the second grievance concerning the non-cleaning service hours, I direct that the employer add 28 hours per month, 7 hours per week, to the PS Form 4852. I also find that the employer should pay employees the difference between the hours actually worked and the hours that should have been worked under the parties' June 1999 settlement agreement.⁷ These culmination of these hours represent significant missed work opportunities for bargaining unit employees. This grievance, like the lead case, claims an employer refusal to abide by a prior settlement agreement. But, here, unlike in the lead case, the employer has not offered a reason why it refused to honor its agreement. Merely stating that "local management was involved with the MS-47

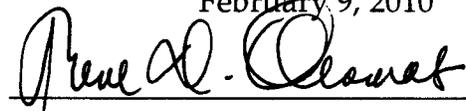
⁷Thus, for example, if the total number of hours to be worked, including the additional hours for non-cleaning services, was ten; and the total number of hours worked by the full-time and the part-time employee was nine, the employer is required to pay the difference for one (1) hour. As indicated above, until Arbitrator Das' award in 2004, the employer was required to schedule the number of hours stated on the PS Form 4852. But, overtime needs may have required the employer to assign work hours that are greater than those on the relevant PS Form 4852.

survey”⁸ and that a “local employee was with the Management Supervisor during the completion of the survey,” does not answer the question why these hours were not added to the PS Form 4852 and scheduled for custodial employees to perform. The failure to answer this question mocks the parties’ national agreement in general and the parties’ negotiated mediation (ADR) procedure in particular. If settlement agreements reached in that forum (or any forum) are to be taken seriously, they must be enforced. Accordingly,

AWARD

Both grievances are sustained. A full-time position is to be posted and remedied as stated herein. The employer is directed to add 28 hours per month, seven hours, per week, to the PS Form 4852. The employer is also directed to total the number of missed work hour opportunities under the prior settlement agreement (28 hours per month), divide that number equally and to pay each custodial employee affected by this award at their appropriate rate. This arbitrator retains jurisdiction of this matter in the event the parties are unable to agree to a resolution on remand.

Dated: Brooklyn, New York
February 9, 2010



Irene Donna Thomas, Arbitrator

⁸Even this argument is questionable given the employer’s Step 1 decision in KAL99143 that “Again we [local management] have nothing to do with the MS-1 or MS-47 survey.”