REGULAR ARBITRATION PANEL

In the Matter of the Arbitration	Grievant: Class Action
Between	Post Office: Sioux Falls, SD
UNITED STATES POSTAL SERVICE	USPS Case:I94T-4I-C98002985
And	
AMERICAN POSTAL WORKERS UNION, AFL-CIO	

BEFORE: John Remington, Arbitrator

APPEARANCES:

For the USPS: Robert Ivey — Labor Relations Specialist

For the Union: Donald L. Foley — National Business Agent

Place of Hearing: Sioux Falls, South Dakota

Date of Hearing: November 4, 1999

Date of Award: January 29, 2000

Relevant Contract Provision: Article 38

Contract Year: 1994-98

Type of Grievance: Non-interpretive Contract Issue

AWARD SUMMARY

THE EMPLOYER VIOLATED THE NATIONAL AGREEMENT AND THE LOCAL MEMORANDUM OF UNDERSTANDING WHEN IT ABOLISHED ELEVEN (11) CUSTODIAL LABOR POSITIONS WITHOUT REQUISITE NOTICE TO THE UNION. LOCAL MANAGEMENT SHALL COMPLY WITH THE MOU AND OUT OF SCHEDULE PREMIUM SHALL BE PAID AS SET FORTH BELOW.

John Remington, Arbitrator

THE PROCEEDINGS

The above captioned parties, having been unable to resolve a class action grievance arising from the abolishment and posting for preferred assignment bid all Custodial Laborer duty assignments at the Sioux Falls General Mail Facility in February of 1997, selected the undersigned Arbitrator John Remington, pursuant to the terms of their collective bargaining agreement, to hear and decide the matter in a final and binding determination. Accordingly, a hearing was held on November 4, 1999, in Sioux Falls, South Dakota, at which time the parties were represented and were fully heard. Oral testimony and documentary evidence were presented by the parties; no stenographic transcript of the proceeding was taken; and the parties waived oral closing arguments and instead agreed to file post hearing briefs, which they subsequently did file.

THE ISSUE

DID THE EMPLOYER VIOLATE THE TERMS OF THE NATIONAL AGREEMENT AND THE LOCAL MEMORANDUM OF UNDERSTANDING WHEN IT ABOLISHED AND POSTED FOR BID ALL CUSTODIAL LABORER DUTY ASSIGNMENTS AT THE SIOUX FALLS GENERAL MAIL FACILITY IN FEBRUARY OF 1997, AND IF SO, WHAT SHALL THE REMEDY BE?

RELEVANT DOCUMENTATION

1. **National Agreement, USPS and APWU, 1994-1998.**

ARTICLE 30
LOCAL IMPLEMENTATION

A. Presently effective local memoranda of understanding not inconsistent or in conflict with the **1994** National Agreement shall remain in effect during the term of this Agreement unless changed by mutual agreement pursuant to the local implementation procedure set forth below or, as a result of an arbitration award or settlement arising from either party's impasse of an item from the presently effective local memorandum of understanding.

B. .....

C. All proposals remaining in dispute may be submitted to final and binding arbitration, with the written authorization of the national Union President or the **Vice-President,** Labor Relations. The request for arbitration must be submitted within 10 days of the end of the local implementation period. However, where there is no agreement and the matter is not referred to arbitration, the provisions of the former local memorandum of understanding shall apply, unless inconsistent with or in conflict with the **1994** National Agreement.

ARTICLE 38
MAINTENANCE CRAFT

Section 4. Posting

A. In the Maintenance Craft all vacant duty assignments shall be filled as follows:

4. When it is necessary that fixed scheduled day(s) of work in the basic work week for a craft assignment be permanently changed, or that the starting time for such an assignment be changed by 2 or more hours, the affected assignment(s) shall be reposted, by notice of intent. An exception to the requirement to re-post an assignment where the change in starting time is 2 or more hours may be negotiated locally. If the incumbent in the assignment has more seniority for the preferred assignment than the senior employee on the eligibility register for those off days or hours, the employee may remain in the duty assignment, if the employee so desires.

5.The determination of what constitutes a sufficient change of duties or principal assignment areas, to cause the duty assignment to be reposted shall be a subject of negotiations at the local level.

2. Local Memorandum of Understanding, 1994-1998

This agreement is entered into pursuant to the terms of Article 30, 1994-1998 National Agreement between the American Postal Workers Union, AFL-CIO and the United States Postal Service.

Article 12. Seniority

A.1. Every effort will be made by Management when posting employee duty assignments to list in detail primary/principal

assignment area, any secondary areas if applicable and any duty assignments the assigned person would serve as a backup or relief. A side agreement will be developed listing all the various areas (primary and secondary) for all employee duty assignments.

Article 38. Maintenance Craft

A. Bid Assignments

1.The APWU President will be consulted 48 hours prior to posting any duty assignment.

It is here noted that the negotiation of the above MOU in April of 1996 left in place an earlier Memorandum of Understanding signed on October 16, 1995. This earlier MOU provides, in relevant part, that:

1. Each Maintenance Craft custodial job shall have "daily" and "senior" route(s) assigned and said routes shall be listed on the Notice of Intent and P.A.R. selection form. Additionally, an addendum shall be included with each Notice of Intent which states which routes are performed on each scheduled workday for each job being posted/reposted.

2. Any current custodial job not being reposted as of Oct. 17, 1995 shall have daily/senior routes numbers assigned that reflect work currently being done. From this date forward if any changes to these daily/senior routs occur, then #3 below shall apply.

3. In the future, if more than 50 percent of the assigned daily/senior routes for any custodial job is changed, said job shall be reposted by Notice of Intent. Merely adding/subtracting items will not cause the job to be reposted unless the 50 percent change is exceeded.

BACKGROUND

The United States Postal Service, Sioux Falls Station, hereinafter referred to as "EMPLOYER," entered into a Local Memorandum of Understanding (MOU), pursuant to the terms of the 1994-98 National Agreement, with the American Postal Workers Union, and its Sioux Falls Area Local, hereinafter referred to as the "UNION." This MOU included a set of

provisions applicable to the Maintenance Craft which was signed off by Sioux Falls Area Local President Dave Heckenlively and USPS Maintenance Manager Dick Lunder in October of 1995. On September 9, 1996, Lunder sent the following letter to Heckenlively:

> This letter will serve as my 30 day notice to nullify MOU 10/16/95. Originally I thought it would be a good plan to insure accountability, but it has hampered management's flexibility to take care of emergencies and project work. This is evident with increased grievances, which we are trying to eliminate.
>
> Within 30 days I will be abolishing all custodial positions and reposting with a change in start times and days off to better take care of our customers and facility. After bidding is completed and positions awarded, management will assign routes according to start time priorities. Day to day seniority will not be applicable in route assignments.
>
> If you have any questions please contact me. Thank you.

On October 10, 1995, Employer Human Resources Specialist Sonja Moulton posted a notice that 10 Custodial Laborer positions would be abolished effective Saturday, October 14, 1995, placing those employees indicated in the posting into and unassigned regular position effective October 14, 1995. The Employer then posted a Notice of Intent To Fill a Vacancy on October 17, 1997, listing ten duty assignments into which Custodial Laborers would be selected. This Notice of Intent included an 'Attachment B' by which the routes associated (under *Principal Assignment Area*) with each preferred duty assignment (job slot) were identified. However, it was not until February 20, 1997, that the Employer informed the Union and all Maintenance employees that eleven Laborer Custodial positions would be abolished. Those employees affected by this abolishment would become unassigned regular personnel effective March 1, 1997. On February 25, 1997, the Employer posted a Notice of Intent to fill eleven Laborer Custodial positions, with a closing date of bid set for March 4, 1997. On March 10, 1997, the results of the Notice of Intent were posted.

Pursuant to the above February notices, Union Representative Clay Melton filed a class action grievance on March 5, 1997. This grievance alleges that:

> On February 20, 1997 local USPS management posted a notice of abolishment for 10 custodial labor positions without giving the Union the 48 hour prior notice as established by the local

> agreement. Also, of the 10 abolished [positions] one was abolished twice and four did not change. The Union feels this to be a gross violation.

In remedy, this grievance requests that "all custodians" be returned to the "positions they held on February 19, 1997." The remedy further notes that "all affected custodians are considered to be in an out-of-schedule status until this matter is resolved."

Manager of Maintenance Wesley E. Green denied the grievance at Step 2. His written denial notes that while there was a typographical error in the original posting, "all errors were corrected," and that there was no "fraudulent or deceptive intent" on the part of Management. Green further asserts that the Union was notified in "plenty of time." This dispute was thereafter processed through the grievance procedure without resolution. It is, therefore, properly before the Arbitrator for final and binding resolution.

UNION'S POSITION

It is the position of the Union that the Employer violated both the National Agreement and the Local Memorandum of Understanding by the abolishment and reposting of the ten (or eleven counting the position that was double posted) Custodial Laborer assignments at issue in this arbitration. The Union contends that Article 38 of the National Agreement requires that any occupied duty assignment be reposted when necessity dictates that its starting time be changed by two hours or more or when necessity dictates that its non-scheduled days be changed. The Union argues that Article 38 reserves to negotiation between the parties at the local level determinations as to what constitutes a sufficient change in the duties or principal assignment areas to cause a duty assignment to be reposted. (Sec.4A4, and 4A5]. This Article also places specific requirements on the Employer regarding what information must be included on the posting of Notice of Intent to Fill a Vacancy, including the hours of duty and the principal assignment area.

The Union contends that the instant grievance results from an action by the Employer – in direct contravention of a Local Memorandum of Understanding – to alter the established parameters of all Custodial Laborer duty assignments and to, thereby, re-post all those occupied jobs. The action which precipitated the initiation of this grievance was the announcement that the Employer would "abolish" all eleven occupied duty assignments of Custodial Laborers at the Sioux Falls General Mail Facility, making all eleven incumbents "unassigned regulars" until such

time as they were able to secure bid duty assignments through the reposting of their then present duty assignments.

The Union maintains that the action of "abolishment" is undefined within the context of Article 38 of the National Agreement. Additionally, the Employer's use of the term constitutes a failure to describe the actual content of its actions. That is to say, what the Employer undertook to accomplish through it's February 20, 1997, letter to the effected employees is not explained. The Union claims that the Employer actually was in the process of altering the parameters of the employees' bid duty assignments, but failed to describe in what ways that was to occur. Aside from the fact that some duty assignments would have non-scheduled days changed, each and every occupied duty assignments was about to be stripped of its defining duties and principal assignment area parameter. Additionally, the Employer failed in its obligation under the terms of the Local Agreement to consult with the Local President forty-eight hours in advance of such reposting of bid duty assignments.

The Union argues that because Article 38 permits the Employer to re-post an occupied duty assignment, it becomes incumbent upon the Employer to prove that such changes are necessary. While management may have a right to determine the hours and days of work, making changes to occupied duty assignments (within the context of that right) is clearly limited by the terms of Article 38. Additionally, it is noted that the provision of Article 38, Sec. 5C2, must be construed as a recognition of the fundamental right of the bargaining unit employee who has successfully acquired a bid duty assignment to be secure in that duty assignment and to "work the duty assignment as posted". Thus management's right to make determinations about hours and days of work, limited as it is by Article 38, Sec. 4A4, comes into conflict with the employee's right to be secure in his or her bid duty assignment. Resolution of these two conflicting rights must be found in the terms of the collective bargaining agreement.

The union further maintains that the Employer has never proffered any reasonably coherent explanation of a need that may have prompted its decision to alter and then re-post occupied duty assignments. The Employer's action to strip from these duty assignments the previously agreed upon parameter of duties and principal assignment area is an unmitigated violation of the parties' October 1995 MOU on the matter. Not only did the Employer fail to

explain in it's announcement of the action, but it also failed to explain through it's responses to this grievance, what justification it might have claimed for it's unilateral action.

Finally, the Union contends that even had the Employer made some reasonably coherent explanation of why it sought to abandon it's prior agreement with the Union, the simple fact remains that the parties had reached appropriate, mutual agreement about defining the parameters of bid duty assignments and how those parameters were to be recognized in the bidding process. The Employer was not entitled to repudiate that agreement. The Union requests that the Arbitrator sustain the grievance, specifically that the Employer be directed to honor as valid and binding the Memorandum of Understanding of October 16, 1995; to restore the identification of routes as the principal assignment area of each Custodial Laborer; and to come into full compliance with the MOU. The Union further requests that the award includes payment of out-of schedule premium to those Custodial Laborers whose schedules were changed as a result of the contractually improper abolishment and reposting.

THE EMPLOYER'S POSITION

The Employer takes the position that since this is a contractual case, the Union must demonstrate through clear and convincing probative evidence that management did indeed violate the National Agreement, and likewise through clear and convincing evidence that their requested remedy is permitted by the Agreement. The Employer argues that under the provisions of Article 38 of the Local Memorandum of Understanding, it has the right to re-post a duty assignment "...if a Maintenance duty assignment has more than 50% of the route(s) changed, or if the greater portion of the principal assignment area is changed, or if the specified work location where the greater portion of the assignment is currently being performed is changed.

The Employer contends, based on the testimony of Wes Green, Manager, Maintenance, and Richard Lunder, Supervisor, Maintenance Operations, that the Union was fully notified of the intent to abolish the custodial positions. Management provided the Union with a letter dated September 9, 1996, informing the APWU President, Dave Heckenlively of Management's intent to abolish and re-post all custodial positions. Management again provided the Union and all effected employees with a letter dated February 20, 1997, notifying them that due to the needs of the Service eleven Custodial Laborer positions were being abolished effective Saturday, March 1,

1997. The Employer here notes that the Union does not contest that these notices were received. In this connection, the Employer also argues that the Union's claim of failure to give 48 hours consultation notice as required by the MOU is weakened by the Union's failure to call Heckenlively as a witness at the instant arbitration hearing.

The Employer argues that the Union has attempted to cloud the real issues of this case by making allegations of procedural errors in the abolishment of the custodial positions. However, through testimony provided by Human Resources Specialist, Sonja Volk, the Employer established that the Union's allegation of procedural errors was unfounded. Volk's testimony, which was not contested by the Union, revealed that she received notice to abolish and post for bid the eleven custodian positions on February 18, 1997. Once the Notice of Abolishment was sent out, Volk created eleven new custodian positions and prepared the Notice of Intent to Fill a Vacancy. The Notice was posted on February 25, 1997. After the closing date (March 4, 1997), Volk reviewed the Preferred Assignment Selection Forms and awarded the positions in accordance with the guidelines established in Article 38, of the National Agreement. The Employer points out that all eleven custodians who had their positions abolished submitted Preferred Assignment Selection Forms, and all were awarded a new position.

The Employer maintains that the Union was given 30 days notice of Management's intent to no longer honor the LMOU through Lunder's letter of September 9, 1996 to Heckenlively. In this connection the Employer argues that Article 30 [Local Implementation] Section D, of the National Agreement makes alleged violations of the terms of a Memorandum of Understanding grievable. However, since no grievance was filed the Local Memorandum of Understanding ceased to exist as of October 9, 1996. Further, it is noted that during the last round of local negotiations, the LMOU was not re-negotiated.

The Employer argues that it is authorized to abolish positions under the National Agreement, "...so long as the action was not arbitrary, capricious, or unreasonable..." In support of this position the Employer cites Arbitrator J. Earl Williams (W7-5S-C 23403- Job Abolishment, 1991). While the Union contends that Management was required to furnish information regarding an abolishment, Arbitrator Williams found that the Postal Service does not need to justify it's reason for taking any action which is exclusively reserved to it under Article 3

of the National Agreement. According to Williams, it is not even required to tell the Union its reasons. The Employer therefore urges that the grievance be denied and dismissed.

DISCUSSION, DECISION AND AWARD

Despite the fact that numerous issues, including but not limited to management rights to schedule; "abolishment" of positions; reposting at Management's discretion; and alleged procedural irregularities arose at the hearing, it cannot be denied that the crux of this dispute involves the Employer's decision to abolish and re-post all Custodial Laborer duty assignments in the Sioux Falls post office. Further, it is abundantly clear that the Employer's discretion in this matter is controlled and limited by the provisions of Article 38 of the National Agreement and the Local Memorandum of Understanding. Indeed, it was an attempt by local management to re-post Custodial Laborer duty assignments in 1995 that resulted in Union protests and led to the negotiation of the 1995 Memorandum of Understanding. The MOU resolved the dispute over the proposed reposting and established agreed upon parameters for those duty assignments that included the identification of specific routs attached to each duty assignment under the category of principal assignment area. Accordingly, this MOU effectively modified the provisions of Article 38 as they applied to the Sioux Falls installation by establishing "daily" and "senior" maintenance routes and mandating that these daily and senior routes be referenced in future job posting by number.

It was with this background that Lunder decided to again abolish and re-post all occupied Custodial Laborer duty assignments in September of 1996. It is apparent that he clearly perceived the MOU to be a significant impediment to his plan because his communication to the Union began by announcing "my 30 day notice to nullify MOU 10/16/95." Lunder testified that he took this action because he and Maintenance Manager Green wanted more "flexibility and control" and

that Green disliked the "bidding by area" which allegedly had resulted in grievances. The Arbitrator notes that neither Lunder nor Green provided evidence of such grievances. Both Lunder and Green testified that it was really Green's decision to abolish the positions. Green also testified that it was his opinion that local management had the right to declare the MOU null and void simply by giving the Union thirty days notice.

There can be little doubt from the testimony that both Lunder and Green had somehow come to the erroneous conclusion that the MOU could simply be terminated by giving the Union 30 days notice. However, there is nothing within the provisions of Article 30 of the National Agreement that provides for unilateral nullification or rejection of an existing local agreement whether or not notice is given. Apparently Lunder and Green either believed that the MOU was not a collectively bargained agreement, and/or that it was not enforceable through the provisions of the National Agreement. Their apparent belief in this regard is clearly unfounded. Article 30 of the National Agreement provides that presently effective local agreements that are not inconsistent or in conflict with the National Agreement shall remain in effect unless they are changed by mutual (emphasis added) agreement. Further, neither Lunder nor Green cited any alleged inconsistency or conflict with the National Agreement as the basis for their decision to unilaterally "nullify" the MOU. While their desire for greater flexibility and control is understandable, the Employer cannot simply discard or reject a negotiated provision that it no longer finds convenient. This is as true for Local Memoranda of Understanding as it is for the National Agreement. Indeed, it cannot be denied that it was Lunder who negotiated and signed the MOU in October of 1995. The Arbitrator must therefore find that the proposed nullification of the MOU together with the notice of abolishment was wholly improper and in violation of the National Agreement. Accordingly, he further finds that the MOU continued to be in full force and

effect in February of 1997 when the Employer abolished the eleven Custodial Laborer positions, and that this abolishment violated that Memorandum of Understanding.

The Employer correctly asserts that it has the right to abolish positions under Article 3 of the National Agreement so long as its action is not arbitrary, capricious or unreasonable. There is a substantial body of arbitral decision to support this position and the Arbitrator deems it unproductive to comment further upon these decisions. Based on the record, however, it would appear that the proposed abolishment was little more than a subterfuge through which local management hoped to rid itself of the maintenance routes and area bidding procedures which it had bargained for in October of 1995. Lunder's testimony clearly reveals that while he had initially agreed with the procedures, by October of 1996 he had determined that they were not working well from his and Green's perspective. He also wanted to regain some of the flexibility that he had bargained away. To avoid violating the provisions of Article 38, he therefore determined to abolish the old positions and create new ones without bid assignments and daily and senior maintenance routes. He provided no justification for this decision other than a vague reference to increased flexibility and control and the unsubstantiated allegation that the bidding procedure had led to grievances. Further, there is no evidence that the work at issue somehow disappeared or that significant changes in the facilities or workload were involved. On the contrary, credible testimony at the hearing revealed that the custodial route work was essentially the same prior to and after the action in dispute. There would therefore appear to be little doubt that local management's intention was not to abolish positions but rather to modify the position descriptions and duties.

Lunder did not, however, abolish the positions within 30 days as stated in his letter but waited until February 20, 1997 before actually posting a notice of abolishment. He testified that

he did so to make sure that everyone involved was in agreement with his proposal, and further testified that he involved the Union in his discussions. On the contrary, Grievant Melton denied discussing the matter with management and clearly was not in agreement with Lunder's decision as evidenced by his filing of the grievance. Far from gaining universal agreement, it is apparent that the delay merely convinced the Union that Lunder had abandoned his October decision to nullify the MOU and abolish positions. This delay also effectively withdrew notice to the Union President of the Employer's intent to post new duty assignments. Since no further notification to the Union President was made prior to the February 20, 1997 notice of position abolishment, the Arbitrator is compelled to find that the Employer violated Article 38, supra, of the MOU by failing to do so. In consideration of the above discussion, it is evident that local management's claim of abolishing the eleven Custodial Laborer positions must be deemed both arbitrary and unreasonable and not within its Management Rights as set forth in Article 3 of the National Agreement.

The Arbitrator has made a detailed review and analysis of the entire record in this matter, and he has carefully read and considered the various positions and arguments advanced by the parties in their respective post hearing briefs. Having done so, he is satisfied that the critical issues that arose in this arbitration have been addressed above. Further, he has determined that certain other matters that arose in these proceedings must be deemed immaterial, irrelevant, or side issues at the very most, and therefore have not been afforded any significant treatment, if at all, for example: whether or not the Union called Local President Heckenlively to testify; whether or not Green wanted to run the Sioux Falls facility in the way he had run his previous facility; the fact that all incumbents of the abolished positions bid on the new positions; whether or not Melton

attempted to file a grievance prior to March 5, 1997; whether or not there was a typographical error in the abolishment and posting of one of the positions; and so forth.

Having considered the above review and analysis, together with the findings and observations hereinabove made, the Arbitrator has determined, and so he finds and concludes that with the specific facts of the subject grievance, and within the meaning of the National Agreement and applicable Local Memoranda of Understanding, the evidence is more than sufficient to sustain a finding that the Employer violated the National and Local agreements when it abolished and reposted eleven maintenance craft positions in February of 1997. Accordingly, an award will issue, as follows:

AWARD

THE EMPLOYER VIOLATED THE NATIONAL AGREEMENT AND THE LOCAL MEMORANDUM OF UNDERSTANDING WHEN IT ABOLISHED ELEVEN (11) CUSTODIAL LABOR POSITIONS WITHOUT REQUISITE NOTICE TO THE UNION.

REMEDY

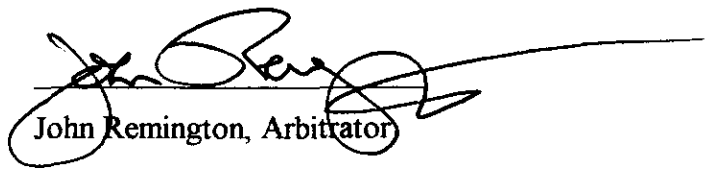
THE EMPLOYER SHALL COMPLY WITH THE PROVISIONS OF THE OCTOBER 16, 1995 LOCAL MEMORANDUM OF UNDERSTANDING AND FORTHWITH RESCIND THE ABOLISHMENT AND REPOSTING NOTICES OF FEBRUARY AND MARCH 1997. FURTHER, EMPLOYEES M. BARKER, O. AARTUN AND D. MADETZKE SHALL RECEIVE OUT OF SCHEDULE PREMIUM PAY, AS FOLLOWS:

BARKER- 22.5 HOURS/WEEK
AARTUN- 5 HOURS/WEEK
MADETZKE-37.5 HOURS/WEEK

No out of schedule pay shall be awarded to employees C. Beck, T. Kunkel, G. Johnson or B. Williams. Based on the request of the Union it is readily apparent that the only disruption in

schedule suffered by these employees was a change in their non-scheduled days. In no case were these employees assigned non-consecutive days off under the new schedule.

It is the determination of the Arbitrator that out of schedule premium pay must be awarded in remedy because the Employer's improper actions effectively forced the above employees to change schedules into which they had bid in reasonable expectation that those schedules would be continued until renegotiated. To not provide such a remedy would effectively encourage local management to violate the Memorandum of Understanding with impunity.



John Remington, Arbitrator

January 29, 2000

St. Paul, MN