

National Postal Mail Handlers Union

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November 7, 2014

TO: All Local Union Officers and Stewards

FROM:  John Hegarty, National President
T.J. Branch, Manager, CAD



RE: National Arbitration Decision: Lead Clerk Position

We are extremely pleased to announce that the NPMHU has prevailed in its National arbitration against the Postal Service over the ability of the Postal Service to allow Lead Clerks to supervise or in any way to assign or direct the work of members of the Mail Handler craft. A complete copy of the award is attached.

Arbitrator Das' Award makes two important findings:

First, Arbitrator Das stressed, as the Postal Service was forced to concede, that Lead Clerks "are not authorized to perform supervisory functions . . . including decisions about hiring, promotion, discipline, approval of leave, the resolution of grievances, and employee evaluations."

Second, Arbitrator Das made clear that, absent negotiations between the Postal Service and the NPMHU, the Postal Service cannot utilize Lead Clerks to direct or guide the work of Mail Handlers.

By way of background, during the negotiations between the APWU and the USPS for their 2010 National Agreement, the APWU bargained to reduce substantially the use of temporary supervisors (204-B). Because there remained a need for clerks to receive oversight, direction and support, the APWU and the USPS also negotiated the creation of a new position called a Lead Clerk. When the Postal Service drafted the Position Description for the Lead Clerk position, however, the Postal Service provided that the Lead Clerk would not only lead employees in the clerk craft, but also would provide such oversight and direction to all

“mail processing employees assigned to mail processing operations,” regardless of craft. The NPMHU grieved that decision.

Following an evidentiary hearing and the submission of post-hearing briefs, Arbitrator Das found that the assignment to the Lead Clerk position of the responsibility to direct and lead the work of Mail Handlers when a supervisor is not present is a “material, substantial and significant” change in the working conditions for Mail Handlers. In reaching this conclusion, Arbitrator Das focused on the fact that the Postal Service had assigned to the Lead Clerk the authority to, among other things, “[r]esolv[e] problems that may occur during tour operations and determin[e] when a supervisor should be involved,” and to “[s]hif[t] employees . . . from one assignment to another.” Of particular significance to Arbitrator Das was the fact that the Postal Service and the NPMHU had previously agreed that those responsibilities were to be performed by the Mail Handler Group Leaders.

As a result, Arbitrator Das held that, because the Postal Service made this change in Mail Handler working conditions through its negotiations with the APWU and not with the NPMHU, “the Postal Service violated Article 5 of the National Agreement,” which prohibits the Postal Service from unilaterally changing the “wages, hours and other terms and conditions of employment.” Accordingly, he ordered the Postal Service to “restore the status quo and to bargain with the NPMHU over these matters.”

In short, the Das Award should put to an end the practice of using clerk craft employees to direct the work of Mail Handlers when a supervisor is not present. The National Office will be working with the Postal Service to revise the job descriptions for the Lead Clerk position and to otherwise implement and enforce this Award.

Please do not hesitate to contact the National Office should you have any questions.

Cc: Mark A. Gardner, National Secretary-Treasurer
National Executive Board
National/Regional CAD

NATIONAL ARBITRATION PANEL

In the Matter of the Arbitration)
between)
UNITED STATES POSTAL SERVICE) Case No. Q06M-6Q-1 2288977
and)
NATIONAL POSTAL MAIL HANDLERS)
UNION, AFL-CIO)
)

BEFORE: Shyam Das

APPEARANCES:

For the Postal Service: Julienne W. Bramesco, Esq.
 Lucia R. Miras, Esq.

For the NPMHU: Matthew Clash-Drexler, Esq.

Place of Hearing: Washington, D.C.

Dates of Hearing: May 1, 2014

Date of Award: November 5, 2014


Relevant Contract Provisions: Articles 3 and 5

Contract Year: 2006 - 2011

Type of Grievance: Contract Interpretation

Award Summary:

The grievance is sustained on the basis set forth in the final paragraph of the above Findings.

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Shyam Das, Arbitrator

The NPMHU filed this grievance in August 2012 challenging whether Lead Mail Processing Clerks and, in some circumstances, Lead Customer Service Clerks, have the authority to supervise or in any way to assign or direct members of the Mail Handler Craft in the performance of their duties. The NPMHU alleged that adoption of a policy by the Postal Service under which Lead Clerks may guide, assign or otherwise direct employees in the Mail Handler craft unilaterally changed the terms and conditions of employment governing Mail Handlers.

In the 2010-2015 National Agreement between the American Postal Workers Union (APWU) and the Postal Service those parties entered into a Memorandum of Understanding which includes provisions relating to Lead Clerk assignments (Lead Clerk MOU). This MOU created two Lead Clerk positions: Lead Mail Processing Clerk and Lead Customer Service Clerk (both hereinafter referred to as Lead Clerk).¹

The NPMHU protested that Lead Clerks cannot properly exercise authority to supervise or to provide direction to Mail Handlers. The Postal Service has since made clear and the NPMHU accepts the explanation that Lead Clerks are not authorized to perform supervisory functions, as defined by the NLRB, including decisions about hiring, promotion, discipline, approval of leave, the resolution of grievances, and employee evaluations.

The creation and implementation of the Lead Clerk position occurred in conjunction with an agreement between the APWU and the Postal Service to eliminate temporary supervisor positions (204-B positions), except in the absence or vacancy of a supervisor for 14 days or more. When there is no supervisor available, Lead Clerks, per their job description, provide oversight to mail processing employees in both the Clerk Craft and the Mail Handler Craft.

The Mail Handler Craft is distinct from the Clerk Craft and is represented by the NPMHU. The Clerk Craft is represented by the APWU. Mail Handlers generally are responsible for loading, unloading, and moving bulk mail. There is a Mail Handler Group Leader

¹ Another lead position, Lead Sales and Service Associate, existed long before the Lead Clerk MOU.

position. Teresa Harmon, Contract Administration Representative for the NPMHU, testified that she was aware of lead employees called Group Leader Mail Handlers in the Mail Handler Craft since at least the late 1960s. Group Leaders provide guidance, direction and assistance where a supervisor is unable to be present at the worksite. The job description states that the Group Leader serves as a working leader of a group of at least five Mail Handlers, although Harmon indicated that is not always followed.

Relevant provisions of the applicable 2006 NPMHU National Agreement include the following:

ARTICLE 3 MANAGEMENT RIGHTS

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

- 3.1 To direct employees of the Employer in the performance of official duties;
- 3.2 To hire, promote, transfer, assign and retain employees in positions within the Postal Service and to suspend, demote, discharge, or take other disciplinary action against such employees;
- 3.3 To maintain the efficiency of the operations entrusted to it;
- 3.4 To determine the methods, means, and personnel by which such operations are to be conducted;
- 3.5 To prescribe a uniform dress to be worn by designated employees; and
- 3.6 To take whatever actions may be necessary to carry out its mission in emergency situations, i.e., an unforeseen circumstance or a combination of circumstances which calls for immediate action in a situation which is not expected to be of a recurring nature.

* * *

ARTICLE 5 PROHIBITION OF UNILATERAL ACTION

The Employer will not take any actions affecting wages, hours and other terms and conditions of employment as defined in Section 8(d) of the National Labor Relations Act which violate the terms of this Agreement or are otherwise inconsistent with its obligations under the law.

Relevant provisions of the Lead Clerk MOU agreed to by the Postal Service and the APWU include the following:

2) Mail Processing/Customer Service

The intent behind the creation of the Lead Processing Clerk and the Lead Sales and Services Associate is to provide oversight, direction and support, in the absence of Supervisory presence to bargaining unit employees in both Mail Processing and Retail operations. Lead Clerk positions will be created at one level above other employees in the group. The Employer will fill duty assignments of a Lead Clerk in any facilities where clerks work without direct supervision and in facilities that have a minimum complement of five (5) clerks. Lead Clerk assignments shall include duties in both the Retail and Mail Processing operations in Post Offices. Lead Clerk assignments will also be filled in facilities with only a Retail operation.

A) Lead Clerk-Mail Processing- Responsibilities include, but are not limited to, resolving problems that may occur during tour operations and determining when a supervisor should be involved, work as a working leader of mail processing employees in a mail processing activity; maintaining records related to mail on hand and mail processed; maintaining a working knowledge of regulations, policies and procedures to mail processing activities.

B) Lead Clerk-Customer Service- Responsibilities include, but are not limited to, maintaining a working knowledge of regulations, policies and procedures related to all phases of retail services and Post Office mail processing operations; acting alone or as a working leader to retail and mail processing employees; providing technical guidance to retail clerks in addition to communicating regulations, policies and procedures to those employees; performing administrative duties in both retail and mail processing operations; and ensuring that all work is performed efficiently.

UNION POSITION

The NPMHU argues that Lead Mail Processing Clerks and Lead Customer Service Clerks should not have the authority to supervise, assign or direct members of the Mail Handler Craft in the performance of their duties. The NPMHU asserts that by permitting Lead Clerks to guide and direct the work of Mail Handlers, the Postal Service unilaterally changed the terms and conditions of employment for employees in the Mail Handler craft. The NPMHU accepts the Postal Service's statement that Lead Clerks are not authorized to perform supervisory functions and asks the Arbitrator to incorporate that limitation into the Award in this matter.

The NPMHU argues that the Postal Service violated Article 5 when it unilaterally changed the terms and conditions of employment for Mail Handlers by permitting the Lead Clerk, as opposed to the (Mail Handler) Group Leader, to direct the work of Mail Handlers. The Postal Service acknowledged at the hearing that it has changed the identity of the individual providing direction or guidance to Mail Handlers. The NPMHU points out that the Postal Service made this change through negotiations with the APWU and did not discuss this change with the NPMHU. The NPMHU argues that this change causes a material, substantial, and significant change to the working environment for Mail Handlers and therefore, violates Article 5. See *Flambeau Airmold Corp.*, 334 N.L.R.B. 165 (2001), quoting *Alamo Cement Co.*, 281 N.L.R.B. 737, 738 (1986), modified on other grounds 337 N.L.R.B. 1025 (2002).

The Postal Service has used Group Leaders for nearly 50 years to provide direction and guidance to Mail Handlers when a supervisor is unavailable. The NPMHU points out that in accordance with the position description, the Group Leader:

- (i) "[a]ssures...that each Mail Handler is assigned a fair share of the load,"
- (ii) "assures that adequate on-the-job training is carried out" and that "each Mail Handler understands the work to be done,"
- (iii) "[a]ssigns employees in the group, as instructed by a supervisor, to individual tasks, and shifts employees from one assignment to another to meet fluctuating workloads,"

- (iv) "[r]esolves problems of a routine nature arising during the tour of duty,"
and
- (v) "provides leadership necessary to secure maximum interest and effort among employees" and "maintains morale of employees in the group."

Harmon testified that the job duties of the Group Leader and the Lead Mail Processing Clerk are the same. The NPMHU asserts that the general practice in the Postal Service is for lead-type positions to be in the same craft as the employees who are being provided direction and guidance, and that by assigning Lead Clerks to direct Mail Handlers the Postal Service was assigning them Mail Handler Group Leader duties. The NPMHU cites NLRB precedent that the substitution of one group of workers for another to perform the same work is clearly a mandatory subject of bargaining. See *Spurlino Materials, Inc.*, 353 N.L.R.B. 1198, 1218 (2009).

The NPMHU disagrees with the Postal Service's assertion that the General Expeditor (Expeditor) position, a position within the APWU, has held the responsibility to direct the work of Mail Handlers for years. The NPMHU argues that the evidence shows that the responsibilities of the Lead Clerk are different than those assigned to the Expeditor. Thus, the Postal Service's argument that there is a long-standing history of allowing employees from one craft to guide members from other crafts lacks merit.

The NPMHU contends that the creation of the Lead Clerk position limits the opportunity for Mail Handlers to be promoted to Group Leader. The total number of Mail Handler Group Leaders may not have been affected by the new Lead Clerk position, but it has reduced the availability of promotional opportunities in situations where the Postal Service determines that bargaining unit employees require oversight, direction and support in the absence of a supervisor.²

² The NPMHU cites an NLRB decision that a reduction in the opportunity for higher-level pay is a mandatory subject of bargaining. See *Corp. for Gen. Trade*, 330 N.L.R.B. 617, 627-28 (2000); *Dearborn Country Club*, 298 N.L.R.B. 915, 915 (1990).

The NPMHU argues that allowing Clerk Craft employees to provide oversight, direction and guidance to Mail Handlers constitutes a material, substantial, and significant change in the working conditions of Mail Handlers. Harmon testified that the most important function of a Mail Handler Group Leader is the ability to maintain morale within the group. Harmon explained that the ability of a Group Leader to maintain morale derives from working side-by-side with their fellow union members, with an understanding of the NPMHU National Agreement and supplementary agreements reached by NPMHU local unions and the Postal Service.

The NPMHU asserts that the Lead Clerk's responsibilities affect the terms and conditions of employment for Mail Handlers. For example, the Lead Clerk has the ability to start a process that could result in discipline by relaying information to a supervisor, as well as the ability to direct the assignments of Mail Handlers.

The NPMHU cites a prior national arbitration award issued in 2014 that makes clear that the Postal Service cannot bargain with one union any terms that would harm members of another union unless it first receives the second union's consent. Postal Service and NALC, APWU, and NPMHU, Case No. Q06N-Q4-C 12114440 (Nolan, 2014).³ The NPMHU asks the arbitrator to similarly find that the Postal Service cannot unilaterally change the terms and conditions of employment for Mail Handlers through separate negotiations with the APWU.

The NPMHU contends that despite the management rights clause in Article 3, the Postal Service does not have the right to unilaterally change the terms and conditions of employment for Mail Handlers. The NPMHU acknowledges the Postal Service's right to determine whether a non-supervisory lead is necessary, however it argues that the Postal

³ The issue in that case was whether a Non-Traditional Full-Time employee (considered full-time under the APWU agreement) could be excessed into a full-time position in the NALC bargaining unit under the NALC agreement. The NALC agreement and the APWU agreement had different and conflicting definitions of full-time employment. Arbitrator Nolan held that the definition of full-time in the gaining union agreement (NALC) governed.

Service does not have the authority to unilaterally assign the duties being performed by the Mail Handler Group Leader to nonbargaining unit employees.

The NPMHU requests that the Postal Service be required to rewrite the Lead Clerk job description to specify that direction can be provided only to employees within the APWU bargaining unit or, alternatively, to restore the status quo and bargain with the NPMHU over these matters.

EMPLOYER POSITION

The Postal Service contends that introducing Lead Clerks to the workplace did not change the terms and conditions of employment for the Mail Handlers. Relying on NLRB precedent, the Postal Service argues that an improper change to a working condition involves more than just an insubstantial modification like the one in this case.⁴

Patrick Devine, the Postal Service Manager of Contract Administration for the APWU Agreement, testified that Mail Handlers receive the same instructions that they always have, the only change is the identity of the person conveying the instructions. Previously it was a supervisor and now, in addition to the Group Leader, Lead Clerks are providing instruction to Mail Handlers. The Postal Service asserts that this small modification, and the minimal interaction between the Lead Clerks and the Mail Handlers, do not amount to a material, substantial, and significant change affecting the terms and conditions of employment.

Devine testified that APWU members have been directing Mail Handlers since at least 1983 when the Postal Service began using Expeditors. Devine explained that an Expeditor is responsible for ensuring that the correct mail gets on the correct truck before it leaves. Expeditors, like Lead Clerks, carry out instructions of the supervisor.

⁴ "[F]or a statutory bargaining obligation to arise with respect to a particular change implemented by an employer, such change must be a 'material, substantial and a significant' one affecting the terms and conditions of employment of bargaining unit employees." United Technologies Corp., 278 N.L.R.B. 306 (1986), at 308.

The Postal Service argues that the management rights provision of the National Agreement gives it the right to direct employees in the performance of their official duties. The Postal Service points out that the management rights clause is almost word for word the language of the Postal Reorganization Act, 39 U.S.C. § 1001(e). The Postal Service contends that this means that its right to direct employees in the performance of their official duties has the force of law.

The Postal Service argues that it has the authority to create the Lead Clerk position pursuant to Article 3. Lead Clerks direct employees when necessary and facilitate efficient operations by providing oversight, direction and support to the operations in the absence of a supervisor. The Postal Service asserts that in the absence of anything in the NPMHU agreement prohibiting the use of leads, or prohibiting the use of leads from other crafts or bargaining units, the management rights clause controls.

The Postal Service rejects the NPMHU's argument that the Lead Clerk MOU violates the NPMHU National Agreement. The Postal Service contends that the NPMHU's arguments are unsupported by the evidence. The NPMHU failed to prove that the Mail Handlers' working conditions changed with the creation of the Lead Clerk position. Additionally, the Lead Clerk position is complement neutral which means that it will not result in the hiring of additional employees, but will result in a duty assignment for an exiting Clerk Craft employee. The ratio of Group Leaders to total Mail Handlers has not varied significantly since May 2011, when the Lead Clerk position was created. There is no evidence that there were any changes to the job duties or tasks that Mail Handlers perform resulting from the creation of the Lead Clerk position.

The Postal Service refutes the NPMHU's position that there was a longstanding agreement between the parties that only Group Leaders could lead Mail Handlers. The Postal Service asserts there was never an agreement to designate Group Leaders as the exclusive lead of Mail Handlers in the absence of the supervisor. The Postal Service also contends that if it had wanted to restrict Lead Clerks to only lead APWU bargaining unit members it would have

done so in the job description, as it did in the Mail Classification Clerk, Window Services Technician, and Accounting Technician job descriptions.

The Postal Service argues that even if it erred by failing to negotiate with the NPMHU over the creation of Lead Clerks, there was no impermissible unilateral action, because any change in working conditions was immaterial, insubstantial, and insignificant. The directions given by the Lead Clerks are the same directions as those given to Mail Handlers by others outside the bargaining unit -- Supervisors, including Acting Supervisors (204-B), and APWU-represented Expeditors. The Postal Service contends that any change to the working conditions of Mail Handlers was *de minimis*.

The Postal Service maintains that the facts considered in the 2014 Nolan Award are distinguishable from the instant case because the Lead Clerk MOU does not conflict with the NPMHU Agreement. Here, the Postal Service contends, there is no conflicting language in the NPMHU Agreement that prohibits employees from a different bargaining unit leading Mail Handler employees.

FINDINGS

The NPMHU National Agreement does not contain a provision expressly precluding employees in a different bargaining unit, such as the APWU, from leading Mail Handlers. However, certain unilateral actions are prohibited in the National Agreement. Article 5 states:

ARTICLE 5 PROHIBITION OF UNILATERAL ACTION

The Employer will not take any actions affecting wages, hours and other terms and conditions of employment as defined in Section 8(d) of the National Labor Relations Act which violate the terms of this Agreement or are otherwise inconsistent with its obligations under the law.

In the past Mail Handler Group Leaders have supplemented supervisors in giving oversight, direction and guidance to Mail Handlers. Now in addition to Group Leaders, Lead

Clerks are performing this function as a consequence of the Postal Service agreement with the APWU to eliminate temporary supervisors (204-B supervisors) and to establish the Lead Clerk positions in issue. The Postal Service should have bargained with the NPMHU prior to assigning Lead Clerks to perform this work.

The Postal Service's argument that there has been no significant change because Expeditors in the APWU bargaining unit have directed the work of NPMHU members in the past is not persuasive. The Expeditor position essentially is responsible for making sure the mail gets onto the correct trucks. As the Postal Service's witness testified (Tr. p. 73) they "inform" Mail Handlers, and, as the NPMHU points out, the Expeditor job description does not include the word "direct", let alone provide that the Expeditor "directs" Mail Handlers. Unlike the Group Leader -- or the Lead Clerk as established by the Postal Service -- the Expeditor does not provide oversight, direction or support to Mail Handlers. In the past the Postal Service has used lead positions, but they have not crossed over bargaining unit lines.⁵

The Postal Service takes the position that Lead Clerks are only conveying instructions from a supervisor and that this is a *de minimis* or insignificant change. The job description makes it is clear that the role of the Lead Clerk is more significant than simply conveying the instructions of a supervisor. The Lead Clerk:

- (i) "Maintains a working knowledge of regulations, policies and procedures related to mail processing activities. Provides guidance to mail processing employees assigned to mail processing operations. Resolves problems that may occur during tour operations and determines when a supervisor should be involved."
- (ii.) "As a working leader of mail processing employees, will cooperate with supervisor to meet established targets for identified goals. Will work to maintain efficiencies and meet dispatches based on the installation operating plan. Shifts employees in the group from one assignment to

⁵ The Lead Clerk MOU which is incorporated in the APWU National Agreement states that Lead Clerks will "provide oversight, direction and support, in the absence of a Supervisory presence to bargaining unit employees in both Mail Processing and Retail operations." As the NPMHU points out, the APWU National Agreement also provides that references therein to "bargaining unit are limited to the APWU and the crafts that it represents."

another, in accordance with the Collective Bargaining Agreement, to balance workload. Trains new employees in specific area of specialization. Makes Supervisor approved entries to correct time and attendance records and retains required supporting documents."

The Postal Service cites several NLRB decisions, including United Technologies Corp., in support of its *de minimis* argument. See, United Technologies Corp., 278 N.L.R.B. 306 (1986). The Board held that in order for a statutory bargaining obligation to arise with respect to a particular change implemented by an employer, such change must be a "material, substantial, and a significant" one affecting the terms and conditions of employment of bargaining unit employees. In that case the Board relied on the limited duration of the program in question and that it was likely to affect only a small number of employees. In this case, however, the creation and assignment of Lead Clerks to direct mail processing employees, including Mail Handlers, potentially could impact much of the Mail Handler bargaining unit. And as noted above, the role of the Lead Clerk as envisaged in its job description is considerably broader than conveying the instructions of a supervisor, and overlaps the role of the Mail Handler Group Leader position which previously performed those functions in the absence of a supervisor. Under these circumstances, I find that the change at issue was material, substantial and significant, and not *de minimis*.

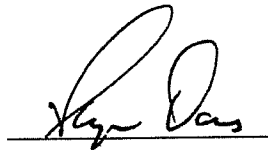
The Postal Service stresses that the ratio of Group Leaders to total Mail Handlers has not significantly decreased, which the NPMHU does not dispute. But, based on the evidence in the record, it is reasonable to conclude there has been an impact on Mail Handler promotional opportunities because Lead Clerks now are able to direct Mail Handlers in the absence of supervisors. The NPMHU, utilizing Postal Service data, provides a statistical review which shows a lost opportunity for Mail Handlers to fill the gap left by the reduction in mail processing supervisors. Between July 2012 and April 2014, the number of employees performing lead (non-supervisory) responsibilities for mail processing employees (both Clerks and Mail Handlers) increased from a total of 1,204 lead positions to 1,627 positions -- a 35% increase. During this same time period, the number of Mail Handler Group Leaders dropped from 711 in July 2012 to 628 in April 2014. While this corresponded to a drop in total Mail Handlers on the rolls, what is significant for present purposes is that Group Leaders decreased

from 59% to 39% of total mail processing lead positions. At the same time, the number of Lead Mail Processing Clerks increased from 493 to 999 -- an increase from 41% to 61% of the total lead positions.

Based on the foregoing, I find that the Postal Service violated Article 5 of the National Agreement. In sum, the NPMHU has established that the Postal Service unilaterally changed the terms and conditions of employment for Mail Handlers when it assigned the Lead Clerk position which it had negotiated with the APWU to provide oversight, direction and support to Mail Handlers, work that in the absence of a supervisor previously had been performed by Mail Handler Group Leaders. The Postal Service is ordered to restore the status quo and to bargain with the NPMHU over these matters.

AWARD

The grievance is sustained on the basis set forth in the final paragraph of the above Findings.

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

Shyam Das, Arbitrator