Impact of Das Award

in

Case Q98C-4Q-C 01238942

(Article 1.6.B.)

Robert D. Kessler & Dennis Taff
National Business Agents
Clerk Craft Division

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Supervisory Performance of Bargaining Unit Work in Offices with less than 100 Bargaining Unit Employees

Contract Language

Article 1.6.B **"In offices with less than 100 bargaining unit employees, supervisors are prohibited from performing bargaining unit work except as enumerated in Section 6.1.A.1 through 5 above or when the duties are included in the supervisor's position description."**

Management Position Descriptions

Postmaster position descriptions in EAS 11 though 18 contain the following phrase:

> **"May personally handle window transactions and perform distribution tasks as the workload requires."**

Supervisor position descriptions in these offices generally state:

> **"May personally perform <u>certain non-supervisory tasks</u> in order to meet established service standards, consistent with the provisions of Article 1, Section 6 of the National Agreement."**

History

All National Level Arbitrators have agreed Article 1.6 is clearly a work preservation clause for the bargaining unit which restricts the performance of bargaining unit work by supervisors.

This restriction is subject to limitations in the agreement in offices with less than 100 employees (i.e., when the duties are listed in the supervisor's position description).

Garrett Award

The language in Article 1, Section 6.B was first addressed at the national level in case AC-NAT-5221, which was decided in 1978 by Arbitrator Sylvester Garrett.

Neither the APWU position nor the USPS position was upheld by the Arbitrator.

The APWU argued, among other things, that a supervisor in a small office could spend no more than 15% of his or her daily work time performing bargaining unit work.

Garrett held, **"There is no support in the language of this provision for this suggestion."**

The USPS argued that it was essentially free to re-write or replace all supervisory position descriptions and that it could, in effect, substitute supervisor's for bargaining unit personnel freely, even on a full-time basis.

Garrett held, **"1-6-B was not intended to authorize revision of supervisory position descriptions to include performance of bargaining unit work"** absent **"changes in relevant conditions or operating methods in a given office."**

The Arbitrator went on to address the situation which existed in many of these small offices. That is where the supervisory position description already included performance of bargaining unit duties, but the amount of work performed by supervisors changed.

He stated: **" 1-6-B grants no authority to substitute a supervisor for a bargaining unit employee . . . There is no way, therefore, that 1-6-B reasonably could be read to grant an unlimited license to eliminate Clerk hours by transferring Clerk work to supervisors . . . it is clear that the USPS errs in claiming an unfettered license under 1-6-B to assign Clerk duties to supervisors. . ."**

Garrett realized that his award could not be applied globally to all individual offices, except **"in light of all relevant facts applicable to that particular installation".**

He went on to state that unless the parties could negotiate a global settlement to these issues, and that has not occurred, they would have to **"proceed with a detailed analysis of the pending grievances."**

This means the issue would be settled or arbitrated based on facts in each individual office by regional level arbitrators, if necessary.

That is what occurred for a period of 23 years.

The union won some of these cases and lost some, based on the facts of each case. Most of the cases the Union prevailed on, as you would expect given the language in Garrett, involved offices where work historically done by the bargaining unit was shifted from the bargaining unit to supervisors.

There were also some regional arbitrators who held that when supervisors on a **"daily, regular and routine basis"** performed bargaining unit work, even if they had historically done so and there was no change or shift of work, it constituted a violation of 1-6-B.

Das made clear in his award that those cases **"cannot be squared with the Garrett Award."**

These awards led the USPS on September 5, 2001 to initiate a dispute alleging there was no violation when a supervisor who had historically performed bargaining unit work on a daily, regular and routine basis continued to do so. At the hearing they added that it would not be a violation as long as there was no shift or transfer or work or change in the amount of work performed by the supervisor or postmaster.

The APWU disagreed and that is what led to the Das Award on 1-6-B in Case Q98C-4Q-C 01238942.

Since 2001 virtually all 1-6-B cases, whether there was a shift of work alleged or not, have been held in abeyance at either Steps 1,2

or 3 awaiting the outcome of the dispute initiated by the Postal Service.

Das Award

APWU Position

The Union argued that the USPS was hopelessly vague and that they had never defined what "daily, regular or routine" means. In addition the USPS did not explain which tasks it was addressing in their dispute or what history constitutes "historical" performance of bargaining unit work

The Union also argued that fixing a time a supervisor may perform bargaining unit work at the expense of clerks is substituting a supervisor for a bargaining unit employee, which Garrett also said they cannot do.

In addition, if the workload decreases, it is clearly improper that only clerks bear the impact.

It would also be improper in offices where the workload increases, that only supervisors increase the amount of bargaining work they perform.

Essentially, the Union argued all 1.6.B grievances are "fact bound" and can only be resolved by application of the principles of the Garrett Award to the facts in a particular office.

USPS Position

The USPS contended that if postmasters historically performed bargaining unit work on a daily, regular and routine basis, they could continue to do so, absent a change or shift of work.

It is worth noting that although the Postal Service took the position that a supervisor or postmaster can perform bargaining unit work on a daily basis, they freely conceded that **"a postmaster cannot increase the number of hours he historically has performed window and distribution tasks."**

Findings of Arbitrator Das

In agreement with the APWU position and in summarizing Garrett, Das reiterated: **"Garrett concluded that Article 1.6.B essentially was intended to restate and embody in the National Agreement a long established policy to avoid having supervisors perform lower level work, subject to specified exceptions."**

He went on to hold: **"Garrett did not accept the Postal Service's position that it was free to increase the amount of bargaining unit work performed by a postmaster or supervisor in a small office to achieve full and efficient use of supervisory work time, irrespective of the impact on hours worked by clerks."**

In addition, Das stated: **"He** [Das] **did not accept the notion that Article 1.6.B incorporated the Postal Service's position that the postmaster is the 'basic clerk' who is supplemented by additional clerks only as required."**

Accordingly, a strong argument can be made that the historical practice as to both the kind and amount of bargaining unit work performed by supervisors and postmasters in a given office, forms a **ceiling**. That ceiling is not only the amount kind and amount of bargaining unit work, but also important is **when** it is done.

The idea that supervisors may increase the kind or amount of bargaining unit work would, in effect, be justified only by the "efficiency" and "basic clerk" arguments already rejected by both Garrett and Das.

On the other hand, in agreement with the USPS position, Das held that **"Garrett clearly did not accept the Union's argument that there could be no regular practice of having supervisors perform lower level work in a small office."**

He held that the Agreement did not **"require the Postal Service to reassign bargaining unit work historically performed by a supervisor in a particular office to clerks because such duties are performed on a daily, regular and routine basis, or because clerks are or could be available to perform the work."**

Arbitrator Das made it very clear that the essence of the Garrett Award is that **"it focuses on change, in particular on Postal Service action that increases the amount of bargaining unit work performed by supervisors, whether in response to changes in workload or to promote efficiency."**

The Das Award, boiled down to its essence, asserts that **"historical practice sets the baseline for what is 'necessary' at a particular office. Any substantial change, thereafter, has to meet the requirements Arbitrator Garrett spelled out."**

Das took great pains in his award to point out clearly that the issue presented to him was **"quite narrow"**, as follows:

> **". . . whether consistent with the exception in Article 1.6.B of the National Agreement, as interpreted by the 1978 Garrett Award . . . a supervisor at a small office, whose position description includes the performance of bargaining unit duties, may continue to perform those duties historically performed by a supervisor at that office on a daily, regular or routine basis, where there has been no shift or transfer of work or change in the amount of such duties performed by the supervisor."**

Das stated the answer to this **"narrow and abstract issue is 'yes'."**

The Arbitrator made it very clear; however, that answer was only yes **"if there has been no reduction in bargaining unit employee hours."**

Arbitrator Das also made it clear his award did not address two other issues raised by the Union as follows:

1. An increase in bargaining unit work performed by a supervisor without a change in clerk hours, and
2. situations where bargaining unit employee hours are reduced without a change in the amount of bargaining unit work done by a supervisor.

He indicated those situations would have to be resolved by application of the facts in that office to the principles of the Garrett Award.

What do we argue in a Post-Das era?

First and foremost, we should now be able to arbitrate those cases in the field that were being held in abeyance pending the Das award.

The vast majority of those cases did involve situations where bargaining unit work was, in fact, shifted from the bargaining unit to supervisors. The Das Award tremendously strengthens those cases.

Any cases in which the USPS can prove what the historical practice was, and where the Union only argued that supervisors violated the Agreement when they performed work on a daily, regular and routine basis are without merit and should be closed.

If there was no argument about an increase in bargaining unit work performed by supervisors over what had been historical in the office, or a decrease in work performed by clerks or both, they should be withdrawn in accordance with the Das Award.

As Das clearly stated: the Garrett award focused on CHANGE.

If there is anything that has been constant over the past 40 years in the Postal Service, it is CHANGE.

Most, if not all small offices have had shifts of work from the bargaining unit to supervisors, or increases in work performed by supervisors, or decreases in work performed by clerks over the years.

The key to resolution of these cases will be to determine whether specific duties have **"historically"** been performed by a supervisor in light of **"all relevant facts"** applicable to that installation.

How is the "history" proven?

Since **"history"** is a critical component of the USPS position as to when Article 1.6.B is **not** violated, arbitrators should then hold the Postal Service to its position that any given kind or amount of bargaining unit work is **only** justified by the **"history"** in that particular office.

It necessarily follows, that the APWU can make a prima facie case of a violation of 1.6.B by simply showing that supervisors performed bargaining unit work.

The USPS burden in any hearing is then to justify having done so because it has been done **"historically".**

There is support for this argument regarding the USPS burden in Case A-C-N 6922, decided by National Arbitrator Carlton Snow on December 17, 1989.

That award dealt with a Union challenge to the performance of certain types of bargaining unit work by supervisors in **all** offices. The Union attempted to demonstrate what the **"past practice"** or **"history"** was in post offices.

The APWU tried to show who had historically performed certain duties such as timekeeping, density and proficiency checks, answering the telephone, etc.

Whichever party is claiming protection based upon the "history" or "practice" in an office has the burden of proof in an arbitration hearing . In offices with less than a hundred employees, that party is clearly the Postal Service.
Therefore, in 1.6.B cases the USPS would have the same burden the Union had before Arbitrator Snow, that is: to demonstrate what the **"history"** or **"past practice"** has been in that office.

Addressing the Union's burden in case #6922, Arbitrator Snow stated: **" It is not inconceivable that a usage** (in 1.6.B cases, that would be the historical practice) **could be incorporated in the parties' agreement** (both Garret and Das have essentially incorporated the historical practice into Article 1.6.B of our Agreement) **and, then, would serve as a qualification of express terms; but the burden of proof would rest with the party making such an assertion."**

In that regard Snow held: **"The Union has argued that, where both supervisors and bargaining unit employees have performed similar tasks, past practice has reserved such work for bargaining unit members. These parties need no lesson in the nature of past practice. Their own Richard Mittenthal, past president of the National Academy of Arbitrators, has written the definitive work on past practice.** (much of which is incorporated into the APWU/USPS JCIM) **. . . Mr. Mittenthal made clear almost thirty years ago that activity rises to the level of a past practice where it has (1) clarity and consistency; (2) longevity and repetition; and (3) acceptability. . . The diverse evidence showed again that past practice at a facility can be marshaled to march in support of very different conclusions. It was reminiscent of the famous statement by the imminent Dean of the Yale Law School, Harry Schulman, when he stated:**

How is the existence of the past practice to be determined in light of the very conflicting testimony that is common in such cases? The Union's witnesses remember only the occasions on which the work was done in the manner they urge. Supervision remembers the occasions on which the work was done otherwise. Each remembers the details the other does not; each is surprised at the other's perversity; and both forget or omit important circumstances. Rarely is alleged past practice clear, detailed and undisputed. Commonly inquiry into past practice . . . produces immersion in a bog of contradictions, fragments, doubts, and one-sided views."

This places a very heavy burden on the USPS since they have to demonstrate what the **"history"** in a particular office is in order to prevail. How may the USPS prove what a supervisor's predecessor did? The incumbent would not know and anything he/she had to offer would be hearsay.

Snow went on to state: **"Proving, however, that some activity has become an accepted way of doing business and has risen to the level of a past practice so that it may clarify language in an agreement requires what the eminent arbitrator, Clarence Updegraff, described as 'full, complete, and clear proof.'. . ."**

Again, it must be determined what the **status quo** is in a particular office. Even within the status quo where the Postal Service can meet that burden, Das placed additional limitations on the supervisor/postmaster as follows:

- The Union may show that the **pattern** of bargaining duties performed by a postmaster or supervisor were **not performed so consistently over a sufficiently long time** that they do not meet the test of **"historically performed"** by **that particular** postmaster or supervisor.

- Just because a postmaster **"historically"** worked X hours performing **specific** bargaining unit duties, he/she is not free to perform **other** duties.

Different Argument on Postmasters

The language in supervisors' position descriptions is fairly ambiguous as it relates to the type of bargaining unit work they may perform (it states: **"certain non-supervisory tasks").**

The postmasters' position descriptions, on the other hand, state they can only **"handle window transactions and perform distribution tasks."** Arbitrator Das was very clear in his award where he stated postmasters may only perform bargaining unit work if it **"falls within the scope of 'window transactions' and 'distribution tasks'."**

There are many duties which have nothing to do with window transactions and distribution tasks which clearly belong to the bargaining unit. Postmasters should not be performing these tasks.

Some examples are:

- Servicing vending machines
- Clearing and assigning carrier accountable mail
- Second notice filing, hold mail duties and related tasks
- Disposing of UBBM mail
- Custodial work, if there are no custodians in the office, clerks should perform the work before postmasters
- Loading and unloading trucks
- Collections
- Bulk mail acceptance

- Dispatch duties
- Spreading mail to carriers

Efficiency Argument

In offices where shifts of bargaining unit work can be documented, management may attempt to make an argument that the shift was made because it was more "efficient."

Arbitrator Garrett was very clear when he stated:

". . . There is no way, therefore,, that 1-6-B reasonably could be read to grant an unlimited license to eliminate Clerk hours by transferring Clerk work to supervisors <u>without also giving consideration to othe possible means of reducing total work hours.</u> . . . Proper observance . . . would require as a minimum that – before such action is taken in any given office – the USPS should also give full consideration to other reasonably available means of eliminating excess manpower."

In these situations, management would have a heavy burden to demonstrate how they gave **"other consideration"** to other possible means. For example, **"other consideration"** should include the assignment of PTF "loaners" or "hub clerks" prior to shifting work from the bargaining unit to supervisors or postmasters.

In addition, management must be able to demonstrate who conducted the **"good faith review"** required by Garrett. This review should include putting the Union on notice with an

opportunity for input prior to the action taking place or it certainly would not be in **"good faith."**

Documentation

The key to prevailing in these cases will be the ability of the Union to document a violation based on change.

In cases where the USPS meets its burden to show a history of the postmaster or supervisor performing a "baseline amount" of bargaining unit work, the Union must then show the Postal Service has departed from the status quo either by taking hours away from clerks, or by adding hours or duties to supervisors or both.

That can be documented in the following manner:

- Interviews of current and former employees and supervisors
- Statements of current and former employees and supervisors
- Notices of excessing, or plans to excess
- Notices of job abolishments and/or reversions
- Notices of impact of automation, area mail processing, etc.
- Function 4 report or recommendations
- Clock rings or other pay records of work hours, both bargaining unit and management
- Loaner Hours Report, a report that will show any hours transferred from one labor distribution code (LDC) or finance number to another
- Flash Report, a detailed report showing mail volume, revenue, work hours, by the week, accounting period(AP), year-to-date(YTD) and same-period-last-year(SPLY). Specifically request the flash report for the last 5 years for AP 13, week 4. This will show an entire year since it contains

YTD numbers. The years can then be compared to illustrate any changes.

- Work hour budget for the office for the last 5 years
- Form 50 of the Postmaster or Supervisor, to determine if he/she gets a uniform allowance. Part 932.11.g of the ELM states only employees who work a **"minimum of 4 hours daily for 5 days a week on a continuing basis, or for not less than 30 hours a week"** are to receive a uniform allowance.
- PS Form 3930, a document which records mail volumes and work hours on weekly basis
- Window Operations Survey (WOS) reports which show window transactions

Also important evidence may be the settlement of Case Q90C-4Q-C 94011535 from 1995 which states:

"No bargaining unit work will be shifted from craft employees to Postmasters/Supervisors solely as a result of a review using the Workload/Work Hour Budget Equalization Guidelines process."

Continuing Violations

In offices where shifts of work took place and we did not challenge them at the time the change occurred, we should initiate grievances and apply the principles of Garrett and Das.

These would be classic examples of continuing violations and should be processed as such.

It will be critical in those cases to provide evidence of what the historic practice has been in the office, how and when the changes occurred and how those changes affected both the supervisors and clerks.

We have a good chance of success where we can demonstrate the USPS has eroded the principles of Garrett by shifting work, over the years.

Where that can be demonstrated, it must be rectified.

We must keep in mind that having the work returned to the bargaining unit is much more important than any back pay that might be involved.

Mike Morris
Assistant Director
Clerk Division

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