MAXIMIZATION

Article 7.3.B and the
Employer's Obligation to
Maximize Full-Time Regulars

The dispute in this instance is anything but a new one. It centers around the core issue of the Employer's obligation to "maximize" the number of full-time regular employees and "minimize" the number of part-time flexible employees in each installation. The controlling language concerning this issue can be found in Article 7, Section 3.B of the parties' Collective Bargaining Agreement. Article 7, Section 3 provides:

ARTICLE 7

EMPLOYEE CLASSIFICATIONS

Section 3. Employee Complements

A. The Employer shall staff all postal installations which have 200 or more man years of employment in the regular work force as of the date of this Agreement as follows:

1. With respect to the combined bargaining units represented by the APWU, as set forth in Article 1 -- 80% full-time employees.

B. The Employer shall maximize the number of full-time employees and minimize the number of part-time employees who have no fixed work schedules in all postal installation; however, nothing in this paragraph B shall detract from the USPS' ability to use the awarded full-time/part-time ratio as provided in paragraph 3.A. above.

C. A part-time flexible employee working eight (8) hours within (10), on the same five (5) days each week and the same assignment over a six month period will demonstrate the need for converting the assignment to a full-time position.

The Union has conceded from the very start in this case that no single part-time flexible employee in this Post Office has worked the 8 hours within 10, 5 days a week for 6 months as required by Article 7, Section 3.C. Because this is an office with under 125 many years of employment, the Maximization MOU is not applicable. Instead, the Union places its reliance, in this instance,

solely on Article 7, Section 3.B., applicable Step 4 decisions, and National and Regional arbitration awards applying that provision.

The Employer is clearly obligated by Article 7, Section 3.B to review their staffing in all post offices on an ongoing basis in order to ensure a proper application of the contract. Failure to do so entitles the affected employee(s) to a conversion at a point in time when it can be reasonably demonstrated that the Employer knew, or should have known, they were in violation of the contract and to appropriate compensation for the period of time the affected employee(s) was/were denied the contractual benefits of full-time regular status to which the employee(s) would have been entitled if not for the violation.

Article 7, Section 3.B certainly does not exist in a vacuum. At least two (2) different national arbitrators and numerous regional arbitrators have reviewed the Employer's obligation to "maximize" under this provision. The totality of these awards paints a clear picture of the significance of the "maximization" obligation.

The Garrett Award

Any analysis of arbitral precedent on the subject of Article 7.3.B.'s maximization obligation must, of necessity, begin with the national level awards on that subject. **Arbitrator Garrett**, in a 1976 case of first impression, provided the parties with a framework for the practical implementation of the Employer's obligation to maximize the number of full-time positions as set forth in Article 7, Section 3.B.[1] In that decision, **Arbitrator Garrett** wrote:

[1]The portion of Article 7, Section 3, in the 1990 Agreement being relied upon in this case contains the identical language interpreted by both Arbitrators Garrett and Gamser in the cases cited herein. The makeup of the section has changed, but the substance is still the same; e.g., the second sentence referenced is now Section 3.B and the third sentence is now 3.C. Additional changes were implemented by Arbitrator Mittenthal in the 1990 Interest Arbitration. But, the language being relied upon herein remains constant.

"Here it is noteworthy that the parties in their 1973 negotiations added two sentences to the original Article VII, Section 3 so as to provide concrete guidance for implementation of the second sentence at the local level. The new third sentence is particularly relevant here, and states:

> 'A part-time flexible employee working 8 hours within 10, on the same 5 days each week and the same assignment over a six-month period will demonstrate the need for converting the assignment to a full-time position.'

"Since individual part-time flexible Clerks are not shown to have worked at Taunton in the manner described in this sentence, it literally does not control here. The Union also errs when it suggests that the 'policy' of this sentence may be applied by the Impartial Chairman, on the basis of its statistical analyses, to direct conversion of 4 part-time flexibles to regular full-time status. When the second sentence of Section 3 is read realistically in light of the third sentence, however, it is clear that a practical approach to cases such as the present is available for the parties at the local level, and that they should have very little need to carry such problems to arbitration."

"The maximization obligation imposed by the second sentence of Article VII, Section 3 is of a continuing nature. It hardly could be otherwise, since relevant conditions affecting the size and composition of the work force cannot be expected to remain static. The Union's comprehensive analyses of the work schedules at Taunton in the present case surely raise an inference that at least one, and possibly more, of the part-time flexible Clerks there might be converted to full-time regular status without significantly impairing efficiency. An assertion by the Taunton Postmaster that inefficiency will result, without concrete documentation of the nature and extent of such inefficiency, is not enough in the face of such Union evidence. Given the record in this particular case, therefore, and keeping in mind the present composition of the Taunton work force, it would have been appropriate for Taunton Management to try to schedule at least one part-time flexible Clerk experimentally in conformity with the standards in the third sentence of Section 3. The second sentence of Article VII, Section 3 reasonably appears to impose an obligation to proceed in this manner when the Union presents a prima facie case for greater maximization in any given installation. Had such a course been followed in Taunton, the local parties easily could have ascertained whether efficiency in fact would be impaired by converting one or more of the part-time flexibles there to full-time regular status."

"Since the parties have been uncertain until now as to how Article VII, Section 3 should be implemented at the local level, it would seem that their local

representatives at Taunton at last should have full opportunity to settle these grievances in light of this Opinion and without further resort to arbitration. The Award thus will return the case to the parties for settlement."[2] [underscoring added]

The Gamser Award

Arbitrator Gamser likewise found that an inference of the need to maximize can be created by combining hours worked by a combination of employees. The Arbitrator wrote:

> "In the instant case, although the data submitted by the Union did not establish, as the Union claimed, that some fifteen additional part-time flexible carrier positions could immediately be converted to full-time regular positions, the data regarding hours worked in the carrier craft by regulars, flexees and casuals through the period ending May 18, 1978, certainly created a strong inference that the Postmaster at Toms River could reestablish his present carrier work schedules and create at least four additional full-time assignments on a temporary basis with only a minimal, if any, impact upon efficiency or impairing required flexibility. The Award below will direct that the Postmaster take such action within thirty days after receipt of this Award. If those four temporary assignments, after a six-month trial period do not produce any adverse impact upon efficiency, the conversion of these positions to full-time regular jobs should be accomplished. Thereafter, in keeping with the continuing obligation imposed by Section 3 of Article VII, the Postmaster should, along with the Union at the local level, review the possibility of converting additional assignments to full-time in the carrier craft for six-month trial periods with a subsequent assessment of the impact of these assignments upon efficiency and the need for flexibility as indicated above."[3] [underscoring added]

It is clear from reading their opinions that **Arbitrators Garrett** and **Gamser** both found that the Employer, when presented with sufficient evidence to raise the inference that one or more full-time regular positions can be created, is required to try to schedule one or more part-time flexible(s) in conformity with the standards in Article 7, Section 3.C. It need not be absolute

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[2] Arbitrator Sylvester Garrett, AB-N- 3744, et al, January 26, 1976, pp. 14-16. [Tab #01]

[3] Arbitrator Howard Gamser, NC-E-9358, October 12, 1978, p. 5. [Tab #02]

proof, but rather sufficient proof to give rise to an inference that a full-time regular schedule is possible. The experimental scheduling is designed to give the absolute answer.

Step 4 Decisions & Memorandums of Understanding

Based upon the record, it appears that the Employer in this case is arguing that the standards of Article 7, Section 3.C., have not been met and, therefore, that no violation exists. This is an ofttimes failed argument that in order to qualify for a new position a single part-time flexible must already have met the specific qualifications contained in Article 7.3.C., as opposed to the general obligation to "maximize" found in Section 3.B.

It should be enough to say that two respected national-level arbitrators have rejected that argument when faced with sufficient evidence to try an experimental schedule. Perhaps just as importantly, the Employer, itself, has acknowledged the acceptability of "combining" the hours of multiple part-time flexibles in order to maximize full-time regular duty assignments.

Apparently, in 1977 the National Association of Letter Carriers [NALC] was hearing the same arguments which were raised by the Employer in this case at Step 2, and again at Step 3. As a result, that Union raised a Step 4 dispute:

> "...Postal Service Management has taken the position that it has an obligation pursuant to Article VII, Section 3, of the 1975 National Agreement, to maximize the number of full-time employees in all Postal installations by converting part-time flexible employees to full-time status *only* when there is evidence that the *same* part-time flexible employee has been working the *same* eight hours within ten hours on the *same* five days each week on the *same* assignment over a *six month* period. NALC disagrees with that interpretation of Article VII, Section 3, and contends instead that the employer has an obligation to maximize the number of full-time employees at a Postal installation by converting part-time flexible employees to full-time status *whenever there exists available work to be performed eight hours within ten hours on five of six days in a service week over a six month period.*

notwithstanding how many different part-time flexible employees may have been performing such work over a six-month period."[4] [emphasis added]

On February 10, 1978, the Postal Service responded:

> "It appears that perhaps there is some misunderstanding as to the Postal Service's position relative to the application of Article VII, Section 3. The need to establish a full-time assignment *is not determined exclusively by the third sentence of Article VII, Section 3. In other words, situations which might exist that would demonstrate a need for a full-time assignment are not limited to the circumstances set forth in the third sentence of Article VII, Section 3.* The sentence states 'A part-time flexible employee working eight hours within ten on the same five days of each week and the same assignment over a six month period will demonstrate the need for converting the assignment to a full-time position.' This provision merely sets forth a particular factual situation, the occurrence of which is considered to indicate that a full-time position is feasible. This sentence clearly refers to the same part-time flexible working the same assignment for 8 hours within 10 hours in the same 5 days per week over a 6 month period.
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> "This is not to say that there can not be other circumstances which might support the conclusion that a full-time position is warranted. However, whether such circumstances exist, will depend on the particular facts relevant to an individual office. *This would include disputes as to whether various duties can be combined into a full-time assignment* in a particular individual situation. Thus it involves a fact question and does not involve the interpretation of the National Agreement."[5] [emphasis added]

This dispute arose under the 1975 Collective Bargaining Agreement. A review of Article VII, Section 3, of the 1975 Agreement reveals that the "third sentence" acknowledged by the Employer as not "exclusively" demonstrating the need for maximization has now become Article 7, Section 3.C, the very provision once again being asserted by management to be the "exclusive" vehicle for maximization.

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[4]NALC Appeal, NC-NAT-8871, August 4, 1977. [Tab #03]

[5]Step 4 Decision, NC-NAT-8871, February 10, 1978. [Tab #03]

Again, in 1978, the parties recognized the propriety of combining the hours of multiple part-time flexibles in order to maximize the number of full-time regular assignments:

> "The parties hereby commit themselves to the maximization of full-time employees in all installations. Therefore, they agree to establish a National Joint Committee on Maximization. That Committee shall, during the first year of the 1978 National Agreement, develop criteria applicable by craft for the establishment of additional full-time duty assignments with either regular or flexible schedules. To that end, the Committee shall develop both an approach to *combining part-time flexible work hours into full-time duty assignments* and a method for determining scheduling needs compatible with the creation of the maximum possible number of such assignments."[6] [emphasis added]

Regional Arbitration Awards

Along with the precedent of the two National Awards cited above and the parties' own agreements, numerous regional arbitrators have also found that Article 7, Section 3.B., creates an additional avenue for conversion supplementing Article 7.3.C. **Arbitrator Larson**, for instance, in a 1987 award often cited by other arbitrators on this issue, said:

> "Nor is § 3C applicable. The Union does not contest that no PTF clerk can be pointed out in Jones' compilation as having worked 8 hours within 10 on the same 5 days each week on the same assignment over a 6 month period.
>
> "Section 3B is applicable and expresses a general obligation on the part of the Employer. The PS 'shall maximize the number of full-time employees and minimize the number of part-time employee.' Section C states one way in which the need for converting an assignment to a FT position can be demonstrated. But § B allows for other proofs to demonstrate that part-time hours of a number of PTFs can be converted into one or more FT positions.
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> "The compilation of Jones and his helpers is impressive. Taking the average of 30-40 PT hours per day 7 days a week and considering that half the shifts are 8 hours, one might infer that several FT clerk positions should be created. However, the

[6]Memorandum of Understanding, September 15, 1978, p. 141, 1978 National Agreement. [Tab #04]

inference must be drawn with caution, since the hours vary from day to day. Differing conditions and needs cause variation in the need for clerk hours beyond those worked by the FTs.

"The Union points out that even if three new FT clerks positions are created in Dunedin, Management will still have ample flexibility. Article 7, § 2B, and Article 8, §§ 1 (last sentence), 2C (last sentence), and 3, and Article 37, § 3E9, of the contract are cited. Shorter days and weeks can be scheduled for remaining PTFs. FTRs can be assigned fixed or rotating shifts, and the work days need not be consecutive. If work in a particular assignment runs out, an employee may be assigned to other available work. Reference is also made to a National Memorandum of Understanding of March 3, 1975, concerning relief and pool assignments.

"I find from the evidence that two FT clerk positions in addition to those existing when the grievance was initiated are justified and required under Article 7, § 3B. . . .

"The decision of Impartial Arbitrator Sylvester Garrett at the National Level in Case # AB-N-3744 et al. (1976) has been read with care. I believe that the present Award and Opinion is consistent with the analysis and application of Article 7, § 3, in that opinion."[7] [underscoring added]

Citing **Arbitrator Larson** with favor, for instance, was **Arbitrator Eaton**, who found that a 40% full-time regular ratio created a "presumption" that Section 3.B. has been violated and rejected the contention that Article 7.3.C. provided the only avenue for conversion:

"While this is no 'magic number', such a ration raises a presumption that Section 3B has been violated, which requires that the Employer justify such a heavy use of part-time employees. And, as Arbitrator Larson correctly observes, Section 3C provides only one possible alternative to compliance with Section 3B."[8] [underscoring added]

[7] Arbitrator Lennart V. Larson, S1C-3W-C 38156, August 5, 1987, pp. 5-7. [Tab #05]

[8] Arbitrator William Eaton, W4C-5G-C 31740, April 5, 1988, p. 17. [Tab #06]

Arbitrator Williams reviewed the situation of a small Texas Post Office employing four (4) part-time flexibles and no full-time regular clerks. The four (4) PTF's averaged between 100 and 125 hours per week. The Arbitrator reasoned:

> "Basically, this case is concerned with the intent of Article 7, Section 3, as referenced above. More to the point, Management contends that the Union must prove that the conditions of 3C exist before it is required to convert a PTF to full-time regular. The Union, on the other hand, contends that it is 7B, which is controlling and requires another full-time regular. Thus, some analysis is in order.
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> . . .
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> "Section 3 B is clear and unambiguous also. The intent is clear, in that the Employer 'shall maximize the number of full-time employees and minimize the number of part-time employees who have no fixed schedules.' However, the dispute arises when Management contends that the only way to prove a need to do this is when the conditions of 3C exist -- in other words only if a PTF is working 8 hours within 10, on the same 5 days each week, and the same assignment over a six month period. This Arbitrator does not agree with this interpretation and does not know of a postal arbitrator who does.
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> . . .
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> "1. When one arbitrator indicates that a percentage of 40 or more being PTFs raises a presumption of a contractual violation, by Management, there is no doubt that 100 per cent is more than suspicious.
>
> 2. It is rather clear that Management, for years, has followed a conscious effort to maximize PTFs..."[9]

In a 1990 award out of Searcy, Arkansas, resulting in the conversion of one (1) part-time flexible to full-time regular, **Arbitrator Sherman** reviewed the varying standards of Article 7.3(B) and 7.3(C), with this analysis:

[9] Arbitrator J. Earl Williams, S4C-3A-C 31218, September 14, 1989, pp. 6-9. [Tab #07]

"...First, Paragraph B [of Article 7.3] may be seen as a broad mandate applicable to all postal facilities, regardless of the size of the work force. In essence, it is a commitment on management's part to give employees the benefit of full time status if it is practical to do so. There can be no serious difference of opinion with respect to the intent behind this paragraph. But Paragraph C is another matter.

"...The problem of interpretation arises in those situations wherein the evidence does not show that any one employee meets the test (eight hours in ten, five days, same assignment for six months) set forth in Paragraph C.

"Management contends that, if the evidence does not meet this test, the grievance must be denied, in other words, that management's use of PTF employees was contractually proper. The Arbitrator cannot agree. He believes that the contracting parties took a more realistic view of the part time - full time problem. That is, they were aware that, since management has the unilateral right to schedule the work, there is nothing to prevent management's scheduling part time employees, not for greatest efficiency, but with a view to not meeting the test set forth in Paragraph C. Accordingly, the Arbitrator concludes that even if the union is unable to prove that any one employee meets the Paragraph C standard, it may still prove that Paragraph B has been violated. It may prove this by presenting convincing evidence to show that management knew or should have known that the work load was, and would be in the future, sufficient to justify utilizing a full time, rather than a part time employee."[10]

In a Canton, Illinois Post Office with only two (2) full-time regular clerks and seven (7) part-time flexibles, **Arbitrator Klein** found a violation of Article 7.3.B., saying:

"Although it is true that Management has the right to determine the methods, means and personnel by which it will maintain the efficiency of postal operations, the language of Article 7.3 sets forth certain restrictions and obligations regarding staffing.

"Article 7.3.B. is a 'broad policy' covering maximization of full time employees, and it creates an 'independent obligation' upon Management as it pertains to employee complements in all postal installations. Section 3.B can be interpreted as allowing

[10] Arbitrator James J. Sherman, S7C-3B-C 20567, September 15, 1990, pp. 14-15. [Tab #08]

for various duties to be combined into one full-time assignment and allowing for part time hours of more than one PTF to be combined into one full time assignment.

. . .

"By negotiating the provisions of Article 7.3.B., the parties have agreed to limit Management's flexibility in determining employee complements. This section constitutes a commitment to maximize full-time employees, and it makes no reference to any exception for purposes of 'flexibility.'

"The Arbitrator cannot uphold Management's position that the requirement for maximization becomes effective only when the conditions of Article 7.3.C have been met."[11]

In granting the Union's request for the conversion of the two (2) senior part-time flexibles to full-time regular status, because the Employer made no effort to defend its presumptive failure to maximize under Article 7.3.B, other than to raise Article 7.3.C arguments, **Arbitrator Martin** said:

"Some day it will end, but it has not yet. In this case, as in a gross of other cases, the Union claimed their right to additional Full Time positions based on Article 7.3B, while Management defended its refusal to increase the number of Full Time Clerks based upon the Union's failure to prove the statistical numbers set out in Article 7.3C. While earlier Awards vary, it has become more and more uniformly found Article 7.3B is an obligation on Management independent of the specifics set out in Article 7.3C...There is no need for the Union to prove the conditions set out in Article 7.3.C exist to establish that management is in violation of Article 7.3.

"Not only are the gross hours worked by Part Time Flexibles during the study period of March through August 1987 impressively large, but the specific ration of Full Time to Part Time substantially bolsters the Union's position."[12]

Arbitrator Jacobs visited a small office in New Hampshire with three (3) full-time regulars and four part-time flexible clerks. The PTFs averaged thirty-six (36) hours per week, normally working six (6) days each week. In ordering the conversion of one (1) part-time flexible to full-time regular

[11] Arbitrator Linda DiLeone Klein, C7C-4L-C 22361, July 9, 1991, pp. 7-8. [Tab #09]

[12] Arbitrator James P. Martin, C7C-4M-C 518, November 15, 1991, pp. 4-5. [Tab #10]

status, and in addition, that local management "should review the situation once more and determine in good faith" whether the creation of still another FTR position was possible, the Arbitrator said.

> "Section 3.B. is applicable and expresses a general obligation on the part of the Postal Service in all installations -- the Postal Service 'shall maximize the number of Full-Time Employees and minimize the number of Part-Time Employees.' This Section constitutes an independent obligation and allows for other proofs as many Postal Service arbitrators have ruled to demonstrate that the part-time hours of a number of PTFs can be converted into one or more full-time positions. This conclusion obviates the necessity of fully meeting the criteria under 3.C."[13]

Arbitrator Baldovin, in another 1992 case, determined that the Employer violated Article 7.3.B whenever it failed to combine the hours of two (2) or more PTF's in order to maximize FTR positions. The Arbitrator reasoned:

> "Management, in essence, argues that Section 3.C., is the triggering mechanism for Section 3.B., and that only when Section 3.C. criteria are met does the contractual mandate of Section 3.B., to maximize full-time employees, become operative. If this were true, then Section 3.B would be meaningless, would serve no purpose and should not be included in the National Agreement. But it was included, and it must be presumed the framers of the Agreement intended Section 3.B. to have meaning and purpose...However, Section 3.C. cannot be viewed as the only situation requiring conversion, it must be viewed as one situation or example requiring conversion that the parties were able to conceive and reduce to writing in the Agreement...
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> "...I am constrained to conclude that Section 3.B. requires conversion anytime it can be demonstrated that a full-time positions can be accommodated. That is when sufficient hours of work exist to permit one employee to work 40 hours a week in the same assignment in lieu of two or more employees working part-time in order to cover the 40 hours."[14]

Similarly rejecting the contention that 7.3.C. was the sole criteria for conversion, was **Arbitrator Benn**, who said:

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[13] Arbitrator Rose F. Jacobs, N7C-1K-C 32782, April 24, 1992, pp. 12-13. [Tab #11]

[14] Arbitrator Louis V. Baldovin, S7C-3W-C 22661, June 29, 1992, pp. 6-8. [Tab #12]

Arbitrator Klein visited the issue of the general obligation to maximize under Article 7.3.B versus the Postal Service's claim that Article 7.3.C provided the "exclusive" vehicle for conversion to Full-Time Regular, saying:

> "After reviewing the numerous awards submitted by the parties in support of their respective positions, this Arbitrator concurs with those Arbitrators who have concluded that Article 7.3.B. is a broad policy statement setting forth a general obligation on the part of Management to maximize the number of full-time positions and minimize the number of part-time positions; Article 7.3.B. constitutes a principle for management to follow in order to maximize the number of full-time positions, and this provision must be given meaning independent of Article 7.3.C. Article 7.3.C. establishes one way to demonstrate that the need for conversion exists; however it 'is not the exclusive criteria' for determining the appropriateness of such action."[17]

In another 1993 award, **Arbitrator Dworkin** similarly addressed management's contention that conversion was warranted only when the terms of Article 7.3.C were met, offering this enlightening analysis:

> "A reading of the language which the Arbitrator has determined is applicable states in clear, and unambiguous fashion that the Postal Service 'shall maximize the number of full-time employees, and minimize the number of part-time employees who have no fixed work schedules in all postal installations.' The foregoing language is clear, and explicit, and requires application in accordance with the manifested intent of the parties. *The language of Paragraph (B) is separate, and distinct from other paragraphs appearing in Section 3*.
>
> "The Arbitrator notes that, Section 3, entitled 'Employee Complements' contains four separately designated paragraphs. As a matter of recognized contractual construction, all paragraphs that relate to the same subject matter should be read, and construed in pari materia; a concerted effort made to harmonize the contract language so as to effectuate the intent and purpose of the contracting parties. When interpreting the language of a collective bargaining agreement, an Arbitrator must first look to the language of the agreement itself to determine the parties' intent. If the language is clear and unambiguous, the interpretive effort is at an end, and the

[17] Arbitrator Linda DiLeone Klein, E7C-2N-C 44246, January 5, 1993, p. 6. [Tab #15]

"The better reasoned approach appears to be those awards ...following the conclusion that '...Section C is not the sole and exclusive criteria for conversion but that the need to convert positions to meet the goal of maximization set out in Section (B) may come from other proof that PTF employees are in fact being utilized on a full-time basis.' The requirement that Article 7.3.C must be satisfied as relied upon by the Service in this case leaves open too many questions. Why would the parties agree to the language in Article 7.3.B if they intended that Article 7.3.C would be the sole basis for demonstrating a maximization violation? The interpretation advanced by the Service makes Article 7.3.B essentially meaningless. In terms of basic rules of contract construction, an interpretation that renders a clause meaningless should be avoided. Moreover, why would the parties agree to such a major concept of maximization which, if Article 7.3.C were the sole basis for demonstrating a violation of that guarantee, could be easily defeated through an alteration of schedules so that the criteria of Article 7.3.C are not met? These are questions that have raised by several of the awards finding that Article 7.3.C is not the sole basis for demonstrating a maximization violation. Perhaps there is a rational explanation. But the point here is that the Union has demonstrated a *prima facie* violation and has shifted the burden to the Service to defeat the showing."[15]

In yet another 1992 case, **Arbitrator Benn** directed the conversion of a Motor Vehicle part-time flexible, who also performed work in the Maintenance and Clerk crafts to accomplish 40 hours each week, saying:

"Compton did not meet the specific requirements of Article 7.3.C. Although Compton worked a 40 hours schedule during the relevant time...he did not work that schedule 'on the same five (5) days each week.' Throughout the period at issue, Compton had differing days off.

"However, existing precedent shows that *a meeting of the specific requirements of Article 7.3.C is not the only way in which a demonstration can be made that a PTF position must be converted to a full-time regular position.*"[16] [emphasis added]

[15]Arbitrator Edwin H. Benn, C0C-4M-C 256, July 17, 1992, p. 9. [Tab #13]

[16]Arbitrator Edwin H. Benn, C0V-4U-C 2511, September 1992, p. 2. [Tab #14]

contract language must be applied as written. An arbitrator owes a duty to accord effect to all of the words used, not to delete words or insert words not used. An arbitrator may not simply re-write contract language on the basis that it is 'improving' it.

"In the view of this Arbitrator, the language of Article 7, Section 3(B) is clear and unambiguous, and is subject to the principles as set forth by the Arbitrator. The language of Paragraph (B) is separate and apart from other paragraphs of Section 3, and should be applied as written. Such application is warranted on the basis of a preponderance of the probative evidence..."[18] [emphasis added]

Finding that the Postal Service violated Article 7, Section 3 when it failed to convert two (2) part-time flexibles to full-time regular status in a North Carolina Post Office with seven (7) FTR and five (5) PTF clerks, **Arbitrator Loeb** commented on the longstanding dispute between the parties over the applicability of Article 7.3.B, saying:

"The advocates were different and some of the facts were unique, but beyond that there was little to differentiate this grievance from all of the others involving Article 7, Section 3.B. which have preceded it over the past twenty years. The issue has been litigated so many times, in fact, that its presentation has become ritualized, each party raising the same arguments and making the same counter arguments in a stylized rite which begins with the Union requesting time cards covering a specific six month period and culminating with arbitration. Along the way, the Union turns the raw data from the time cards into a graph or chart and submits it to Management which reviews it and then, pointing to the language of Article 7. Section 3.C., denies the grievance. Following the denial, the Union maintains that the Service has an obligation to convert the employees under Article 7, Section 3.B. which leads Management to respond that that provision is simply an aspirational declaration which has no binding effect, after which it points to Article 3, the Management Rights clause of the Contract, and argues that the Union's position infringes on its sole and exclusive right to manage postal operations and direct the work forces as it sees fit. So it was that this matter reached arbitration.

. . .

"...Regardless of how they characterize the standard to be applied, however, [the greater number of arbitrators] all agree that Article 7, Section 3.B. creates a

[18] Arbitrator Harry J. Dworkin, C7C-4L-C 19971, June 22, 1993, pp. 13-14. [Tab #16]

> discernible standard separate and apart from the one mandated by Section 3.C. The undersigned finds their position persuasive.
>
> "To take any other position would effectively write Article 7, Section 3.B. out of the Contract, violating the principle that all of the parties' words are to be given effect."[19]

In directing the conversion of two (2) part-time flexibles to full-time regular status based upon the evidence of hours worked over a six month period, **Arbitrator Weatherspoon** similarly addressed the Postal Service's contention that Article 7.3.C provided the exclusive conversion authority in Article 7, saying:

> "...Even without reviewing the prior arbitration decisions, I could not imagine that the parties would mutually agree to limit the Postal Service's ability to employ part-time employees in Article 7.3(B), and then permit the Postal Service to hire an unlimited number of part-time employees in Article 7.3(C), so long as no one employee worked 8 hours on the same five (5) days each week and the same assignment over a six month period.
>
> "If I accept the Postal Service's position, all regular employees could possibly be displaced over time by hiring part-time flexible employees, and scheduling them in a manner as to avoid a violation of Article 7.3(C), without violating Article 7.3(B). Clearly, the parties did not intend to apply Sections 7.3C and 7.3(B) in this manner. A violation can occur under 7.3(B), independent of 7.3(C). Article 7.3C provides a specific example of how Article 7.3(B) may be violated."[20]

The decision of **Arbitrator Klein**, directing the conversion of one clerk to full-time regular in a small Delaware Post Office previously staffed with no FTRs and three (3) part-time flexibles whose combined hours totaled just over ninety (90) hours per week, is particularly on point. In a well reasoned award, the Arbitrator said:

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[19] Arbitrator Lawrence R. Loeb, D90C-4D-C 94006416, December 24, 1996, pp. 9-14. [Tab #17]

[20] Arbitrator Floyd D. Weatherspoon, C90C-4C-C 94058482, May 12, 1997, pp. 4-5. [Tab #18]

"Article 7.3.B. applies to all postal installations regardless of size and man hours. This language creates an obligation to maximize the number of full-time employees which is independent of the criteria of Article 7.3.C. Article 7.3.B expresses no exceptions or qualifications to that obligation.

"This Arbitrator is of the further opinion that Article 7.3.B is a 'broad policy' pertaining to maximization and it creates an obligation to convert PTFs to full-time status when conversion opportunities can be demonstrated. This demonstration is not limited to a single employee working eight hours within ten on the same five days each week and in the same assignment over a six month period. Article 7.3.B. may be interpreted to include a combination of the hours of two or more PTFs to show that a conversion is warranted.

"The Arbitrator cannot sustain Management's position that Article 7.3.C. is controlling here. Article 7.3.B. may be applied independently if there are sufficient hours and sufficient duties to justify conversion."[21]

In yet another even more recent award, **Arbitrator Angelo**, after a thorough analysis of the inter-relationship between each section of Article 7.3, sustained the grievance, finding a violation of Article 7.3.B. **Arbitrator Angelo** said:

"There is, however, nothing in Section 3 that demonstrates the parties intended to create a specific formula to control the operation of Section 7.3.B. And this is true both with respect to the Section 3 as presently written and when it was originally drafted. For this reason alone the interpretations appear to go beyond the reasonable meaning of the Agreement.

"Further, a cardinal rule of contract interpretation is to avoid treating negotiated provisions as mere surplusage. If Section 7.3.C totally controls the methodology for maximizing FTRs, Section 7.3.B is unnecessary...

. . .

"Based on the foregoing I am persuaded that each subpart of Section 3 is a stand-alone clause that expresses independent rights and obligations. In Section 7.3.A the parties expected that the Employer would configure available hours and assignments so as to achieve the specified maximization goals. In Section 7.3.B the only change in the Employer's obligation was to delete the specific percentage

[21] Arbitrator Linda DiLeone Klein, C90C-4C-C 94012023, October 24, 1997, p. 7. [Tab #19]

or ration between FTRs and PTFs. Since the parties did not see fit to limit the manner in which the maximization obligation was satisfied there is no basis for an arbitrator to do so in the course of interpreting the Agreement.

"The historical 'problem' of defining the role of Section 7.3.C is not really a problem at all. The parties expressly stated the clause applied to an individual employee, it does not reference either of the preceding clauses, and it does not mention directly or by inference the Employer's obligation to 'maximize' FTR use. Given the experience, knowledge and expertise of the negotiating parties, if they had not intended to limit section 7.3.C to individual claims they would have said so.

"Therefore the Union's interpretation of Section 7.3.B is correct and controls the outcome of this grievance. The clause required the Employer to construct assignments and schedules so as to insure the maximal use of FTRs..."[22]

Nor can the Employer's obvious interest in maintaining a "flexible" workforce, by itself, over-ride the clear maximization requirements of Article 7.3.B. In a 1988 award, for instance, **Arbitrator Stephens**, analyzing the postmaster's apparent goal of providing a more flexible workforce in a Florida Post Office with 8 full-time regular clerks and 11 part-time flexibles or casuals, said:

"Such a flexible work force does provide much benefits to a management faced with shifting needs for employees to work a differing hours.

"However, as laudable as is this goal on the part of the Postmaster, one must conclude that the Postmaster does not have a free hand to implement his own idea of a flexible work force. The parties to this collective bargaining agreement have upon language (Article 7.3.B, quoted above) which restricts such attempts to hire many part-time flexible employees. Regardless of what this arbitrator believes about the efficiency inherent in a flexible work force, his function in this case is to apply the contract provisions to this instant case.

"The language agreed upon by the parties at the national level states that the employer 'shall maximize the number of full-time employees and minimize the

[22] Arbitrator Thomas Angelo, F90C-4F-C 96013103, June 18, 1998, pp. 14-20. [Tab #20]

number of part-time employees...' The attempt by the Postmaster to do the reverse of what the national parties have agreed upon is a violation of the contract."[23] [underscoring added]

Also finding that "flexibility" is not, in and of itself, sufficient reason to fail to maximize was **Arbitrator Marlatt**. Commenting on **Arbitrator Larson's** afore-cited award, the Arbitrator said:

"Arbitrator Larson went on to answer the argument by the Postal Service that converting some of the PTF clerks to regular schedules would deprive the Postmaster of flexibility, pointing out that shorter days and weeks could be scheduled for the remaining part-time clerks, and full-time regulars could be assigned to rotating shifts and/or non-consecutive nonscheduled days. In any event, the concern for 'flexibility' is misplaced. The Unions and the Postal Service deliberately negotiated numerous limitations upon flexibility into the National Agreements. Management rights under Article 3 are expressly made 'subject to the provisions of this Agreement' and not the other way around. It would obviously be more flexible to staff post offices entirely with part-time employees and casuals, but the Postal Service gave away this right at the Bargaining table."[24]

Addressing management's reversion of one (1) of the two (2) full-time regular positions in a small Colorado Post Office, where the work was then absorbed by the two (2) part-time flexibles and two (2) casuals **Arbitrator McAllister** discussed the competing interests of increased flexibility and the maximization requirement of Article 7.3.B, saying:

"The above language [Article 7.3.B] requires management to maximize full time employees and minimize employees with no fixed work schedules. It is evident that a flexible work force has distinct advantages. Nonetheless, Postmaster Letey does not have an unfettered right to reorganize his work force to maximize flexibility."[25]

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[23] Arbitrator Elvis C. Stephens, S4C-3W-C 29776, October 31, 1988, p. 4. [Tab #21]

[24] Arbitrator Ernest E. Marlatt, S7C-3E-C 18642, May 23, 1990, p. 7. [Tab #22]

[25] Arbitrator Robert W. McAllister, C7C-4U-C 26105, January 10, 1992, p. 6. [Tab #23]

In a 1997 award, **Arbitrator Fletcher**, concluding that the number of hours of bargaining unit work performed by the Postmaster in violation of Article 1.6 combined with the hours of two (2) part-time flexible employees were sufficient to warrant the creation of a full-time regular position, also addressed the balance of efficiency versus the contractual obligation to "maximize," saying"

> "With regard to operational efficiency, it is basic that Management is obligated to operate any enterprise as efficiently as possible. However, this obligation must be harmonized with the specific requirements of the National Agreement. *A collective bargaining agreement places certain prophylactics on management rights. Management is not privileged to ignore those requirements in the name of 'operational efficiency*.'
>
> "Finally, with regard to maximization. The National Agreement is clear, Management agreed that it 'shall maximize the number of full-time employees and minimize the number of part-time employees who have no fixed work schedules in all postal installations.' Arbitrator Schedler in *S1C-3Q-C 29121*, (1989) characterized this as 'a broad statement of policy' which 'carries the implication that management will not adopt procedures or take actions to frustrate maximizing the number of full-time employees.' This obligation is not negated by lack of balance between operational efficiency or job description, if any balance would be possible at all."[26]

To the extent that ,management's obvious desire for flexibility or efficiency is relevant or can be considered, it is clear that once the Union demonstrates the feasibility of a full-time position based upon the workhours of the part-time flexible employees, the burden then properly shifts to the Employer to demonstrate that conversion would either significantly increase costs or result in serious inefficiency. For instance, **Arbitrator Stoltenberg** observed:

> "It must be observed as significant that the only testimony and evidence adduced on this record was that presented by the Union. While several Arbitrators have held that the Union bears the burden of proving that the conversion of PTFs would not adversely impact on efficiency or the cost of the operation, I cannot fully agree. At first blush, it is not clear that the Union would have access to the information in order

[26] Arbitrator John C. Fletcher, I90C-4I-C 94047200/9237, February 11, 1997, pp. 26-27. [Tab #24]

to make that determination. In the instant case, the Union's charts, which remained unchallenged throughout the hearing, reveals a considerable use of PTFs on Tour 1 and Tour 3, with the heaviest use of PTFs on Tour 3. The sheer number of hours available to PTFs would tend to establish that the Service was not minimizing part-time employees. *Management presented no evidence* that the conversion would impact efficiency or flexibility, or that its ability to control the facility would be limited."[27] [emphasis added]

In a 1992 award, **Arbitrator Fletcher** discussed the balancing of the Employer's efficiency and flexibility concerns with its Article 7.3.B. maximization obligations as well as the shifting burdens of persuasion in such cases:

"There is no question that Management has a right to manage and that operational efficiency is enhanced by flexibility. But these considerations must be harmonized with specific agreement commitments, such as Article 7, Section 3.B. which express an obligation to maximize the number of full-time employees in all postal installations . . .

"In such circumstances when the Union has made a *prima facie* showing in support of its contentions the burden (of persuasion if not the burden of proof) shifts to the Service to demonstrate that the evidence is flawed and/or the conclusions suggested are imperfect. Or as an alternative it must come forward with evidence supporting its arguments on efficiency, added costs and/or no practical way of doing the work without PTF's, etc. Neither effort has been advanced here, indeed, neither has been attempted here. Accordingly, on this record, the unchallenged evidence of APWU must be accepted. On its face it demonstrates a showing that 4 FTR assignments could have been crafted from the PTF hours being worked in the Jacksonville, Illinois facility."[28] [underscoring added]

Similarly, in determining that the Employer violated Article 7.3.B in a small office with 1 FTR and 3 PTF's, **Arbitrator Miles** reasoned:

"A review of each of the arbitration decisions reveals that one point is clear; i.e., that a determination in this regard depends upon the particular facts of each case...

[27] Arbitrator Carl F. Stoltenberg, E7C-2L-C 32545, March 22, 1993, pp. 6-7. [Tab #25]

[28] Arbitrator John C. Fletcher, C7C-4L-C 30041, February 29, 1992, p. 5. [Tab #26]

> "With respect to the relevant circumstances in this postal installation, the current staffing is one full-time regular clerk and three PTF Clerks...
>
> "...Therefore, based upon the particular circumstances of this case, it is evident that there is work available to establish another full-time position at the Library Post Office. It was not shown that another full-time position at the Library Post Office would demonstrably increase costs, such as idle time during scheduled tours of duty or overtime. Furthermore, there was no indication that another full-time position would impair the efficiency of the operation. Indeed, with the addition of another full-time position at the Library Post Office, the staffing complement would be two full-time positions and two PTF Clerks..."[29]

Also discussing the shifting burdens of persuasion is **Arbitrator Blackwell**, who in 1997 case sustaining the Union's position, said:

> "The evidentiary standard that I have applied in this case required the Union to establish by the preponderating evidence that the aggregate hours of the part-time Clerks, at the Wynnwood Post Office, constituted a sufficient base of hours to establish three (3) full-time assignments to work those hours. Further, the Union evidence established a prima facie case in support of the Union's contention that the aggregate hours of the PTF employees are sufficient to establish three full-time assignments, and the Management has submitted no evidence to rebut or negate said prima facie case. If there are conditions that would impair the operation of the Wynnewood Post Office, by the establishment of three full-time assignments, as requested in the grievance, it is the burden of Management to go forward with the evidence to establish the impairment or increased costs from the full-time assignments. Such evidence was not forthcoming from the Management and the Union's prima facie case therefore stands unrebutted."[30]

It is also very clear that the Employer may not deliberately manipulate PTF schedules in order to avoid maximization. **Arbitrator Schedler**, for instance, reasoned that where there is sufficient work to justify an additional full-time regular position the Employer is affirmatively obligated to

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[29] Arbitrator Christopher E. Miles, E7C-2F-C 28693, February 18, 1993, pp. 12-15. [Tab #27]

[30] Arbitrator Fred Blackwell, C90C-4C-C 94013880, July 26, 1997, p. 14. [Tab #28]

take action to create one and may not to adopt procedures or take actions to frustrate such a conversion:

> "Section 3 B is a broad statement of policy. In that statement of policy, the Employer has agreed that management 'shall maximize the number of full-time employees and minimize the number of part-time employees who have no fixed work schedules in all postal installations.' That statement carries the implication that management will not adopt procedures or take actions to frustrate maximizing the number of full-time employees. Section 3C is merely a guideline for an employee to justify attaining FTR status; however the crux of the matter is whether or not there is sufficient work to justify, within Postal Service standards, the appointment of an additional FTR Clerk."[31] [underscoring added]

In an October 1990 award, **Arbitrator Williams** provided an excellent analysis of case law to that date before summarizing his own conclusions:

> "1. Some earlier awards relied to some extent on the requirements of Paragraph C. However, they were concerned with juggling and manipulation of hours and often allowed variations in hours rather than be strict constructionists.
>
> 2. Garrett made clear in his national interpretive award that 7.3.B could be the basis for conversion, if conditions supported it.
>
> 3. While the Garrett remedial model remanded to the parties for 6-month experiments and this Arbitrator and one other followed, in all three cases work availability was proved, but Management gave reasons for some hours and/or there were other uncertainties.
>
> 4. When explanations and/or uncertainties are not present, arbitrators tend to accept evidence of full-time work or substantial numbers of hours for several PTFs, over a period of time, as proof that conditions support conversion under 3.B.
>
> 5. Recently, Schedler held that, if such proof is not present but hours are manipulated, it would be a violation of 3.B., failure to maximize."[32]

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[31] Arbitrator Edmund W. Schedler Jr., S1C-3Q-C 29121, April 3, 1989, p. 7. [Tab #29]

[32] Arbitrator J. Earl Williams, E7C-3G-C 23331, October 28, 1990, p. 12. [Tab #30]

CONCLUSION

For all of these reasons, it is clear that once the Union has established, as has clearly been shown in this case, that the part-time flexibles are working sufficient hours each day to warrant the creation of one or more additional full-time position(s), then the burden shifts to the Employer to demonstrate through clear and convincing evidence (and not mere assertions) that creation of a full-time position would create an undue hardship or unreasonable economic burden. Where they cannot do so, as in this instance, the Employer should be found to have violated Article 7.3.B in that they have failed to "maximize the number of full-time positions and minimize the number of part-time positions with flexible schedules" as required by the Agreement.

Accordingly, the Union respectfully requests that the Arbitrator find that the Postal Service violated the Agreement, sustain this grievance, order the creation of appropriate full-time position(s), conversion of the senior part-time flexible(s) to full-time regular, and, as other arbitrators have done, make the affected employee whole for all lost wages and benefits, including, but not limited to, work hour guarantees, holidays, overtime, out-of-schedule premium, etc.

Willie Mellen
Advocate