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ARBITRATION PROCEEDINGS

REGULAR

In the Matter of Arbitration

-between-

UNITED STATES POSTAL SERVICE,
Hilo, Hawaii Post Office,
Hilo, Hawaii,

The Employer,

-and-

AMERICAN POSTAL WORKERS UNION
(APWU), Big Island Area Local,

The Union.

Case No. WIC-5E-C-1309

Re: Scheduling of Annual Leave
and Vacation Periods

LOCAL ARBITRATION

OPINION AND AWARD

OF

ARBITRATOR

Joseph F. Gentile
Arbitrator

December 20, 1983

Los Angeles, California

[1578-2386-83]

BACKGROUND

Pursuant to Article 15 of the National Agreement between the UNITED STATES POSTAL SERVICE ("Service" or "Employer") and the AMERICAN POSTAL WORKERS UNION ("Union" or "APWU"), the undersigned was selected from the Regular Panel of Arbitrators in the Western Region to serve as the impartial Arbitrator in Case No. WIC-5E-C-1309.

An evidentiary hearing was held on Wednesday, September 28, 1983, in the Main Conference Room of the Hilo, Hawaii Post Office, corner of Mokuea & Akahana Streets.

During the course of the hearing all parties were afforded a full and complete opportunity to be heard, cross-examine witnesses, develop arguments and present relevant evidence. No official transcript was made of the hearing. All witnesses appearing before the Arbitrator were duly sworn. Closing arguments were presented orally after receipt of the evidence. The matter stood fully submitted as of September 28, 1983.

The instant grievance was a "Local" grievance and appealed to arbitration by the Local.

APPEARANCES BY COUNSEL

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For the Union:

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ISSUES

At the commencement of the hearing, the Service raised a threshold issue as to whether the matter in dispute was not moot. The Union disagreed. As this was a matter which required initial consideration, the issue was stated thusly:

"Is this matter moot?"

Assuming the matter is not found to be moot, the issue to be addressed and determined on the merits was framed and agreed to as follows:

> "Did the posted policy of October 30, 1981, violate the National Agreement or the Local Memorandum of Understanding?"
>
> "If so, what is the appropriate remedy?"

APPLICABLE PROVISIONS OF AGREEMENT

During the presentation and argumentation of this case, various provisions of the Agreement and ancillary documents were referenced and cited. These will be briefly noted and quoted where appropriate:

1) Article 5,which prohibited unilateral action, was one of the Union's contentions -- that the content of the questioned policy of October 30, 1981, was in fact a unilateral action prohibited by Article 5;

2) Article 10, Section 3(C) provided that "[t]he parties agree that the duration of the choice vacation period(s) in all postal installations shall be determined pursuant to local implementation procedures";

3) Article 10, Section 2 tied leave regulations to Subchapter 510 of the Employee and Labor Relations Manual ("ELRM");

4) Article 10, Section 3(D) outlined how annual leave would be granted. Sub-paragraph 4 of Section 3(D) stated that

"[t]he remainder of the employee's annual leave may be granted at other times during the year, as requested by the employee" [emphasis supplied]; and

5) Article 30 enumerated those areas for local implementation. Section B, paragraphs 4, 5, 6 and 7 addressed vacation scheduling.

Two provisions of the ELRM were also referenced: Section 512.121 which stated:

> "The leave year begins with the first day of the first complete pay period in a calendar year. It ends on the day before the first day of the first complete pay period in the following calendar year";

and Section 512.61 which stated in part that ". . . leave is subject to specific vacation planning provisions of applicable collective bargaining agreements. . ."

The Local Memoradum of Understanding addressed "leaves" in Article X. The relevant section noted and quoted by the parties was Section 3 [in pertinent part]:

> ". . . In the event a vacancy occurs on the vacation schedule in the course of the year, due to retirements, resignations, transfers, etc., employees shall be notified of such vacacies by posting and seniority will again prevail."

The prior Local Memorandum of Understanding also had a paragraph which contained the following langauge; this paragraph was eliminated in the current Local Memorandum of Understanding:

> "Employees' scheduled annual leave shall not be cancelled for any reason, except at the request or approval of the individual employee."

FACTUAL SUMMARY

Management at the Hilo, Hawaii Post Office posted a notice dated October 30, 1981. The posting was on or about the time indicated by its date. The notice addressed vacation planning and one of its provisions stated that "[t]here will be no annual leave granted from December 6, 1982 to January 1, 1983." This policy was expressly limited to the leave year for 1982, namely, January 9, 1982, to January 7, 1983.

The October 30, 1981, notice stated that ". . . for the 1982 leave year . . . employees will be required to take all scheduled approved leave during the 1982 leave year except for transfers, retirements, resignations and in serious emergency situations."

In early November, 1981, the Union filed a grievance questioning the contractual propriety of the notice, and, more specifically two aspects: (1) the requirement that no annual leave be taken for the period indicated and (2) the statement that scheduled vacations could not be vacated except for the those reasons indicated. In the Union's view, these two aspects of the policy violated the relevant contractual guidelines and ELRM quoted above. Additionally, the Union also felt that past practices had been violated.

The matter was processed through the steps of the grievance procedure, but without resolution. Management gave its Step 3 answer by letter dated March 10, 1982. The grievance was denied. The Union appealed the matter to Step 4.

In a joint letter dated April 20, 1982, it was agreed that the facts indicated that the issue was ". . . a purely local dispute over the application of the Local Memorandum and Chapter 510 of the Employee and Labor Relations Manual. Accordingly. . . this case is hereby remanded to Step 3 for further development and consideration . . ."

The issue remained unresolved; thus, it was appealed to arbitration by the Local.

The evidence further established the following facts:

1) Excessive overtime was being used in the month of December;

2) There had been scheduling problems with attendant overtime as a result of frequent cancellation by employees of all or part of their scheduled annual leave;

3) At the time the October 30, 1981, notice was posted, the Service and the Union were in negotiations for the Local Memorandum of Understanding;

4) Section 7 of the previous Local Memorandum of Understanding [quoted on p. 3 above] was negotiated out of the Local Memorandum of Understanding;

5) Neither the right to cancel vacation leave nor the Service's prohibition to take vacation during the time indicated in the notice were moved to impasse by the Union;

6) Similar matters, though not exactly the same, to those indicated in five (5) were placed at impasse by the National Association of Letter Carriers;

7) In Leave Year 1981, December 6, 1981, to December 28, 1981, were excluded from vacation planning without apparent protest; and

8) Prior to the October 30, 1981, notice, there was a practice that allowed employees to cancel annual leave for any reason.

The above reflects the factual context for this matter.

UNION'S POSITION

In support of its position that management did not act within the contractual guidelines when it published the policy, the Union developed these arguments:

1) Management acted in bad faith during the period when the policy was posted the the Local Memorandum of Understanding was agreed to;

2) Article X, Section 3, of the Local Memorandum of Understanding protected those matters the Service was attempting to remove, namely, the right to vacate leave and the right to have leave during the entire year;

3) The policy was contrary to the ELRM, and, more specifically, the definition of leave year in the ELRM;

4) Past practice supported the right of employees to vacate leaves; and

5) There was an absence of any evidence to support the Service's position that the period in December required that employees not be allowed to take vacation leave time.

SERVICE'S POSITION

The following contentions were offered by the Service in support of its position that the posting of the vacation leave policy was proper and within contractual guidelines:

1) As a threshold matter, the matter was moot as the policy was expressly limited to 1982 and 1982 has passed; thus, the remedial action, should a violation be found, would be non-existent;

2) The Service negotiated in good faith; the Union had the opportunity to impasse the matters as the National Association of Letter Carriers;

3) The provision of the Local Memorandum of Understanding which granted the employees considerable latitute to vacate leaves was negotiated from the document;

4) Article X, Section 3, is express in its coverage and fails to grant what the Union claims it was intended to grant;

5) The data supports the period of leave exclusions as presented in the policy of October 30, 1981, and this period of exclusion was not contrary to the ELRM; thus,

6) The Union failed to meet its burden of proof that a violation took place, assuming arguendo, the issue is not found to be moot.

OPINION AND CONCLUSIONS

The first matter which requires comment in this case is that of "mootness." As this issue is threshold in character, it must be addressed immediately.

A review of the limited arbitral decisions which have considered "mootness" and those court decisions often relied on by arbitrators indicates that a case is "moot" when it no longer presents an actual controversy or where the issue has ceased to exist because it has become academic (no practical effect on the existing controversy) or dead through prior settlement, abandonment, withdrawal or prior decision.

The issue presented in this matter questions the contractual propriety of the content of a policy posted on or about the date of October 30, 1981. The policy was clearly and expressly limited to the calendar year 1982; thus, any remedial action which may be appropriate should a violation be found is virtually nonexistant. This would appear to satisfy the generally accepted definition of "mootness"; however, since the underlying matter asks for the interpretation of the Local Memorandum of Understanding as it applies to this fact situation, an interpretation which has not ceased to be a viable controversy, the Arbitrator will address the merits.

Reading the relevant contractual provisions and other attendant language, such as the ELRM, there appears to be no prohibition to the Service's statement that the period in question, December 6, 1982 to January 1, 1983, could be excluded from leave consideration. It is clear that the leave period extends for the time indicated in the ELRM and the agreements; however, it is

equally clear that for this period of time in question, there is no express prohibition on the Service as to annual leave scheduling. A reasonable reading of the documents presented in this case also makes clear that no prohibition of the type argued for by the Union should be implied from the words used.

The only restriction as to this annual leave exclusion period would be that found in the Service's arbitrary, capricious or discriminatory establishment of such a policy. In more direct terms, the abuse of the Service's discretionary authority.

The Union argued that there was an absence of legitimate reasons for the establishment of this exclusion period; thus, an abuse of discretion. The Service countered this contention with data that overtime was a factor during this heavy mail period. Having considered both positions, the Arbitrator concluded that there was insufficient evidence to establish any abuse of discretion by the Service with respect to the exercise of its right to establish the annual leave exclusion period stated in the October 30, 1981, policy.

The second issue in dispute rests with the right of employees to vacate their previously scheduled annual leave time periods. Section 7 of the prior Local Memorandum of Understanding clearly granted to the employees very strong rights in this regard; however, this clause was eliminated from the current Local Memorandum and not placed at impasse. Section 3 of the current Article X of the Local Memorandum of Understanding can not reasonable stand in the place of the eliminated Section 7 -- the language is simply not reasonabley susceptible to such an interpretation and application.

Past practice can and is a forceful consideration when language is ambigious and unclear. As to this second issue, the eliminated language without replacement words of such a clear and express intent can not be engrafted through a past practice which flourished under language which was negotiated out of the Local Memorandum of Understanding.

Therefore, the test to be applied is whether management abused its discretion when it disallowed an employee the ability to vacate a previously scheduled annual leave.

For the above reasons, the Arbitrator must answer the issue "no."

AWARD

Based on the evidence as presented, it is the AWARD of this Arbitrator that:

1) the issue is not moot for the reasons stated and

2) the posted policy of October 30, 1981, did not violate the National Agreement or the Local Memorandum of Understanding.

3) Grievance DENIED.

Respectfully submitted,

Joseph F. Gentile
Arbitrator

JFG:kk

December 19, 1983

Los Angeles, California

[1578-2386-83]