

C#13080

NATIONAL ARBITRATION PANEL

In the Matter of the Arbitration	(GRIEVANTS:
between)	APWU President
UNITED STATES POSTAL SERVICE	(NALC President
-and-)	CASE NO. HOC-NA-C 3
AMERICAN POSTAL WORKERS UNION	(
-and-)	
NATIONAL ASSOCIATION OF LETTER CARRIERS)	
)	

BEFORE: Richard Mittenthal, Arbitrator

APPEARANCES:

For the Postal Service:	Suzanne H. Milton Attorney Office of Labor Law
For the APWU:	Darryl J. Anderson Attorney (O'Donnell Schwartz & Anderson)
For the NALC:	Keith E. Secular Attorney (Cohen Weiss & Simon)

Place of Hearing:

Washington, D.C.

Date of Hearing:

November 20, 1992

Dates of Post-Hearing
Statements:

June 18, 1993

AWARD:

The grievance is granted.

Date of Award: July 12, 1993


Richard Mittenthal
Arbitrator

BACKGROUND

This grievance involves the scope of the Postal Service's newly won right to invoke the impasse arbitration procedures of Article 30 (Local Implementation) of the 1990 National Agreement. The parties agree that the Postal Service may resort to interest arbitration to challenge an existing provision of a Local Memorandum of Understanding (LMOU) which deals with subject matter within the 22 enumerated items in Article 30B. The Postal Service insists it is entitled to make this same challenge against an existing provision of a LMOU which is outside the 22 enumerated items. The Unions disagree.

Since the mid-1960s, the parties have encouraged the execution of LMOUs. Those agreements included a wide variety of clauses. Some served to implement the general provisions of the National Agreement; others dealt with subject matter not covered by the National Agreement. The parties specifically contemplated LMOUs which went beyond the terms of the National Agreement. For instance, Article 7, Section 13(c) of the 1968 National Agreement prohibited local clauses which "repeat, reword, paraphrase or conflict with the National Agreement..." but added that "this is not to be interpreted to mean that local negotiations are to be restricted to only those options provided in articles in the National Agreement..."

This history was not ignored in the 1971 National Agreement, the first contract following the Postal Reorganization Act and the creation of the collective bargaining process now in effect. Article 30 stated that "it was impractical to set forth in the Agreement all detailed matters relating to local conditions..." and that therefore "further negotiations regarding local conditions will be required with respect to local installations, post offices, and facilities." It went on to say that "any agreement reached shall be incorporated in memoranda of understanding." It provided that no such LMOU "shall be inconsistent or in conflict with this Agreement..."; it provided for arbitration of impasses reached in local negotiations. And arbitration could then be invoked either by the Unions or the Postal Service.

The 1971 local negotiations resulted in a huge number of impasses. More than 100,000 of them were appealed to arbitration. Obviously, the parties were unable to dispose of this volume of disputes. This difficulty prompted changes in the 1973 National Agreement. The parties decided to limit the number of impasses by restricting "local implementation" to

"22 specific items enumerated below..." Thus, the local negotiators were required to deal with any or all of these 22 items but were not required to discuss anything else. The parties provided for arbitration of impasses where the appeal to arbitration was timely and was authorized by the National Union President. This impasse arbitration process could not be invoked by the Postal Service.

The language of the 1973 National Agreement, specifically, Article 30, was carried forward into the 1975, 1978, 1981, 1984 and 1987 National Agreements. It should be quoted at length:

A. Presently effective local memoranda of understanding not inconsistent or in conflict with the 1987 National Agreement shall remain in effect during the term of this Agreement unless changed by mutual agreement pursuant to the local implementation procedure set forth below.

B. There shall be a 30-day period of local implementation to commence October 1, 1987 on the 22 specific items enumerated below, provided that no local memorandum of understanding may be inconsistent with or vary the terms of the 1987 National Agreement.

[1 through 22 dealing with such subjects as wash-up periods, local leave program, vacation scheduling, scope of "overtime desired" lists, light duty assignments, local implementation of the National Agreement language on seniority and posting, and so on]

C. All proposals remaining in dispute may be submitted to final and binding arbitration, with the written authorization of the national Union President. The request for arbitration must be submitted within 10 days of the end of the local implementation period. However, where there is no agreement and the matter is not referred to arbitration, the provisions of the former local memorandum shall apply, unless inconsistent or in conflict with the 1987 National Agreement.

D. An alleged violation of the terms of a memorandum of understanding shall be subject to the grievance-arbitration procedure.

Also a National Memorandum of Understanding with respect to "procedures" to be applied is the "implementation of Article 30" has been in effect for a good many years.

The Postal Service was dissatisfied with some aspects of Article 30. It believed it was unfair for the Unions alone to have access to impasse arbitration over the terms of a LMOU. It noted that the Unions could seek changes in a LMOU through arbitration while Management could do no more than oppose such changes. It urged that simple justice required that Management be given equal access to arbitration under the "local implementation" procedure of Article 30. Its proposals in the 1990 national negotiations reflected this objective. The Unions, on the other hand, claimed no revision in Article 30 was necessary and resisted Management's demand for equal access.

The 1990 negotiations failed and the parties appointed an interest arbitration board (Board) to resolve their differences. One of the many issues before the Board was Article 30. The Postal Service argued, as it had in negotiations, that equal access to impasse arbitration should be granted. Its initial proposal to the Board stated:

Local Implementation. In order to establish a "level playing field" with respect to those items subject to local implementation, the Postal Service proposes that Article 30 be amended to provide that both the Union as well as the Postal Service could submit disputed proposals to final and binding arbitration. Currently, only the Union can request arbitration which, in effect, "chills" local implementation discussions.

The Board's award summarized the parties' positions as follows:

Union Position - The Joint Bargaining Committee argues against any change in the status quo and contends that Article 30 and the accompanying implementing Memorandum of Understanding should not be changed.

¹ This quoted language is taken from the 1987 National Agreement.

USPS Position - The Postal Service seeks to amend Article 30 and the accompanying implementing Memorandum of Understanding to permit [local] issues remaining in dispute to be appealed to impasse arbitration by management, a right currently enjoyed only by the Unions.

The Board ruled in the Postal Service's favor. New language was added to Article 30A, stating that "presently effective" LMOUs could be changed not only by "mutual agreement pursuant to the local implementation procedure..." but also -

...as a result of an arbitration award or settlement arising from either party's impasse of an item from the presently effective [LMOU]...

New language was added to Article 30C, stating that proposals remaining in dispute "may be submitted to final and binding arbitration" not only by one of the national Union Presidents but also by "the Assistant Postmaster General, Labor Relations." And, finally, a new Article 30F was written to establish a different burden of proof on the Postal Service with respect to certain proposals it submits to impasse arbitration:

F. Where the Postal Service, pursuant to Section C, submits a proposal remaining in dispute to arbitration, which proposal seeks to change a presently-effective [LMOU], the Postal Service shall have the burden of establishing that continuation of the existing provision would represent an unreasonable burden to the USPS.

The parties agree that the Postal Service, like the Unions, can now invoke impasse arbitration over any subject matter within the 22 items listed in Article 30B. The Postal Service, however, believes it may also invoke arbitration on subject matter presently in a LMOU but beyond the scope of these 22 items. The Unions disagree. It was this disagreement which prompted the present grievance.

APWU initially filed a motion asking that I recuse myself because I served as Chairman of the Board which made these changes in Article 30. Its position was that I should not be

² A few other minor changes in the language of Article 30 were also made.

called upon to interpret the very provision which I played a part in creating. Both the Postal Service and NALC opposed the motion. In an award dated December 23, 1992, I denied APWU's motion. The parties now request a decision on the merits.

DISCUSSION AND FINDINGS

The Postal Service relies heavily on the new language in Article 30A and F. It stresses that paragraph A recognizes that a presently existing LMOU may be "changed...as a result of an arbitration award...arising from either party's impasse of an item from the presently effective...[LMOU]." It stresses that paragraph F similarly speaks of Management making a proposal to "change a presently-effective...[LMOU]" and Management later, following Union rejection of the proposal, having the right to "submit...[such] a proposal...to arbitration." Its position is that these Article 30 revisions meant that Management thereafter would be able to take to impasse arbitration any LMOU provision regardless of whether or not its subject matter is covered by the 22 items set forth in 30B. Moreover, it insists its concern that Management be allowed to impasse LMOU clauses outside the 22 items was made clear to the Unions "in the Postal Service proposals and at the bargaining table prior to interest arbitration."

The Unions approach the problem quite differently. They argue that the right to place a local issue in impasse arbitration is found in Article 30C, not 30A or 30F. They contend that this right deals with "all proposals remaining in dispute" at the end of the "local implementation period", that this quoted language from 30C plainly refers to local proposals regarding the 22 items listed in 30B, and that the parties thus meant to limit impasse arbitration to subject matter within the scope of these 22 items. They urge, accordingly, that Management should not be permitted to appeal to impasse arbitration any current LMOU clause whose content is outside the 22 items. Furthermore, they assert that the record upon which the Board based its award "does not contain any indication that the Postal Service was seeking to expand the scope of impasse arbitration to matters outside the 22 items." They believe the Board meant to give Management the "same access to impasse arbitration that the Unions enjoyed [prior to 1990] -- no less, but no more." They emphasize that the Unions were limited in impasse arbitration to these 22 items in the past and that this limitation should apply to the Postal Service as well.

The Postal Service's interpretation is not without appeal. LMOUs were never frozen. According to Article 30A, they could be changed in a number of ways prior to 1990. A LMOU clause "inconsistent or in conflict with the...National Agreement" was not enforceable and hence could in effect be ignored. A LMOU clause could be revised (or eliminated) through "mutual agreement" during the local implementation period. A LMOU clause could be revised (or eliminated), absent mutual agreement, through the "local implementation procedure", namely, through "final and binding arbitration." These possibilities had existed for years at the time the Board began its deliberations on the terms of the 1990 National Agreement.

The Board established another way of changing LMOUs. Its award stated that a LMOU clause could be modified (or eliminated) "as a result of an arbitration award...arising from either party's impasse of an item from the presently effective...[LMOU]." These words were not mere surplusage. They were written in recognition of the fact that a new device for changing a LMOU had been created. The parties disagree as to the nature of the new device. The Unions insist that it is procedural, that it merely grants Management equal access to local impasse arbitration. The Postal Service insists it is substantive as well as procedural. It urges that the new language serves not only to provide Management with equal access but also to permit Management to place "an item", that is, any item, from a "presently effective" LMOU before the impasse arbitrator.

The Postal Service position, at first blush, seems plausible. But it must be remembered that the purpose of Article 30A is simply to guarantee the continuity of LMOUs subject only to whatever changes may be justified by "inconsistenc[y]...", "mutual agreement", or "final and binding arbitration." Article 30A does not authorize the parties to take a local issue dispute to impasse arbitration. That authorization is found in Article 30C, "All proposals remaining in dispute may be submitted to final and binding arbitration..." A close reading of Article 30 as a whole makes clear that 30C is referring to "all proposals..." under the local implementation procedure, that is, "all proposals..." under 30B with respect to the 22 specific items mentioned therein. Accordingly, 30C limits the submission to impasse arbitration to these 22 items.

Had the Board intended to ignore these limits and expand the impasse arbitration agenda to other than the 22 items, it surely would have changed the language of 30C. Its failure to do so suggests that the Board never meant to expand the

impasse arbitration agenda.

This conclusion is reinforced by the terms of Article 30F, "Where the Postal Service, pursuant to Section C, submits a proposal remaining in dispute to arbitration..." (Emphasis added). The underscored words reveal, as I have already noted, that it is 30C which authorizes a submission to interest arbitration. It follows that the scope of that arbitration must be determined by 30C, not by 30A. And when 30C speaks of "all proposals remaining in dispute...", it is plainly referring to proposals made by the parties under the local implementation procedure described in 30B, proposals concerning the 22 items set forth in 30B.

Whatever doubt remains should be dispelled by the purpose of the Article 30 revision. The Postal Service's initial proposal to the Board on Article 30 stated:

...In order to establish a "level playing field" with respect to those items subject to local implementation, the Postal Service proposes that Article 30 be amended to provide that both the Union as well as the Postal Service could submit disputed proposals to final and binding arbitration...
(Emphasis added)

The "level playing field" was obviously an appeal for equal access, nothing more. Nowhere does this Postal Service statement to the Board suggest that the "playing field" not only be leveled but enlarged as well. Indeed, the Postal Service sought equal access only "with respect to those items subject to local implementation." These words refer to the 22 specific items in Article 30B, the permissible impasse arbitration agenda.

Later, in the proceeding before the Board, the Postal Service offered a position paper explaining its Article 30 proposal. The position paper urged that the parties be put on "equal footing", that they meet on "equal terms", that Management be an "equal party" with an "equal chance" to resolve problems. Although the position paper discussed "old provisions" of LMOUs which Management should be allowed to submit to impasse arbitration, all of those "old provisions" dealt with subject matter set forth in the 22 items for local implementation. Nowhere did the position paper request that the 22 items be expanded, that the impasse arbitration agenda be enlarged.

Finally, the Board's award summarized the Postal Service request as follows:

...to permit [local] issues remaining in dispute to be appealed to impasse arbitration by management, a right currently enjoyed only by the Unions. (Emphasis added)

The Board's concern was whether to provide Management with the same right of access to impasse arbitration as was then "...enjoyed by the Unions." Equal access was the issue. Nothing in the Board's words suggest that it believed the Postal Service was seeking to add to the 22 specific items in Article 30B or otherwise expand the impasse arbitration agenda.

Indeed, the Postal Service concedes that it has no right to submit to impasse arbitration a new LMOU clause whose subject matter is outside the 22 items. It insists, however, that it now may go to impasse arbitration over an old (that is, an existing) LMOU clause outside the 22 items. This distinction may have been raised during the negotiations which preceded the 1990 interest arbitration but it certainly was not raised in the arguments made to the Board.

For these reasons, my ruling is that the Article 30 changes simply provide the Postal Service with equal access. The Postal Service's access to impasse arbitration should be neither greater nor smaller than the Unions' access under prior National Agreements. Because the Unions were not entitled before 1990 to go to impasse arbitration on subject matter outside the 22 items, the Postal Service does not have that right either.

AWARD

The grievance is granted.



Richard Mittenthal
Richard Mittenthal, Arbitrator